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WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES

Volume III

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Wells A. Hutchins

Completed by
Harold H. Ellis
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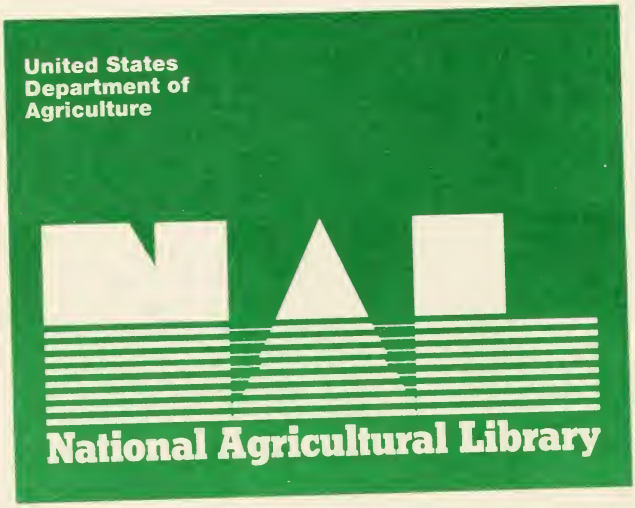
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WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES

By

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Completed by

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and

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Volume III

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SUMMARY OF CONTENTS

Volume I.

Ch. 1. State Water Policies
Ch. 2. Classification, Definition, and Description of Available Water Supplies
Ch. 3. Characteristics of Watercourse
Ch. 4. Navigable Waters
Ch. 5. Property Nature of Water and Water Rights Pertaining to Watercourses
Ch. 6. Water Rights Systems Pertaining to Watercourses
Ch. 7. Appropriation of Water
Ch. 8. The Appropriative Right
Ch. 9. Exercise of the Appropriative Right

Volume II.

Ch. 10. The Riparian Doctrine
Ch. 11. The Pueblo Water Right
Ch. 12. The Ancient Hawaiian Water Rights
Ch. 13. Protection of Water Rights in Watercourses
Ch. 14. Loss of Water Rights in Watercourses
Ch. 15. Adjudication of Water Rights in Watercourses
Ch. 16. Administration of Stream Water Rights and Distribution of Water
Ch. 17. Diffused Surface Waters
Ch. 18. Other Waters at the Surface
Ch. 19. Ground Water Rights
Ch. 20. Ground Water Rights in Selected States

Volume III.

Ch. 21. Federal-State Relations
Ch. 22. Interstate Dimensions of Water Rights
Ch. 23. International Law Affecting Water Rights
Appendix: Summaries of the State Water Rights Systems
Bibliography: Publications of Wells A. Hutchins
Indexes

VOLUME III

TABLE OF CONTENTS

Page

Chapter 21 – FEDERAL-STATE RELATIONS
by Harold H. Ellis and J. Peter DeBraal 1

General Allocation of Federal and State Powers 1
The Commerce Power 2
In General 2
Exercise of the Commerce Power 3
Corps of Engineers 4
Federal Power Commission 8
Environmental Protection Agency 10
Definition of Navigable Waters for Commerce Power Purposes 15
Limitations on Applicability of State Laws 21
Effect on Private Rights Obtained Under State Law 29
Other Federal Powers 38
The Proprietary Power and the Reservation Doctrine 38
The War Power 53
The Welfare Power 54
Sovereign Immunity and the McCarran Amendment 57
Various Legislative Proposals 60
Federal-State Coordination and Cooperation 62

Chapter 22 – INTERSTATE DIMENSIONS OF WATER RIGHTS
by Harold H. Ellis and J. Peter DeBraal 66

Litigation Between States 66
Some Other Litigation with Interstate Dimensions 75
Interstate Compacts or Agreements Relating to Water 81
The Consent Requirement 82
Effects of Interstate Compacts Upon Private or Public Rights Under State Law 85
Existing Water Apportionment Compacts Involving Western States ... 87
Water Allocation Affected by Federal Regulatory Laws and Projects 103
Validity of State Legislative Restrictions on Taking Water Out of State ... 107

Chapter 23 – INTERNATIONAL LAW AFFECTING WATER RIGHTS
by G. Graham Waite 116

Introduction 116

The Boundary Waters Treaty of 1909 120
The Columbia River Treaty of 1961 129
The Rio Grande Irrigation Convention of 1906 133
The Rio Grande, Colorado, and Tijuana Treaty of 1944 134
Water Allocation 134
General Provisions 138
Conclusions 139

APPENDIX: SUMMARIES OF THE STATE WATER RIGHTS SYSTEMS 141

Introduction 141
State Summaries 141
Alaska 141
Governmental Status 141
State Administrative Agency 142
Water Rights Laws Regarding Watercourses Prior to 1966 142
Purpose of use of water 142
Appropriation of Water of Watercourses Prior to 1966 143
Doctrine of prior appropriation 143
(1) Early recognition of appropriative rights by Congress... 143
(2) Early recognition by the judiciary 143
Procedure for appropriating water 145
(1) Organized mining districts 145
(2) Local customs, laws, and court decisions 146
Some judicially declared aspects of the appropriative right 147
(1) Quantity of water 147
(2) Change in exercise of right 147
(3) Sale of water right with land 147
(4) Loss of appropriative right 148
(5) Condemnation of rights-of-way for conveyance of water 148
The Riparian Doctrine Prior to 1966 148
Early uncertain status 148
Summary of handling of riparian questions 148
Effect of the 1917 statute 149
The Dual Systems of Water Rights 150
Interrelationships prior to 1966 150
Enactment of the 1917 statute 150
The sequence summarized 151
Repeal of riparian legislation in 1966 151
Rights to Use Percolating Ground Water Prior to 1966 152
Determination and Adjudication of Existing Water Rights Prior to 1966 152

Constitutional Provisions of 1959 152
The Alaska Water Use Act of 1966 153
Provides for appropriation of water 153
Waters subject to appropriation 154
Effect upon riparian rights 154
Procedures regarding appropriation of water 156
(1) Preexisting water rights 156
(2) Determination of preexisting rights 156
(3) Permits and certificates 156
(4) Exempted water uses 158
(5) Priority 158
(6) Effect of priority 158
(7) Permit terms and conditions 159
(8) Preferred use 159
(9) Time for construction and completion 159
(10) Loss of appropriative right 159
(11) Transfer and change of appropriations 160
(12) Distribution of water 160
(13) Penalties 160
Ground water 161
Arizona 162
Governmental Status 162
Pre-American Water Enterprises 162
State Administrative Agency 162
Appropriation of Water of Watercourses 163
Recognition of doctrine of prior appropriation 163
Procedure for appropriating water 164
Restrictions and preferences in appropriation of water 166
Some aspects of the Arizona appropriative right 167
Repudiation of the Riparian Doctrine of Water Rights 170
Subterranean Watercourse 171
Definite underground stream 171
Underflow of surface stream 172
Percolating Ground Waters 172
Determination of Conflicting Water Rights 177
Special statutory procedure 177
Court transfer procedure 177
Water rights registration 177
Administration of Water Rights and Distribution of Water 178
California 179
Governmental Status 179
Spanish-Mexican Water Enterprises 179
Colonization agencies and organizations 179
Water rights 179

Influence of Spanish-Mexican water rights on State water law 180
State Administrative Agencies 181
Appropriation of Water of Watercourses 181
Recognition of doctrine of prior appropriation 181
Procedure for appropriating water: Former nonstatutory and Civil Code 183
Procedure for appropriating water: Present Water Code 184
Restrictions and preferences in appropriation of water 187
Certain stockponds: Rights clarified 190
Some aspects of the California appropriative right 191
The Riparian Doctrine 194
Recognition of the riparian doctrine 194
Accrual and character of the riparian right 194
Severance of riparian right from land 196
Riparian lands 197
Riparian waters 197
Purpose of use of water 198
Place of use of water 200
Storage of water 200
Diversion and return of water 201
Interrelationships of the Dual Systems 202
Relative superiority of conflicting rights 202
Superior appropriative rights 203
Superior riparian rights 203
The constitutional amendment of 1928 204
The Pueblo Water Right 207
Subterranean Watercourse 208
Definite underground stream 208
Underflow of surface stream 208
Percolating Waters 209
Other Considerations Regarding Ground Waters 211
Determination of Conflicting Water Rights 211
Court reference procedure 211
Statutory adjudication procedure 211
Modification of decree 213
Administration of Water Rights and Distribution of Water 213
Colorado 214
Governmental Status 214
Early Water Enterprises 214
State Administrative Agencies 215
Appropriation of Water of Watercourses 215
Recognition of doctrine of prior appropriation 215
Procedure for appropriating water 217

Preferences in appropriation of water 221
Some aspects of the Colorado appropriative right 222
Riparian Water-Use Doctrine Not Generally Recognized 227
Ground Waters 230
Definite underground stream 230
Underflow of surface stream 230
Ground waters tributary to a surface watercourse 230
Ground waters not tributary to a surface watercourse:
Designated ground waters 233
Ground waters outside designated ground water basins 236
Determination of Conflicting Water Rights 238
Administration of Water Rights and Distribution of Water 242
Hawaii 243
Governmental Status 243
State Administrative Agency 244
Early Irrigation in Hawaii 244
Interrelationship of Land Titles and Water Titles 244
Water Rights in Surface Watercourses Before the
McBryde Decision 245
Ancient water rights 246
(1) Ahupuaas and ilis kupono 246
(2) Rights conveyed by the konohiki 246
(3) Appurtenant rights 247
(4) Loss of ancient water right 248
Statutory rights of occupants in ahupuaa 249
Prescriptive rights 249
Riparian rights 250
Water Rights in Surface Watercourses After the
McBryde Decision 250
Ground Waters 255
Definite underground stream 255
Relation of underflow to rights in surface stream 255
Nonartesian "percolating" waters 256
Artesian waters 256
Regulation of artesian wells 256
Ground Water Use Act of 1959 256
Determination of Conflicting Water Rights 259
Private ways and water rights 259
Courts of equity 260
Decrees 260
Idaho 261
Governmental Status 261
Early Water Uses 261
State Administrative Agency 262

Appropriation of Water of Watercourses 262
Recognition of doctrine of prior appropriation 262
Procedure for appropriating water 263
Restrictions and preferences in appropriation of water 271
Some aspects of the Idaho appropriative right 272
Decisions Regarding Riparian Water-Use Doctrine 278
Ground Waters 279
Subterranean watercourse 279
Percolating waters 279
Legislation regarding ground water 280
Determination of Conflicting Water Rights 282
Adjudication legislation of 1969 282
Request by trial court for hydrographic examination 283
Summary supplemental action 283
Administrative determination of certain adverse claims 284
Administration of Water Rights and Distribution of Water 284
Kansas 286
Governmental Status 286
State Administrative Agency 286
Appropriation of Water of Watercourses 286
Recognition of doctrine of prior appropriation 286
Procedure for appropriating water 287
Restrictions and preferences in appropriation of water 289
Some aspects of the Kansas appropriative right 290
State Water Plan Storage Act 292
The Riparian Doctrine 293
Adoption of the riparian doctrine 294
Riparian waters 294
Riparian land 294
Riparian proprietors 294
Nature and extent of the riparian right 295
Interrelationships of the Dual Systems 296
Ineffective modification of riparian doctrine by earlier statutes 297
The effective 1945 statute 298
Summary of the interrelationships 300
Ground Waters 301
Underflow of stream 301
Appropriation statute applies to all ground waters 301
Ground waters tributary to a surface watercourse 302
Artesian waters 302
Ground water management districts 303
Determination of Conflicting Water Rights 303
Rights of water users on effective date of 1945 act 303

Reference by court in water rights action 306
Administration of Water Rights and Distribution of Water 307
Montana 308
Governmental Status 308
Early Water Uses 308
State Administrative Agency 308
Appropriation of Water of Watercourses 309
Recognition of doctrine of prior appropriation 309
Pre-1973 procedure for appropriating water 310
Pre-1973 procedure for appropriating unadjudicated water: Nonstatutory 310
Pre-1973 procedure for appropriating unadjudicated water: Statutory 311
Pre-1973 procedure for appropriating adjudicated water 311
Procedure for appropriating water: 1973 Montana Water Use Act 313
Procedure for appropriating water: Some other aspects 315
Restrictions and preferences in appropriation of water 316
Some aspects of the Montana appropriative right 319
Repudiation of the Riparian Water-Use Doctrine 325
Ground Waters 326
Definite underground stream 326
Subflow of surface stream 326
Percolating ground waters 326
Legislative provisions 326
Determination of Conflicting Water Rights 328
Pre-1973 determination of rights in stream water 328
Determination of existing rights under the 1973 Montana Water Use Act 328
Administration of Water Rights and Distribution of Water 330
Nebraska 332
Governmental Status 332
Early Uses of Water 332
State Administrative Agency 333
Appropriation of Water of Watercourses 333
Recognition of doctrine of prior appropriation 333
Procedure for appropriating water 334
Restrictions and preferences in appropriation of water 337
Some aspects of the Nebraska appropriative right 339
Riparian Doctrine 346
Recognition of the riparian doctrine 346
Accrual, nature, and extent of the riparian right 346
Riparian waters 349
Purpose of use of water 351

Interrelationships of the Dual Systems 352
Ground Waters 358
Court decisions 358
Statutes 359
Determination of Conflicting Water Rights 362
Statutory provisions 362
Judicial construction 363
Administration of Water Rights and Distribution of Water 365
Nevada 365
Governmental Status 365
Early Uses of Water 366
State Administrative Agency 366
Appropriation of Water of Watercourses 366
Recognition of doctrine of prior appropriation 366
Procedure for appropriating water 367
Restrictions on the right to appropriate water 370
Some aspects of the Nevada appropriative right 371
Riparian Water-Use Doctrine: Recognition and Repudiation 376
Early recognition 376
Repudiation 377
Interrelationships of the Dual Systems 378
Ground Waters 379
Definite underground streams 379
Percolating waters 379
Ground water statutes 380
Determination of Conflicting Water Rights 382
Court transfer procedure 382
Statutory adjudication procedure 382
Administration of Water Rights and Distribution of Water 383
New Mexico 385
Governmental Status 385
Pre-American Water Enterprises 385
State Administrative Agency 385
Water Rights of Community Acequias 386
The Pueblo Water Right 387
Origin of the pueblo rights doctrine 387
Adoption of the doctrine in New Mexico 388
Appropriation of Water of Watercourses 389
Recognition of doctrine of prior appropriation 389
Procedure for appropriating water 391
Restrictions on the right to appropriate water 394
Some aspects of the New Mexico appropriative right 395
Repudiation of the Riparian Water-Use Doctrine 399
Ground Waters 400

Early court decisions 400
Legislation 401
Special Statutory Adjudication Procedures 405
Administration of Water Rights and Distribution of Water 406
North Dakota 407
Governmental Status 407
State Administrative Agencies 407
Appropriation of Water of Watercourses 408
Recognition of doctrine of prior appropriation 408
Procedure for appropriating water 409
Restrictions and preferences in appropriation of water 411
Some aspects of the North Dakota appropriative right 413
The Riparian Water-Use Doctrine 415
Early recognition of the riparian doctrine: Legislative 415
Early recognition of the riparian doctrine: Judicial 415
Accrual and character of the riparian right 416
Interrelationships of the Dual Systems 417
Ground Waters 420
Special Statutory Adjudication Procedures 421
Administration of Water Rights and Distribution of Water 422
Oklahoma 423
Governmental Status 423
State Administrative Agency 423
Appropriation of Water of Watercourses 423
Recognition of doctrine of prior appropriation 423
Procedure for appropriating water 424
Restrictions on the right to appropriate water 427
Some aspects of the Oklahoma appropriative right 428
The Riparian Doctrine 430
Recognition of the riparian doctrine 430
Nature and extent of the riparian right 431
Riparian lands and proprietors 432
Nonriparian use 433
Interrelationships of the Dual Systems 433
Ground Waters 436
Special Statutory Adjudication Procedures 439
Administration of Water Rights and Distribution of Water 440
Oregon 440
Governmental Status 440
State Administrative Agencies 440
Appropriation of Water of Watercourses 441
Recognition of doctrine of prior appropriation 441
Procedure for appropriating water 442
Restrictions and preferences in appropriation of water 447

Some aspects of the Oregon appropriative right 452
The Riparian Doctrine 459
Recognition of the riparian doctrine 459
Some aspects of the riparian right 460
Interrelationships of the Dual Systems 462
Earlier judicial modification of the riparian doctrine 462
Legislative modification of the riparian doctrine 463
Validity of legislative modification of the riparian doctrine 463
Statutory adjudication of riparian rights 465
Effect of legislation and court decisions on the dual system relationship 466
Ground Waters 467
Some pre-1955 court decisions 467
Ground Water Act of 1955 468
Determination of Conflicting Water Rights 471
Statutory adjudication procedures 471
Court transfer procedure 475
Early water rights 475
Administration of Water Rights and Distribution of Water 475
South Dakota 477
Governmental Status 477
State Administrative Agency 477
Appropriation of Water of Watercourses 478
Recognition of doctrine of prior appropriation 478
Procedure for appropriating water 478
(1) Prestatutory 478
(2) Original statutory method 479
(3) Current method 480
(4) Dry draw law 482
Restrictions and preferences in appropriation of water 483
Some aspects of the South Dakota appropriative right 485
The Riparian Doctrine 487
Recognition of the riparian doctrine: Legislative 487
Recognition of the riparian doctrine: Judicial 488
Accrual and character of the riparian right 489
Interrelationships of the Dual Systems 494
Rules applied in early supreme court decisions 494
Legislation of 1955 and its effect 496
Ground Waters 498
Early statutes and court decisions 498
The Ground Water Act of 1955 499
Special Statutory Adjudication Procedures 501
Administration of Water Rights and Distribution of Water 502

Texas 503
Governmental Status 503
The Reconstruction Courts of Texas 503
Early Uses and Regulation of Water in Texas 503
State Administrative Agency 504
Appropriation of Water of Watercourses 504
Recognition of doctrine of prior appropriation 504
Procedure for appropriating water: Prestatutory 506
Procedure for appropriating water: Original statutory method 506
Procedure for appropriating water: Current method 506
Restrictions and preferences in appropriation of water 509
Some aspects of the Texas appropriative right 511
The Riparian Doctrine 516
Recognition and accrual of the riparian doctrine 516
Some aspects of the riparian doctrine 518
Interrelationships of the Dual Systems 524
In general 524
Effect of some early water statutes on riparian rights 525
Riparian and nonriparian waters 525
Diversion of riparian water to nonriparian land 526
Riparian-appropriative conflicts and adjustments 526
Definite Underground Streams 528
Underflow of Surface Streams 528
Percolating Ground Waters 528
Court decisions 528
Underground water conservation districts 530
General Public Regulation of Artesian Water 531
Special Statutory Adjudication Procedures 531
Administration of Water Rights and Distribution of Water 533
Utah 535
Governmental Status 535
Early Irrigation in Utah 535
State Administrative Agency 536
Appropriation of Water of Watercourses 536
Recognition of doctrine of prior appropriation 536
Procedure for appropriating water: Prestatutory 538
Procedure for appropriating water: Original statutory method 540
Diligence rights 541
Procedure for appropriating water: Current method 541
Restrictions and preferences in appropriation of water 548
Early classification of primary and secondary water rights 551
Some other aspects of the Utah appropriative right 552

Repudiation of the Riparian Water-Use Doctrine 563
Ground Waters 564
Ground waters subject to appropriation 564
Current procedure for appropriating ground water 565
Protection of means of diversion 565
Drainage of land versus interference with ground water rights 566
Forfeiture and abandonment 567
Control of artesian wells 567
Early decisions relating to ground water 567
Special Statutory Adjudication Procedures 568
Administration of Water Rights and Distribution of Water 569
Washington 570
Governmental Status 570
State Administrative Agency 571
Appropriation of Water of Watercourses 571
Recognition of doctrine of prior appropriation 571
Procedure for appropriating water: Prestatutory 573
Procedure for appropriating water: Act of 1890 574
Procedure for appropriating water: Act of 1891 574
Procedure for appropriating water: Current method 575
Restrictions and preferences in appropriation of water 580
Some other aspects of the Washington appropriative right 585
The Riparian Doctrine 591
Recognition of the riparian doctrine 591
Accrual and character of the riparian right 592
Some other aspects of the riparian right 593
Interrelationships of the Dual Systems 597
Ground Waters 602
Court decisions 602
Legislation 605
Statutory Adjudication Procedures 609
Statutory procedure 609
Effect of statute: Preexisting court jurisdiction 611
Additional provisions regarding ground waters 611
Administration of Water Rights and Distribution of Water 612
Claim-filing Requirement 612
Wyoming 613
Governmental Status 613
State Administrative Agencies 613
Appropriation of Water of Watercourses 614
Recognition of doctrine of prior appropriation 614
Procedure for appropriating water: Early methods 618
Procedure for appropriating water: Current method 619

Restrictions and preferences in appropriation of water 625
Some other aspects of the Wyoming appropriative right 627
Repudiation of the Riparian Water-Use Doctrine 638
Ground Waters 639
Court decisions 639
Legislation 639
Special Statutory Adjudication Procedures 644
Territorial procedure 644
Current State procedure 644
Administration of Water Rights and Distribution of Water 647
Statutory provisions 647
Judicial views of administrative authority 648

BIBLIOGRAPHY: PUBLICATIONS OF WELLS A. HUTCHINS 650

TABLE OF CASES CITED 656

GENERAL INDEX 726

246-767 O - 77 - 2

WATER RIGHTS LAWS
IN THE
NINETEEN WESTERN STATES
VOLUME III

Chapter 21

FEDERAL-STATE RELATIONS*

by Harold H. Ellis and J. Peter De Braal

This chapter examines the national framework of Federal constitutional and statutory provisions and related court decisions, particularly as they affect the operation of the water laws of the Western States. Included are selected aspects of the numerous and complex matters that may be involved.

Although this chapter alludes to certain interstate considerations in which Federal governmental and judicial powers and functions may be involved, interstate dimensions of water rights are dealt with primarily in chapter 22. Aspects of international law affecting water rights are considered in chapter 23.

GENERAL ALLOCATION OF FEDERAL AND STATE POWERS

Federal and State levels of government both exercise control over water resources in important ways. Federal authority is derived principally from the powers expressly or impliedly granted by the United States Constitution, by the laws enacted thereunder, and by pertinent court decisions construing the Constitution and applicable legislation. Other powers are reserved to the States or to the people.

Insofar as consistent with Federal, interstate, or international limitations, each State may adopt its own system of water law. However, State water laws cannot be self-contained units. Not only does the water itself cross and form State and international boundaries, but the federated nature of American government will not permit such isolation; States are only quasi-sovereign. Moreover, economic activity and movement within the United States require that State powers be limited in the interests of interstate commerce. Under the United States Constitution, the Federal Government has these and various other interests in water, along with the power to implement them.

The national interests served by Federal water resource programs and laws include using the country's waters for the flow of trade and travel between its

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*This chapter has drawn upon chapter 17 of Ellis, H. H., Beuscher, J. H., Howard, C. D., & DeBraal, J. P., "Water-Use Law and Administration in Wisconsin" (1970). That chapter drew partially upon research by Frank Trelease, Professor of Law, University of Wyoming, conducted at the University of Wisconsin under contract with the U.S. Department of Agriculture, portions of which were published, with permission of the Department, in Trelease, F. J., "Federal Limitations on State Water Law," 10 Buffalo L. Rev. 399 (1961). This chapter was prepared in 1974.

several States and areas, strengthening the country both internally and in its relations with foreign nations, and conducting its defenses and its national business. The Federal Government is a government of delegated powers. The Constitution gives it powers to regulate commerce among the States, manage Federal property, make war and provide for the common defense, and promote the general welfare of the nation. One or more of these powers and related constitutional provisions have been used to justify various aspects of water regulation or water resource development by the Federal Government. Additional powers, such as the power to consent or to withhold consent from compacts between the States and the power to make treaties, are discussed in chapters 22 and 23. The Federal powers generally are paramount to those of the States.

The State powers to legislate in the field of water rights arise from the general sovereignty reserved to the States in the 10th amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power to create certain property rights and the police power to regulate property in the interest of the public welfare stem from this reserved sovereignty, and they are the sources drawn upon in State regulation of private water rights. Western State water allocation laws usually have assigned individual private water rights as property, subject to certain regulation and to certain public rights in navigable watercourses. Such considerations as the extent to which private water rights may be acquired or exercised, the security given to and regulation of such rights, the balance between private and public rights, and the shaping of the future development and conservation of water resources are all matters of local interest with which the States are quite properly concerned.

However, the division between powers delegated to the United States and those reserved to the States under our dual form of government is not always precise or clear. State and Federal interests do not always coincide and their laws may clash where they deal with the same water. The roles of Federal and State Governments with regard to water rights and related laws have been the subject of considerable controversy in recent years. The Federal powers relating to water resources are quite extensive, as shown below. In practice, however, Congress has provided for various methods of recognizing State water-rights laws and has provided for consultation and participation by the States in several Federal projects. Some judicial and, in some instances, Federal agency interpretations of such legislative provisions are included in the subsequent discussion.

THE COMMERCE POWER

In General

The most important source of Federal jurisdiction over water has been its power in regard to navigable waters. This power derives from a flexible

construction of article I, section 8 of the Federal Constitution, giving Congress the power "to regulate commerce * * * among the several States * * *." In an early case, the United States Supreme Court said that "commerce" includes "navigation."[1] In another case, the power to regulate commerce was held to include the control of navigable waters for the purpose of navigation.[2] The Court has indicated that the power to control navigation and navigable waters may include the power to protect the navigable capacity by preventing diversions of the water[3] or of nonnavigable tributaries that affect navigability,[4] or by preventing obstructions by bridges or dams,[5] or by constructing flood control structures on the navigable waters or on their nonnavigable tributaries or even on the watersheds of the rivers and tributaries.[6] The power to prevent obstruction in turn may lead to the power to license obstructions.[7] The power to obstruct may lead to the power to generate electric energy from the dammed water.[8] It also may include the power to destroy the navigable capacity of the waters and prevent navigation.[9]

Drawing upon such judicial determinations as a foundation, Congress has developed a large program of river regulation and water control. The Federal program is a very significant factor in modern water regulation, conservation, and development. Multipurpose projects combining features such as navigation improvement, flood control, power production, irrigation and other water supply, and recreation may envision the development of entire river basins.

Exercise of the Commerce Power

The Federal commerce power over navigable waters may be exercised affirmatively, negatively, or permissively. (1) The United States itself may take affirmative action, such as by improving navigation channel and harbor facilities by dredging and constructing protective works.[10] It may build dams for the purpose of storing water to provide a navigable stream by releasing the water during periods of low natural flow[11] and for the purpose of protecting the navigability of water during floods and preventing those navigable waters

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[1] *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) *1, 189-193 (1824).

[2] *Gilman* v. *City of Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865).

[3] *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405 (1925).

[4] *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 701-710 (1899).

[5] *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907); *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921).

[6] *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

[7] *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

[8] *Ashwander* v. *TVA*, 297 U.S. 288 (1936).

[9] *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *South Carolina* v. *Georgia*, 93 U.S. 4 (1876).

[10] *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945).

[11] See 16 U.S.C. §832 (1970) (Bonneville Project).

from causing flood damage to the uplands.[12] (2) Negatively, the United States may prohibit the interference by others with the navigable capacity of water over which it exercises jurisdiction under the commerce clause.[13] (3) Permissively, the United States may license that which it may prevent, or delegate to others that which it may itself do. Following is a brief discussion of some of the pertinent *regulatory* enactments and associated regulations of Federal agencies.[14]

Corps of Engineers

Section 401 of the rivers and harbors legislation in part provides:

> It shall not be lawful to construct * * * any * * * dam [or] dike * * * over or in any * * * navigable river, or other navigable water of the United States until the consent of Congress * * * shall have been

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[12] *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

[13] *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405 (1925); *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921); *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907); *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1899).

[14] Federal *water projects* are discussed later such as at notes 27, 104-122, 139-147. In addition to the regulatory enactments and practices of Federal agencies discussed below, the United States Coast Guard in the Department of Transportation [see 49 U.S.C. §1655(b) (1970)] has various functions in the enforcement of Federal laws relating to navigable waters of the United States, the establishment and operation of navigation aids, and the saving of lives or property. 14 U.S.C. §§2 and 81 *et seq.* (1970). There are a number of relevant Federal laws concerning a variety of subjects, including such matters as requirements regarding lights on vessels and actions that may constitute Federal crimes.

A number of Federal regulations regarding the equipping or operation of motorboats are included in the Motorboat Act of 1940. 46 U.S.C. §526 *et seq.* (1970), as amended, (Supp. I, 1971). The Coast Guard may adopt necessary regulations under the Act. *Id.* §526(p). The Federal Boat Safety Act of 1971 includes various provisions regarding the safety and numbering of boats and related functions of the Secretary of Transportation and the Coast Guard. 46 U.S.C. §1451 *et seq.* (Supp. I, 1971). The Act is applicable to waters that are subject to the jurisdiction of the United States and to vessels owned in the United States which are operated on the high seas beyond the territorial seas of the United States. *Id.* §1453(a). If a State does not have a numbering system approved by the Secretary of Transportation, the Secretary is the issuing authority. *Id.* §1467. Unless permitted by the Secretary, no State or political subdivision may establish, continue in effect, or enforce any provision or regulation which establishes any boat or associated equipment performance or other safety standard except, unless disapproved by the Secretary, a provision or regulation, not identical to a Federal regulation, regarding the carrying or using of marine safety articles to meet uniquely hazardous conditions. *Id.* §1459.

See 33 C.F.R. §§2.05-1, 2.05-5 (1973) for a general description of the legal responsibilities of the Coast Guard.

Federal courts have admiralty jurisdiction regarding various kinds of disputes over boats using navigable waters affording the possibility of interstate commerce. This is discussed in Ellis, H. H., Beuscher, J. H., Howard, C. D., & DeBraal, J. P., "Water-Use Law and Administration in Wisconsin" §17.05 (1970), and sources cited therein.

> obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army * * *.[15]

Further approval is required to modify or deviate from the plans as approved.

> [S]uch structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced * * *.[16]

In addition, section 403 of the legislation provides in part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any * * * canal, lake * * * or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Persons or corporations violating these sections may be fined from $500 to $2,500 and such persons may be imprisoned for up to 1 year. Moreover, the "removal of any structures or parts of structures" erected in violation of these sections may be obtained under a Federal district court injunction in proceedings under the direction of the United States Attorney General.[17]

In *Cummings* v. *Chicago*, the United States Supreme Court said that the effect of this Federal legislation "reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government."[18]

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[15] 30 Stat. 1151 (1899), 33 U.S.C. §401 (1970).

[16] 33 U.S.C. §401 (1970).

[17] *Id.* §406.

In 1960, the United States Supreme Court decided that the Attorney General could sue for an injunction for a violation of §403 even though the act complained of technically may not have involved a "structure," as that term is used in §406, because "'no statute is necessary to authorize such a suit.'" *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960), quoting from *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405, 426 (1925).

Designated officials in or employed by the Corps of Engineers, United States collectors of customs, and other Federal revenue officers may request that violators of these statutes be prosecuted by United States attorneys. 33 U.S.C. §413 (1970).

[18] *Cummings* v. *Chicago*, 188 U.S. 410, 431 (1903), discussed in *Montgomery* v. *Portland*, 190 U.S. 89, 103-107 (1903), and *International Bridge Co.* v. *New York*, 254 U.S. 126, 132-133 (1920). (*Continued*)

The Secretary of the Army may prescribe various regulations for the "use, administration, and navigation of the navigable waters of the United States * * * covering all matters not specifically delegated by law to some other executive department."[19] Relevant regulations that have been adopted include a basic permit form for issuing permits under section 403.[20] This form includes the following condition:

> That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.[21]

The regulations also provide, among other things:

> As a matter of policy, permits will not be issued where authorization of the proposed work is required by State and/or local law and that authorization has been denied. However, initial processing of an application for a * * * permit will proceed until definitive action has been taken by the responsible State or local body to grant or deny authorization.[22]

The United States Supreme Court construed section 403, quoted above, as providing a basis for authorizing the Federal Government to enjoin the Sanitary District of Chicago, under State enabling legislation, from diverting water at more than a certain rate from Lake Michigan through a canal. The Court said such a diversion would cause a change in the water level of Lake Michigan and the Chicago River "and, if that be necessary, an obstruction to

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See also *Wisconsin* v. *Illinois*, 278 U.S. 367, 412 (1929), discussed at note 101 *infra*, with respect to "the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State * * *."

[19] 33 U.S.C. §1 (1970).

[20] 33 C.F.R. §209.120(m)(1) and App. C (1974). Section 209.120(m)(1) refers to §10 of the 1899 River and Harbor Act, 33 U.S.C. §§402 and 403 (1970). See also 33 C.F.R. §209.120(h).

The Secretary of the Army has delegated authority to issue permits under §403 of the rivers and harbors legislation to the Chief of Engineers. See 33 C.F.R. §209.120, App. D.

See §209.120(m)(3) regarding letters of permission for minor work that will have no significant impact on environmental values and should encounter no opposition.

Permits for structures under §401 of the rivers and harbors legislation "will be drafted during review procedures at Department of the Army level." 33 C.F.R. §209.120(m)(4), referring to §9 of the 1899 River and Harbor Act, 33 U.S.C. §401 (1970).

[21] 33 C.F.R. §209.120, App. C, Permit, General conditions, para. h (1974).

[22] *Id.* §209.120(f)(3).

their navigable capacity."[23] This diversion was primarily to dilute sewage, the water and the sewage being discharged through canals and rivers leading into the Mississippi River.

In another case, the Court held that section 403 authorized the Federal Government to enjoin the discharge of industrial solid wastes through sewers into a river without first obtaining a conditional permit from the Corps of Engineers, and to require the partial removal of the solid wastes in order to restore the navigable capacity of the river. The Court held that such discharge constituted a "diminution of the navigable capacity of a waterway" which constitutes an "obstruction" within the meaning of section 403.[24]

Until October 18, 1972 (as discussed in more detail later under "Environmental Protection Agency"[25]), under section 407 of the legislation, the Secretary of the Army could issue permits to deposit refuse materials (except refuse matter "flowing from streets and sewers and passing therefrom in a liquid state") in or on the banks of navigable waters if, in the judgment of the Chief of Engineers, anchorage and navigation would not be injured. The 1972 Federal Water Pollution Control Act Amendments provide that permits for such discharges may no longer be issued under section 407.[26]

In addition to the regulatory functions described above, the Corps of Engineers has a number of functions in regard to the planning, construction, and operation of projects for navigation, flood control, and related purposes.[27]

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[23] *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405, 429 (1925).

In *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 489 (1960), discussed immediately below, the Court said that the Court's "broad construction of [§403 in *Sanitary Dist. of Chicago* v. *United States*] was reaffirmed in *Wisconsin* v. *Illinois*, 278 U.S. 367, 414 [1929], another case involving the reduction of the water level of the Great Lakes by means of withdrawals through the Chicago River."

[24] *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 489 (1960). The Court also held that it was not within the exemption in §407 of refuse "flowing from streets and sewers and passing therefrom in a liquid state," as discussed at note 60 *infra*.

[25] See the discussion at notes 60-63 *infra*.

[26] 33 U.S.C. §1342(a)(5) (Supp. II, 1972).

However, permits may be issued by the Secretary of the Army, acting through the Chief of Engineers, for the discharge of dredged or fill material into navigable waters at specified disposal sights unless the Administrator of the Environmental Protection Agency prohibits the specification of any defined area as a disposal site or denies or restricts its use. *Id.* §1344.

[27] A provision regarding navitation vs. consumptive uses is discussed at notes 150-153. Some of the general Federal legislation applicable to the Corps of Engineers authorizes the Secretary of the Army "to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water." 33 U.S.C. §708 (1970).

Federal legislation also authorizes the Secretary, on the Chief of Engineers' recommendation as being advantageous in the public interest, to provide additional storage

(*Continued*)

In addition to legislation of general applicability, specific legislation authorizing or pertaining to particular projects may contain specific provisions regarding those projects.

Federal Power Commission

Federal legislation dating from 1920 provides that the Federal Power Commission is authorized to issue licenses to States, individuals, and others

> for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs * * * or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories),[28] or for the purpose of utilizing the surplus water or water power from any Government dam [with certain exceptions]; *Provided* * * * no license affecting the navigable capacity of any navigable waters of the United States shall be issued * * * [unless] approved by the Chief of Engineers and the Secretary of the Army.[29]

Section 802(b) of the applicable legislation provides that each applicant for a Federal license for a power project shall submit "[s]atisfactory evidence that

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capacity in flood control reservoirs for "domestic water supply or other conservation storage" if a State or local political subdivisions contribute to the additional cost and agree to utilize such additional storage capacity in a manner consistent with the Federal uses and purposes. *Id.* §701h. Another statute authorizes the Corps of Engineers to impound water in its reservoir projects for "municipal or industrial" purposes and credit the value thereof to the economic value of the entire project, if State or local interests agree to pay the cost and certain other requirements are met. 43 U.S.C. §390b (1970). See 43 U.S.C. §§390c-90f, concerning rights of State and local interests regarding water storage provided for their use at their expense in reservoirs built by the Corps.

Further, the Chief of Engineers, under the supervision of the Secretary of the Army, may construct, maintain, and operate public park and recreational facilities or may permit such activities and may lease lands for various purposes at water resource development projects under the control of the Department of the Army. This authority is subject to certain restrictions, certain preferences given to Federal, State, or local governmental agencies, and to public uses for boating, swimming, fishing, and other recreational uses, and consistent with the State laws for the protection of fish and game. 16 U.S.C. §§460d to 460d-2 (1970).

[28] With respect to dams or works on public lands and reservations, see the discussion at notes 163-167 *infra*.

[29] 16 U.S.C. §797(e) (1970). See also 18 C.F.R. §1.1 *et seq.* (1974), regarding applicable regulations.

The United States Supreme Court has said, *inter alia*, "Section 23(b) [of the Federal Water Power Act, 16 U.S.C. §817] prohibits construction of nonlicensed hydroelectric projects on navigable streams, regardless of any effect, detrimental or beneficial, on navigation or commerce by water * * *." *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90, 95-96 (1965).

the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *."[30] The United States Supreme Court has indicated that while the applicant could be required to submit evidence of compliance with such State laws as the Commission may consider appropriate to effectuate the purposes of a Federal license, evidence of compliance with all State licensing requirements is not required, since compliance with State requirements "that are in a conflict with Federal requirements might well block the Federal license."[31]

Section 821 of the applicable legislation provides: "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[32] The Court said that this section "expressly 'saves' certain State laws relating to property rights as to the use of water, so that these are not superseded" by this legislation and "has primary, if not exclusive, reference to such proprietary rights."[33] It is to be distinguished from section 802(b), discussed above, "which deals with marshalling of information for the consideration of a new

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[30] 16 U.S.C. §802(b) (1970).

[31] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152 (1946).

[32] 16 U.S.C. §821 (1970).

[33] 328 U.S. 152, 175-176.

In another case the Court noted, *inter alia*, that 16 U.S.C. §803(c) provides that licensees "shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation" of the licensed project, and that by 16 U.S.C. §799 all licenses are required to be "conditioned upon acceptance by the licensee of all the terms and conditions of this [Water Power] Act." The Court said that while these sections and §821 discussed above (and §814 regarding licensees' eminent domain powers) "are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by §27 [16 U.S.C. §821] from destruction or appropriation by licensees without compensation, and that it is one which petitioner, by acceptance of the license under the provisions of §6 [16 U.S.C. §799], must be deemed to have agreed to recognize and protect. Whether §21 [16 U.S.C. §814], giving to licensees the power of eminent domain, confers on them power to condemn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us." *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378-379 (1930), discussed in *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254-255 (1954).

Federal license * * *."[34] The Court's interpretation of these legislative provisions is discussed in more detail later.[35]

Even though a hydroelectric power project is located on a nonnavigable stream, the applicable legislation provides that a declaration of intention shall be filed with the Federal Power Commission, which may require that a license be obtained if it finds that interstate or foreign commerce would be affected.[36]

Environmental Protection Agency

The 1972 Federal Water Pollution Control Act Amendments established as their objective the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. To that end, the act declared a number of policies and goals, included among which is the goal of eliminating the discharge of pollutants into navigable waters by 1985 and the interim goal of achieving by July 1, 1983, wherever attainable, a water quality level suitable for recreation and the protection and propagation of fish, shellfish, and wildlife.[37] To attain these goals and policies and achieve the stated objective, the 1972 amendments, under the administration of the Environmental Protection Agency (unless otherwise expressly provided),[38] authorize (1) an extensive program for research and demonstration grants[39] and (2) increased funding for the construction of municipal waste treatment facilities,[40] and (3) establish a greatly expanded program for water quality standards, enforcement, and permits.[41] The ensuing discussion of this extensive and complex legislation briefly describes various aspects of the regulatory provisions relating to the water quality standards, enforcement, and permit programs as they reflect additional approaches to the relations between the States and the Federal Government.[42]

The act declares that, except as provided in specified sections of the act, the

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[34] 328 U.S. 152, 175-176.

[35] See the discussion at notes 89 and 90 *infra*.

[36] 16 U.S.C. §817 (1970); *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90 (1965).

[37] 33 U.S.C. §§1251(a)(1) and (2) (Supp. II, 1972).

The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* §1362(7). This definition of navigable waters apparently was intended to be broadly construed. See the discussion at notes 81 and 82 *infra*.

[38] *Id.* §1251(d).

[39] *Id.* §§1251-1265.

[40] *Id.* §§1281-1292.

[41] *Id.* §§1311-1345.

[42] It is the policy of the Congress, according to the 1972 amendments, "to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, * * *" and to provide for "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State." *Id.* §§1251(b) and (e).

discharge of any pollutant[43] by any person shall be unlawful.[44] In order to carry out the objective of this act, a timetable was established to achieve effluent limitations[45] by July 1, 1977, and July 1, 1983, which shall require using (1) "the best practicable control technology currently available" and "the best available technology economically achievable" by each date, respectively, for point sources[46] of pollution, and (2) secondary treatment and "the best practicable waste treatment technology" by each date, respectively, for publicly owned treatment works.[47]

The system of State water quality standards created under earlier legislation[48] was continued and expanded. Subject to various time specifications, notification, and publishing requirements, each State is directed to adopt water quality standards for interstate and intrastate waters, if such standards were not adopted prior to the enactment of the 1972 amendments. If the Administrator of the Environmental Protection Agency determines that the standards do not meet the requirements of the legislation in effect immediately prior to the passage of the 1972 amendments, he is to specify the necessary changes which the State shall adopt. Failing such action by the State, or if the State fails to adopt any standards, the Administrator shall promulgate such changes or standards for that State.[49]

At least once every 3 years following passage of the 1972 amendments, each State is to review its water quality standards and revise them or adopt new standards when appropriate. Any new or revised standards shall consist of the water quality criteria based on the designated uses of the navigable waters involved, and shall be submitted to the Administrator for review. The Administrator shall approve the standards or, if not consistent with the

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[43] The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* §1362(6).

The term "pollution" is defined as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* §1362(19).

[44] *Id.* §1311(a).

[45] An "effluent limitation" is defined as "any restriction established by a State or the Administrator [of the Environmental Protection Agency] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." *Id.* §1362(11).

[46] "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* §1362(14).

[47] *Id.* §1311(b). Effluent limitations for point sources of pollution discharging into publicly-owned treatment works shall be in accordance with the pretreatment and any other requirements under §1317.

[48] 33 U.S.C. §1160 (1970).

[49] 33 U.S.C. §§1313(a) and (b) (Supp. II, 1972).

requirements of this act, he shall specify the necessary changes. If a State does not adopt the specified changes, the Administrator shall promulgate such standards for the navigable waters involved in that State.[50]

Included among the numerous regulations and guidelines that the Administrator is directed to promulgate and adopt[51] are regulations for national standards of performance[52] for new sources[53] of waste water discharges from various processing and manufacturing industries.[54] The Administrator is also directed to promulgate effluent standards for toxic pollutants and regulations establishing pretreatment standards for pollutants to be treated in publicly owned treatment works, which pollutants are determined not to be susceptible to treatment in such treatment works or which would interfere with the operation of such treatment works.[55]

The Administrator may issue permits for the "discharge of pollutants" (defined as "additions of pollutants to navigable waters from any point source"[56]), if certain statutory requirements are met or on such conditions as the Administrator determines are necessary to carry out the provisions of the 1972 amendments.[57] The Administrator shall suspend his issuance of permits in any State for which he has approved a State program for issuing permits for discharges into navigable waters within its jurisdiction.[58]

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[50] *Id.* § 1313(c).

[51] See § 1314 for an extensive listing of areas for which the Administrator is to develop information, guidelines, or procedures.

The major thrust of § 1314 is to develop criteria for water quality and to provide information, guidelines, or procedures to minimize water pollution and preserve or restore water quality.

[52] "Standard of performance" is defined as "a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." *Id.* § 1316(a)(1).

[53] "new source" is defined as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." *Id.* § 1316(a)(2).

[54] *Id.* § 1316(b).

The Administrator may add other processing and manufacturing industries to those specified in the statute.

The States may develop procedures for applying and enforcing standards for those new sources located within the individual States. If the Administrator finds that the requirements for these standards will be met, the States are authorized to apply and enforce such standards.

[55] *Id.* § 1317.

[56] *Id.* § 1362(12). The phrase "point source" is defined in note 46 *supra.*

[57] *Id* § 1342(a)(1), referring to § § 1311, 1312, 1316, 1317, 1318, and 1343.

[58] *Id.* § 1342(c)(1). No such State permit shall issue if he objects to it after notification as specified, but he may waive this requirement for certain kinds of sources. *Id.* § 1342(d) to (f). He may withdraw approval of any State permit program.

In addition to these permit requirements, there are also certification provisions which require that any non-Federal applicant for a Federal permit or license to conduct any activity (including, but not limited to, the construction or operation of facilities) which may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification (from the State or interstate water pollution control agency having jurisdiction over the navigable waters where the discharge originates) that the discharge will comply with certain statutory requirements. No such permit or license shall be granted until the certification has been obtained or waived.[59]

Section 407 of Title 33 of the United States Code provides that it shall not be lawful to discharge or deposit refuse materials, except refuse matters "flowing from streets and sewers and passing therefrom in a liquid state," in or on the banks of navigable waters or their tributaries "where the same shall be liable to be washed into such navigable waters." However, as noted earlier under "Corps of Engineers," until October 18, 1972, permits having certain limitations and conditions could be issued by the Secretary of the Army to deposit refuse materials in or on the banks of navigable waters if, in the judgment of the Chief of Engineers, anchorage and navigation would not be injured.[60] The 1972 amendments provide that permits for such discharges may

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if, after public hearing, he determines that the State is not administering the program in accordance with the requirements of this section and if the State does not take appropriate corrective action. *Id.* §1342(c)(3).

[59] *Id.* §1341(a)(1), referring to §§1311, 1312, 1316, and 1317.

[60] 33 U.S.C. §407 (1970).

Persons violating §407 may be fined $500 to $2,500 or imprisoned up to 1 year. *Id.* §411. "[O]ne half of [the] fine [is] to be paid to the person or persons giving information which shall lead to the conviction" of the violators. *Id.* §413

In a five to four divided opinion in 1960, the United States Supreme Court held that the discharge of industrial solid wastes through sewers into a navigable river was not within the exemption in §407 of refuse "flowing from streets and sewers and passing therefrom in a liquid state." *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 489-491 (1960). This case is also discussed at note 24 *supra* in regard to 33 U.S.C. §403 (1970).

In 1966 the Court held that a company could be indicted for violating §407 by allowing commercially valuable gasoline to be discharged into a navigable river. The Court said, *inter alia*, "The word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966) (6 to 3 divided opinion).

With respect to whether §407 may apply to "water deposits that have no tendency to affect navigation," the Court in a subsequent case said that "although there was much dispute on this question in the past, * * * in *United States* v. *Standard Oil Co.*, *supra*, we held that 'the "serious injury" to our watercourses . . . sought to be remedied [by the 1899 act] was caused in part by obstacles that impeded navigation and in part by pollution,' and that the term 'refuse' as used in [§407] 'includes all foreign substances and pollutants . . . .' 384 U.S., at 228-229, 230. * * * See also *Illinois* v. *City*

(*Continued*)

no longer be issued under section 407.[61] Permits previously issued under section 407 shall be deemed to be permits issued under subchapter 4 of the 1972 amendments and "permits issued under this subchapter [4] shall be deemed to be permits issued under section 407 * * *."[62] The regulations of the Environmental Protection Agency provide: "No permit shall be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, anchorage and navigation of any of the navigable waters would be substantially impaired by the discharge."[63]

The Administrator is authorized to issue orders of compliance for violations of the provisions relating to (1) effluent limitations, (2) national standards of performance, (3) toxic and pretreatment standards, and (4) inspections, monitoring, and entry, and (5) for violations of permit conditions or limitations. The Administrator is required to issue such orders whenever any State fails to proceed with appropriate enforcement action.[64] The Administrator is also authorized to commence civil actions for appropriate relief, including permanent or temporary injunctions, for any violation for which he is authorized to issue orders of compliance.[65] Moreover, the

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of Milwaukee, 406 U.S. 91, 101 (1972). * * *" *United States* v. *Pennsylvania Chemical Corp.*, 411 U.S. 655, 670-671 (1973).

[61] 33 U.S.C. §1342(a)(5) (Supp. II, 1972).

However, the Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sights unless the Administrator of the Environmental Protection Agency prohibits the specification of any defined area as a disposal site or denies or restricts its use. *Id.* §1344.

[62] *Id.* §1342(a)(4). Applications pending for such permits on October 18, 1972, shall be deemed to be applications for permits under subchapter four of the 1972 amendments. *Id.* §1342(a)(5).

While the United States Supreme Court, through 1974, does not appear to have dealt with the question of the issuance of permits for the discharge of refuse into nonnavigable tributary waters, a Federal district court in a 1971 case concluded that §407 clearly did not give the Secretary of the Army authority to issue permits for the dumping of refuse into nonnavigable tributary waters and that §407 "absolutely prohibits deposits of refuse matter into them." *Kalur* v. *Resor*, 335 Fed. Supp. 1, 10, 12 (D.D.C. 1971). But although §407 is still in effect, conditional permits to discharge pollutants into such waters apparently may be issued under the Federal Water Pollution Control Act Amendments of 1972 as interpreted by the Environmental Protection Agency and a Federal court of appeals. See note 82, *infra*. The U.S. Supreme Court, through 1974, had not dealt with this question either.

[63] 40 C.F.R. §125.21(c) (1973).

[64] 33 U.S.C. §1319(a) (Supp. II, 1972).

[65] *Id.* §1319(b).

Civil penalties are not to exceed $10,000 per day of violation. Criminal penalties for a first conviction shall be not less than $2,500 and not more than $25,000 per day of violation or 1 year imprisonment or both. For subsequent criminal convictions, the penalities are increased to a maximum of $50,000 per day of violation or 2 years imprisonment or both. *Id.* §1319(c) and (d).

(Continued)

Administrator is granted emergency powers to seek an injunction to restrain the discharge of pollutants which is "presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish * * *."[66]

Except as provided in the act, the States are not precluded from adopting or enforcing any standards or limitations regarding discharges of pollutants or any requirements regarding control or abatement of pollution. However, for any standards, limitations, or prohibitions in effect under this act, a State may not adopt any less stringent requirements.[67]

Definition of Navigable Waters for Commerce Power Purposes

Judicial or statutory criteria by which to determine navigable waters for various Federal purposes may vary, depending on the particular constitutional or statutory provisions or matters at issue.[68] "The navigability of [a river] is, of course, a factual question * * * but to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability."[69] The basic test appears to be "*whether a waterway has been used or is susceptible of being used * * * as a highway of commerce over which*

Whenever a municipality is a party to a civil action brought by the United States, the State in which the municipality is located shall be joined as a party and shall be liable for any judgment or expenses incurred against the municipality to the extent that the laws of the State prevent the municipality from raising the revenues necessary to comply with such judgment. *Id.* §1319(e).

[66] *Id.* §1364.

In addition to these enforcement actions by the Administrator, any citizen may commence a civil action on his own behalf (1) against any person (including the United States, or any other governmental agency to the extent permitted by the 11th amendment to the Constitution), who is alleged to be violating an effluent limitation or standard or violating an order of the Administrator or a State with respect to an effluent limitation or standard, or (2) against the Administrator for failure to perform a nondiscretionary act. *Id.* §1365(a). The 11th amendment is set out in chapter 22, note 9.

The Governor of a State is also authorized to commence a civil action against the Administrator for an alleged failure to enforce an effluent standard or limitation, the violation of which is occurring in another State and is adversely affecting the public health or welfare in his State or is violating a water quality requirement in his State. *Id.* §1365(h).

[67] *Id.* §1370.

[68] See Laurent, F. W., "Judicial Criteria of Navigability in Federal Cases," 1953 Wis. L. Rev. 9.

Some differences between Federal and State tests of navigability for various purposes are discussed in chapter 4.

[69] *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 405 (1940).

trade and travel may be conducted in the customary modes on inland waters."[70]

For commerce power purposes, the United States Supreme Court in an early case said that waters are navigable "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries * * *."[71] Associated rules have modified or have been added to this early test of navigability for commerce power purposes, including the following rules:

(1) In *United States* v. *Applachian Electric Power Company*,[72] often called the *New River* case, the United States Supreme Court held that a natural waterway may be classed as navigable even though artificial aids are needed to make it suitable for use before commercial navigation can be undertaken, although there must be a balance between cost and need at a time when the improvement would be useful.[73] Prior case law had proceeded upon the

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[70] Laurent, F. W., *supra* note 68, at 36 (emphasis added).

[71] *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

"The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power * * * To regulate Commerce * * * among the several States.' " *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940).

[72] *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

[73] *Id.* at 407-409. The Court said, *inter alia*, " 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in §3 of the Water Power Act [16 U.S.C. §796(8), quoted at note 78 *infra*] by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or are suitable for use. * * * [T]here are obvious limits to such improvements as affecting navigability. * * * There must be a balance between cost and need at a time when the improvement would be useful. * * *

"* * * Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed * * * or riparian rights * * * is determined * * * as of * * * the admission to Statehood * * *, navigability, for the purpose of the regulation of commerce, may later arise." *Id.* at 407-408. (Moreover, for bed title purposes, unlike commerce power purposes, a watercourse need not constitute a link in interstate commerce for it to be classed as navigable. See *United States* v. *Oregon*, 295 U.S. 1, 14 (1935), discussed in chapter 4 at note 72.)

Various Federal-State considerations regarding bed titles are discussed in chapter 4. More detailed discussions of these complicated matters are included in Ellis, H. H., Beuscher, J. H., Howard, C. D., & DeBraal, J. P., "Water-Use Law and Administration in Wisconsin" 53-70 (1970); Mann, F. L., Ellis, H. H., and Krausz, N. G. P., "Water-Use Law in Illinois" 82-108 (1964). See pp. 61-62, at note 176, and pp. 84-85, at note 7, of these publications, respectively, regarding implications of the *New River* case on the test of navigability for bed title purposes.

premise that a river, to be navigable, must be useful for commerce in its natural state.[74]

(2) In the *New River* case the Court said, "It is well recognized too that the navigability may be of a substantial part only of the waterway in question."[75]

(3) In *Economy Light & Power Company* v. *United States*[76] the Court held that a waterway, which was once navigable by the Federal test, continues to be navigable for commerce power purposes, even though commercial uses have been discontinued because of artificial obstructions or changed economic conditions. And in *United States* v. *Cress*,[77] the Court held that navigable rivers which had been dammed and canalized continue to be navigable waters of the United States notwithstanding the artificial improvements.

The Federal Power Act includes a broadly stated definition of navigable waters which was considered in the *New River* case. It includes

> those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or water by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.[78]

Most statutes providing for regulatory authority of the Corps of Engineers described earlier under "Exercise of the Commerce Power—Corps of Engineers" refer simply to navigable waters of the United States.[79] or to the

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[74] See *The Montello*, 87 U.S. (20 Wall.) 430 (1874). See also *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871), quoted at note 71 *supra*.

In the *New River* case, the Court said with respect to the test laid down in *The Daniel Ball* that "Each application of this test * * * is apt to uncover variations and refinements which require further elaboration." *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940).

[75] *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 410 (1940).

[76] *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921).

[77] *United States* v. *Cress*, 243 U.S. 316 (1917).

[78] 16 U.S.C. § 796(8) (1970), discussed in note 73 *supra*.

[79] 33 U.S.C. § § 1, 401, and 407 (1970). [But see note 61 *supra* describing the Corps' functions under § 1344, a part of the 1972 water pollution legislation. Its definition of navigable waters is discussed at notes 81-82 *infra*. It was expansively applied to § 1344 in *United States* v. *Holland*, 373 Fed. Supp. 665 (M.D. Fla. 1974).]

General regulations promulgated by the Corps provide *inter alia*: "The term

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"navigable capacity of any of the waters of the United States."[80]

In the Federal Water Pollution Control Act Amendments of 1972, discussed earlier under "Exercise of the Commerce Power–Environmental Protection

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'navigable waters of the United States' is used to define the scope and extent of the regulatory powers of the Federal Government. Precise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this section are in close conformance with the tests used by the Federal courts and determinations made under this section are considered binding in regard to the activities of the Corps of Engineers.

"(c) *General definition*. Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity." 33 C.F.R. §§209.260(b) and (c) (1974). More specific criteria are also included in §209.260. See also §209.120(d)(1) (1974).

The legislation applicable to the Coast Guard, described in note 14 *supra*, refers simply to "the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. §2 (1970). This has been construed by the Coast Guard to include navigable waters of the United States. 33 C.F.R. §2.10-10 (1973). Subpart 2.10 includes general descriptions of navigable waters subject to Coast Guard jurisdiction.

[80] 33 U.S.C. §403 (1970). Section 403 subsequently refers to "navigable river, or other water of the United States" and "navigable water of the United States * * *."

In a recent case, a Federal court of appeals held that navigable water of the United States within the meaning of the Rivers and Harbors Act "must be construed in line with the interpretation in The Daniel Ball [quoted at note 71 *supra*], as contemplating such a body of water forming a continuous highway over which commerce is or may be carried on with other states or foreign countries, by water * * *" and that showing navigability only up to a connecting intrastate railhead was insufficient. *Hardy Salt Co.* v. *Southern Pac. Transp. Co.*, 501 Fed.(2d) 1156, 1169 (10th Cir. 1974). The court said, *inter alia*, "Although the definition of 'navigability' laid down in The Daniel Ball has subsequently been modified and clarified [citing cases], its definition of 'navigable water of the United States,' insofar as it requires a navigable interstate linkage by water, appears to remain unchanged [citing and discussing cases]. *Id.* at 1167.

"We realize that the construction of 'navigable water of the United States' made in The Daniel Ball and The Montello [87 U.S. (20 Wall.) 430 (1874)] may be viewed as involving a statute depending on the admiralty power, while the Rivers and Harbors Act is an exercise of power under the commerce clause. See United States v. Crow, Pope & Land Enterprises, Inc. [340 Fed. Supp. 25 (N.D. Ga. 1972), appeal dismissed, 474 Fed.(2d) 200 (5th Cir. 1973)]. Nevertheless, The Daniel Ball was a landmark decision and its interpretation of 'navigable water of the United States,' adhered to in The Montello and Escanaba Co. v. Chicago [107 U.S. 678 (1882)], was well settled at the time of the enactment of the 1899 statute. It was the interpretation given to 'navigable water of the United States' as used in the 1890 Rivers & Harbors Act, a predecessor of the 1899 Act, see 21 Op. Att'y Gen. 430, 432-33 (1896). When Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute [citing cases]. We may assume that the Congress was aware of these decisions and of the

Agency," "navigable waters" are defined as "the waters of the United States, including the territorial seas."[81] The Conference Report on the differing Senate and House versions of this legislation stated, "The Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[82]

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interpretation which they had placed upon the phrase 'navigable water of the United States' so that if it had intended the Act of 1899 to employ a broader definition, it would have manifested such an intention by clear and explicit language. See Cummings v. Chicago, 188 U.S. 410, 430, * * * (1903); compare Federal Power Act § 3(8), 16 U.S.C.A. §796(8) * * *. In the absence of any such language it should not be assumed that any such departure was intended." *Id.* at 1168.

[81] 33 U.S.C. §1362(7) (Supp. II, 1972).

[82] S. Rep. No. 92-1236, 92d Cong., 2d Sess. 144 (1972).

Explanatory material prepared by Senator Muskie accompanying his presentation of the Conference Report to the Senate included the quoted statement in the Conference Report and added, "Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce." 118 Cong. Rec. 33699 (1972).

Senate Bill 2770 §502(h) (1971), as enacted by the Senate, had defined the term "navigable waters" to mean "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." As enacted by the House of Representatives, the term "navigable waters" was amended to mean "the navigable waters of the United States, including the territorial seas." H. R. 11896 §502(8) (1972). With the omission of the word, "navigable," the House amended version was adopted.

The Environmental Protection Agency has included the following broad definition of "navigable waters" in its regulations regarding the national pollutant discharge elimination system promulgated under this act: "The term 'navigable waters' includes:

"(1) All navigable waters of the United States;

"(2) Tributaries of navigable waters of the United States;

"(3) Interstate waters;

"(4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;

"(5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and

"(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce." 40 C.F.R. §125.1(o) (1974).

This is a more expansive definition of "navigable waters" than anything employed by

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The Congress has declared certain named streams or portions thereof to be navigable or nonnavigable, although it often has expressly reserved the right to alter or repeal such declarations.[83]

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the United States Supreme Court for commerce power purposes through 1974. It remains to be seen how the Court may construe and apply this act's definition of "navigable waters" as "the waters of the United States * * *" and how it may react to the definition of the Environmental Protection Agency. However, in a recent decision of the United States Court of Appeals, Sixth Circuit, involving the discharge of oil into a nonnavigable stream, the court said, *inter alia*, "Congress in 1972 adopted a new definition of the term 'navigable waters' for purposes of the Federal Water Pollution Control Act. * * * 'The term "navigable waters" means the waters of the United States, including the territorial seas [33 U.S.C. §1362(7)].' " *United States* v. *Ashland Oil & Transp. Co.*, 504 Fed. (2d) 1317, 1325 (6th Cir. 1974). "[W]e believe Congress * * * intended the Federal Water Pollution Control Act to apply, as Congressman Dingell, [one of the active supporters of the bill (*Id.* at 1323)] put it, 'to all water bodies, including main streams and their tributaries [118 Cong. Rec. 33756-57 (1972)].' [The court also said, "We believe Congressional intent was accurately portrayed by Representative Dingell" who had said, " 'the conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.' " 504 Fed. (2d) at 1323.] Certainly the Congressional language must be read to apply to our instant case involving pollution of one of the tributaries of a navigable river." *Id.* at 1325. In view of the latter statement (and the court's holding, described below) any broader import of the former statements would be *dicta*. The court held that (1) the Congress, in adopting the Federal Water Pollution Control Act Amendments of 1972, intended "to control both discharges of pollutants directly into navigable waters and discharges of pollutants into nonnavigable tributaries which flowed into navigable rivers;" (2) Congress has "constitutional authority under its interstate commerce powers to prohibit discharge of pollutants into nonnavigable tributaries of navigable streams * * *." *Id.* at 1318-1319. But for various purposes Federal jurisdiction may extend to nonnavigable tributaries without necessarily calling them navigable waters. (See the discussion at notes 4, 36, and 60 *supra* and at 136 *infra*.) Hence, such jurisdiction need not necessarily be identical to the definition of navigable waters.

Various provisions in the previous Federal water pollution control legislation pertained to "interstate or navigable waters." 33 U.S.C. §1160 (1970). Navigable waters were not defined but "interstate waters" were defined as "all rivers, lakes, and other waters that flow across or form a part of State boundaries, including coastal waters." *Id.* §1173(e). This legislation also provided that whether the polluting material is discharged directly into such waters "or reaches such waters after discharge into a tributary of such waters," it was subject to abatement as provided under certain regulatory provisions in the legislation. *Id.* §1160(a). However, none of these provisions were expressly included in the current legislation.

[83] See 33 U.S.C. §§34, 39, 50, 59h (1970).

In addition to Federal legislation and court decisions regarding the navigability of particular waters for various purposes, regulations or determinations of various Federal agencies, although not conclusive, have also considered particular waters to be navigable or nonnavigable for various purposes. See, e.g., 33 C.F.R. §209.260 (Corps of Engineers) (1974).

Limitations on Applicability of State Laws

The mere grant to Congress of the power to regulate commerce did not deprive the States of all powers over navigable waters.[84] and there has been no indication of any expressed intention on the part of Congress to "occupy the field" and enact legislation so sweeping and comprehensive as to exclude all State legislation on the subject.[85] Instead, the Supreme Court has recognized the States' vital interest in the control of water resources and has specifically conceded the power of the States to exercise control over navigable water for the interests of their citizens until Congress in some way asserts its superior power.[86] It has observed that a State may establish regulations dealing with its local streams and also with the waters of the United States within that State in the absence of an exclusive assumption of jurisdiction by the United States over the navigability of its waters. The States are said to have a "traditional jurisdiction" subject to the admittedly superior right of the Federal Government to regulate interstate and foreign commerce.[87] Water-rights legislation in the State's "traditional jurisdiction" may apply to waters subject to Federal jurisdiction only by general inclusion. In this regard, recall that for various purposes Federal jurisdiction may extend to nonnavigable tributaries of federally defined navigable waters. On the other hand, the Federal Government may exercise less than the full extent of its constitutional powers.

An inconsistency between State and Federal law may have varying limiting effects. For example, it may prevent the State law from being applied to waters and for purposes to which the Federal power attaches, or it may only prevent the State law from being applied to a particular situation regarding those waters.[88] The State law in either case may remain untouched in form and continue to be applicable to other waters to which the Federal power does not attach or to situations in which the Federal interest does not arise.

An illustration of the first type of limitation is found in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission.*[89] There, State requirements for licensing power projects and prohibitions against diversions of

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[84] *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) *299 (1851).

[85] See Rottschaefer, H., "Handbook of American Constitutional Law" §§151, 152, at 284 (1939).

[86] *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899).

[87] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152 (1946).

[88] *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1899), involved a limitation of the second type. That case involved a company which had been permitted to appropriate water for irrigation under State laws applicable to all watercourses within its boundaries despite the fact that the particular appropriation was of such a large quantity that it would have had a substantial effect on the navigability of the Rio Grande, and that the required permission of the Secretary of War had not been obtained. An injunction against the diversion was granted, but this still left the statute in full force for all other streams in the State and applicable to any other appropriations of the Rio Grande that would not have the same effect.

[89] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152 (1946).

streams out of their watershed were held to have no application to navigable rivers of the United States regarding matters over which exclusive jurisdiction had been given to the Commission by Congress. Yet, the State laws remained applicable to other waters and matters in the State.

Section 802(b) of the applicable Federal legislation provides that each applicant for a Federal license for a power project shall submit "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *."[90]

In the *First Iowa* case, the Court indicated that while the applicant could be required to submit evidence of compliance with such State laws as the Commission may consider appropriate to effectuate the purposes of a Federal license, evidence of compliance with all State licensing requirements is not required, since compliance with State requirements "that are in conflict with Federal requirements might well block the Federal license." The Court said that section 802(b)

> does not itself require compliance with any State laws. Its reference to State laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable State laws, if any, arises not from this Federal statute but from the effectiveness of the State statutes themselves.[91]

The Court also said that the Federal Power Act established to some extent a dual system of control.

> The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the State government there is no suggestion that the two agencies both shall have final authority.[92]

The Court also discussed another section of the Act which provides: "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[93]

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[90] 16 U.S.C. §802(b) (1970).

[91] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 166-167, 177-178 (1946).

[92] *Id.* at 167-168.

[93] 16 U.S.C. §821 (1970).

The Court said, among other things, that this section "expressly 'saves' certain State laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act."[94] But the Court said that its directness and clarity as a "saving" clause and its location near the end of the Act emphasizes its distinction from 16 U.S.C. §802(b), discussed above, "which deals with marshalling of information for the consideration of a new Federal license" and that this section "is thoroughly consistent with the integration rather than the duplication of Federal and State jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by Federal legislation take its natural course."[95]

The Court said that the effect of this "saving" clause

> in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.[96]

As mentioned earlier,[97] section 401 of the rivers and harbors legislation, regarding Federal regulation of structures in navigable waters, provides:

> [S]uch structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced * * *.[98]

While the United States Supreme Court has indicated that Federal considerations are paramount and may override conflicting State legislation regarding

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[94] 328 U.S. 152, 175.

[95] *Id.* at 175-176.

[96] *Id.* In a subsequent case, the Court said: "The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise [citing and quoting 16 U.S.C. §821 and other sections of the Act]. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act." *Federal Power Comm'n* v. *Niagara Mohawk Paper Corp.*, 347 U.S. 239, 252 (1954). See also the discussion of this case regarding the Federal Water Power Act in note 130 *infra*.

[97] See the discussion at note 16 *supra*.

[98] 33 U.S.C. §401 (1970).

structures in navigable waters of the United States,[99] it said in *Cummings* v. *Chicago* that the effect of this Federal legislation "reasonably interpreted, is to make the creation of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government."[100] In another case, the Court said that a certain change made in the wording of the applicable legislation in 1899 "was not intended to override the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State and both State and Federal approval were made necessary in such a case. *Cummings* v. *Chicago*, 188 U.S. 410."[101]

The basic form of permits administered by the Corps of Engineers for works in or affecting navigable waters does not purport to obviate the necessity of obtaining State assent for the work authorized. The applicable regulations also provide: "As a matter of policy, permits will not be issued where authorization of the proposed work is required by State and/or local law and that authorization has been denied."[102]

Regulatory functions under the 1972 Federal Water Pollution Control Act Amendments are discussed earlier under "Environmental Protection Agency." These include a number of specific Federal-State relationships. For example, the Administrator of the Environmental Protection Agency may issue permits for the discharge of pollutants (defined as "additions of pollutants to navigable waters from any point source"), but he shall suspend his issuance of such permits in any State for which he has approved a State program for issuing permits for discharges into navigable waters.[103]

The immediately foregoing discussion has dealt with questions regarding State water laws in the handling of Federal permits or licenses or other regulatory provisions. What if the Federal Government itself engages in works on federally navigable waters in furtherance of the commerce power?

Arizona v. *California*,[104] decided in 1931, was a suit brought to enjoin Ray Lyman Wilbur, then Secretary of the Interior, from constructing Hoover Dam under authority of the Boulder Canyon Project Act of 1928.[105] California and other States were defendants in the suit only as interested parties, since they claimed an interest in the waters of the Colorado River. Arizona's claim of control over the dam and water rights and the decision on these points are

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[99] *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405, 426 (1925). This case is discussed at note 23 *supra*.

[100] *Cummings* v. *Chicago*, 188 U.S. 410, 431 (1903), discussed in *Montgomery* v. *Portland*, 190 U.S. 89, 103-107 (1903), and *International Bridge Co.* v. *New York*, 254 U.S. 126, 132-133 (1920).

[101] *Wisconsin* v. *Illinois*, 278 U.S. 367, 412 (1929).

[102] See the discussion at notes 20-22 *supra*.

[103] This is discussed at notes 56-58 *supra*.

[104] *Arizona* v. *California*, 283 U.S. 423 (1931).

[105] 43 U.S.C. §§617-617t (1970).

succinctly stated in the Court's opinion:

> The wrongs against which redress is sought, are, first, the threatened invasion of the quasi-sovereignty of Arizona by Wilbur in building the dam and reservoir without first securing the approval of the State Engineer as prescribed by its laws; and, second, the threatened invasion of Arizona's quasi-sovereign right to prohibit or to permit appropriation, under its own laws, of the unappropriated waters of the Colorado River flowing within the State. The latter invasion, it is alleged, will consist in the exercise, under the Act and the compact, of a claimed superior right to store, divert, and use such water.
>
> First. The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the State. At Black Canyon, the site of the dam, the middle channel of the river is the boundary between Nevada and Arizona. The latter's statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer; and the statutes declare in terms that this provision applies to dams to be erected by the United States. * * * The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.
>
> The United States may perform its functions without conforming to the police regulations of a State. * * * If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the State Engineer for approval. And the Federal Government has the power to create this obstruction in the river for purpose of improving navigation if the Colorado River is navigable.[106]

The Court concluded that the affected portion of the river was navigable.[107] It also noted that construction of the dam and reservoir had not yet commenced and that Arizona had conceded that water already appropriated in Arizona was not being threatened.[108] The Court dismissed Arizona's bill of complaint although it did so "without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriation and to enjoy the same."[109]

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[106] 283 U.S. 423, 451-452 (1931).

[107] *Id.* at 452 *et seq.*

The Court also said "the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power." *Id.* at 456.

[108] *Id.* at 460.

[109] *Id.* at 464.

In the more recent case of *Arizona* v. *California*, decided in 1963,[110] some of the principal issues concerned the allocation of the water among the affected States. Such aspects of the case are discussed in more detail in chapter 22. The Court cited the earlier *Arizona* v. *California* case in stating that the Boulder Canyon Project Act was passed "in the exercise of the Congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects * * *."[111] The Court added that the act "is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements."[112]

The Court concluded that by enacting this act, the Congress had created a comprehensive scheme for developing the Colorado River and for apportioning the Lower Basin's share of the mainstream waters among California, Arizona, and Nevada, which the Court upheld. The Secretary of the Interior could make contracts for the sale and delivery of water stored in Lake Mead above Hoover Dam, and the use of such waters was prohibited without such a contract.[113] Under the provisions of and circumstances surrounding the act, the Secretary's authority was construed to include authority to determine which users within each State would get that State's share of the mainstream waters, subject to the limitations and directions contained in the Act.[114] The Court concluded that

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[110] 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964).

[111] 373 U.S. 546, 587.

[112] *Id.* See note 232 *infra*, suggesting that it may not be entirely clear what the Court would have held about the exercise of either the commerce power or general welfare power solely by itself.

The act states that it was for "the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project * * * a self-supporting and financially solvent undertaking * * *." 43 U.S.C. §617 (1970).

[113] 373 U.S. 546, 564-565. See chapter 22, note 134, regarding the taking of water from points above Lake Mead. See also note 119 *infra*.

[114] *Id.* at 579-585.

The Court noted that the act "specifically set out in order the purposes for which the Secretary must use the dam and the reservoir: 'First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power.' §6." *Id.* at 584.

In its subsequent decree, the Court construed a present perfected right to mean a water right in existence on the effective date of the act "acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works * * *" as well as water rights for future needs of Federal reservations. 376 U.S. 340, 341 (1964). This is discussed under "Other Federal Powers—The Proprietary Power and the Reservation Doctrine," *infra*.

While the Court interpreted the Act to mean that Congress had established the share

such apportionment was not controlled by State laws.

> Section 18 [of the Act] merely preserves such rights as the States "now" have, that is, such rights as they had at the time the Act was passed.[115] While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river. * * * Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. * * * [W]e hold that the general saving language of §18 cannot bind the Secretary by State law and thereby nullify the contract power expressly conferred upon him by §5. * * *[116] Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights. * * * What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, State law has no place.[117]

The Court indicated that, before the legislation was enacted, the river's flow created periodic droughts and floods. Solutions to the problem were too costly for any or all of the States to undertake.

> In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake, Congress responded to the pleas of the States to come to their aid. The result was the Project Act * * *.

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of each of the three Lower Basin States in the mainstream water, the Court construed the Act to have given the Secretary certain discretionary authority to apportion the water in the event of a shortage, as discussed in chapter 22 under "Water Allocation Affected by Federal Regulatory Laws and Projects." In the latter regard, see also note 121 *infra*.

[115] Section 18 of the act states, "Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement." 43 U.S.C. §617q (1970).

[116] Section 5 of the act states in part: "The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy * * *. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." *Id.* §617d.

[117] 373 U.S. 546, 587-588 (1963).

> * * * [T]he United States assumed the responsibility for the construction, operation, and supervision of Boulder [now Hoover] Dam and a great complex of other dams and works.[118] Behind the dam were stored virtually all the waters of the main river * * *. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin. * * *[119] All this vast, interlocking machinery * * * could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the §5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different State legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.[120]

The Court added, "Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes."[121]

It is not entirely clear what the Court would hold about the extent and application of such Federal powers in regard to nonnavigable or nonfederally

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[118] Not all of the dams and works mentioned by the Court at this point were built under the authority of the Boulder Canyon Project Act itself. See *United States* v. *Arizona*, 295 U.S. 174, 185-187 (1935), regarding Parker Dam and Laguna Dam, in which the Court said: "The clause of §1 of the Boulder Canyon Project Act empowering the Secretary to construct a main canal connecting the Laguna Dam 'or other suitable diversion dam' with the Imperial and Coachella Valleys does not authorize the building or in any respect apply to the proposed Parker Dam. * * * [T]he plaintiff does not, and it could not reasonably, claim that §1 of the Boulder Canyon Project Act authorizes the construction of this dam." *Id.* at 186-187.

[119] At another point the Court said: "The whole point of the Act was to replace the erratic, undependable, often destructive release of waters conserved and stored by the project. Having undertaken this beneficial project, Congress in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act." 373 U.S. 546, 579.

[120] *Id.* at 588-590.

In regard to the Secretary's discretionary power to allocate the available water in times of shortage, the Court added, "None of this is to say that in case of shortage, the Secretary * * * may not lay stress upon priority of use, local laws and customs, or any other factors that might be helpful in reaching an informed judgment in harmony with the Act * * *." *Id.* at 594.

[121] The Court also said, "It will be time enough for the courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including his obligation to respect 'present perfected rights' as of the date the act was passed." *Id.* See chapter 22, note 143, regarding 1968 legislation.

stored water, in view of the Court's statements that the act had left regulation of the tributary waters to the States and that "virtually all the waters of the main river" were stored behind Hoover Dam, in addition to statements regarding other aspects of the case.[122]

Effect on Private Rights Obtained Under State Law

Since State powers in relation to federally defined navigable watercourses generally are not completely proscribed, State laws granting or allocating private rights to the use of water may apply to such watercourses as well as other waters.[123] In the Western States, these allocations have been principally made by permitting the appropriation of water to beneficial use, and in the Eastern States by the recognition of riparian rights of the holders of property bordering the watercourses. Such State-granted rights cannot rise above the powers of the granting authority, and as the State's powers are limited by Federal supremacy over navigable waters, the private rights are similarly limited.

The Federal Government may prevent the exercise of private water rights when inconsistent with a Federal power or purpose. We have already seen that an appropriation of water may be prevented when it would divert and consume so substantial a quantity of water as to affect the navigability of a stream over which the United States has jurisdiction.[124] A hydroelectric power dam that would constitute an obstruction to a navigable stream cannot be built on the strength of the riparian rights flowing from ownership of the damsite or from the permission of the State in the form of a license to construct the dam. The United States' permission to obstruct the flow and build the structure in the bed is also required, in this case taking the form of a license from the Federal Power Commission.[125]

The power of the United States over navigable waters has been said to be a dominion over the flow of the waters. "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable."[126] Thus, as

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[122] This includes the Court's statements quoted in note 119 *supra*. See the discussion at notes 136 and 137 *infra*, regarding nonnavigable waters.

It also is not entirely clear what the Court might have held if the Act had not included the provisions for protecting present perfected rights or the stated priority it gave to navigation improvement, river regulation, and flood control. See notes 114 and 121 *supra*, regarding the language of the Act and the Court in this regard. See also the Court's language in the earlier case of *Arizona* v. *California*, 283 U.S. 423, 456-458 (1931), concerning the priority to be given navigation improvement, river regulation, and flood control.

[123] Of course, States recognize variations in the rights obtainable in navigable as against nonnavigable waters and exercise additional controls over private rights on the basis of navigability. See chapter 4.

[124] *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1899).

[125] *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

[126] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913).

far as the Federal Government is concerned, whatever rights a State may attempt to create in these waters are subject to the Federal commerce power; the private rights carry within them an inherent infirmity. This has been frequently expressed by saying that the right is "subject to a dominant servitude"[127] or to "a superior navigation easement."[128]

Even after the United States has permitted a private use to become established as a continuing use, it may destroy that use by the exercise of the Federal commerce power and pay nothing for its loss. It need not condemn the right, it merely exercises its easement or imposes its servitude. There is, consequently, no taking of property. In *United States* v. *Chandler-Dunbar Water Power Company*,[129] the Government constructed a ship canal in the exercise of its power to improve navigation of the St. Marys River and in the process destroyed a power plant. The company's structures on submerged land (to which it had title) had been built under a revocable license from the Secretary of War, and the act of Congress authorizing the navigation works ended this permission. The company sought no compensation for these structures but did seek to recover the value of the 18-foot head of water power available at the power site. The Supreme Court disallowed the claim, since the company had no right of property as against the Government in the flow of the river, and any property values in the flow came from the right to place obstructions in the bed, a right held only on sufferance. In a subsequent case, the outcome of this case was characterized as a clear congressional authorization for the Federal Government to exercise its dominant servitude without making allowances for preexisting rights under State law.

> In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court accordingly recognized the Government's absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.[130]

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[127] *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945). See also *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225 (1956).

[128] *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 736 (1950).

[129] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913).

[130] *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250 (1954).

The Court concluded, however, that there had not been such a clear congressional authorization in the Federal Power Act. The Court said: "While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all right to use the waters of those streams * * * we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, require clear authorization. A classic example of such a clear authorization appears in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 [1913]. The Act of March 3, 1909, there authorized

Similarly, the Court has indicated that the construction of a Federal dam that backs the water of a navigable stream up against an upper private dam, and thereby reduces the head of the latter and destroys much of the value of the power potential, does not give the owner of the upper dam a claim against the United States.[131] The power of the Government over the level of the water is plenary, and no rights can be acquired by individuals to have the river maintained at any particular level. Other riparian rights that may be "destroyed" by the Federal activity, but for which court decisions have indicated it need not pay, are rights of access to navigable water[132] and rights to place structures between the high- and low-water marks.[133]

While there appear to be some unresolved questions, based on some of the foregoing and more recent court decisions, the following general conclusions would appear warranted. The Federal navigation servitude extends to the ordinary high-water mark of navigable watercourses; and private property within the ordinary high-water mark, as well as various private rights to use such navigable waters (including associated values of lands beyond the high-water mark), may be abrogated or impaired without compensation in the exercise of the Federal commerce power.[134]

In 1970, however, Congress restricted the exercise of the Federal power to improve rivers, harbors, canals, or waterways in regard to the taking of real property above the high-water mark. The legislation provides in part:

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the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce. * * *

* * * *

"That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users. On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." 347 U.S. 239, 249, 250-251.

In this general regard, see Bartke, R. W., "The Navigation Servitude and Just Compensation–Struggle for a Doctrine," 48 Oreg. L. Rev. 1 (1968); Maloney, F. E., Plager, S. J., & Baldwin, G. N., "Water Law and Administration: The Florida Experience" 226-235 (1968); Morreale, E. H., "Federal-State Rights and Relations," in 2 "Waters and Water Rights" §101 (R. E. Clark ed. 1967).

[131] *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945).

[132] *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 390-391 (1945).

[133] *United States* v. *Chicago, Milw. St. P. & P.R.R.*, 312 U.S. 592 (1941).

[134] See *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624 (1961); *United States* v. *Rands*, 389 U.S. 121 (1967); and other cases cited in these cases.

> In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.[135]

As previously noted, in an early case the Court indicated that by virtue of the navigation servitude, the Federal Government could prevent the diversion of water from a nonnavigable tributary so as to affect the navigability of a navigable watercourse.[136] But the extent to or circumstances in which

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[135] 33 U.S.C. §595a (1970).

Section 595a also provides, however, that: "In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken."

Section 595 had provided, and still does provide, that "* * * where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly."

Some or all of this legislation, and its suggested effect upon a number of the previous court cases discussed or cited above, is discussed in Allen, R. C., "Federal Evaluation of Riparian Property: Section 111 of the Rivers and Harbors Act of 1970 [33 U.S.C. §595a *supra*]," 24 Maine L. Rev. 175 (1972); Comment, "Navigation Servitude–The Shifting Rule of No Compensation," 7 Land & Water L. Rev. 501 (1972); Trelease, F. J., "Federal-State Relations in Water Law," prepared for the National Water Commission, Nat'l Tech. Inf. Service, Springfield, Va., Accession No. PB 203 600, at 189-196 (1973).

Section 595a also is discussed in *United States* v. *967.905 Acres of Land, Etc., Minn.*, 447 Fed.(2d) 764 (8th Cir. 1971), certiorari denied, 405 U.S. 974 (1972); *United States* v. *8,968.06 Acres of Land, Etc., Texas*, 326 Fed. Supp. 546 (S.D. Tex. 1971).

[136] *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1899), *supra* note 4.

In this case, the Court noted that the language of 26 Stat. 454 §10 (1890), a forerunner of the section of the Rivers and Harbors Act of 1899, set out following note 16, "is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, whenever done or however done, within the limits of the * * * United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. * * *

"* * * [I]f the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters which, flowing into the Hudson, make it a navigable stream, to such an extent

compensation may or may not be required when rights to use, or property along, nonnavigable tributaries are impaired by the Federal Government's improvements, works, or other exercise of the commerce power, appears to be rather unsettled.[137]

To the extent that compensation may be required for the impairment of private rights by a Federal project, if it is not paid by agreement or

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as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned * * *." 174 U.S. 690, 707-709.

With respect to hydroelectric power projects on nonnavigable streams, see the discussion at note 36 *supra*.

[137] In *United States* v. *Cress*, 243 U.S. 316, 329-330 (1917), a Federal dam and lock on a navigable river had backed up and raised the level of water in a nonnavigable tributary creek so as to overflow certain lands located on the creek and, in another instance, so as to destroy the usefulness of a milldam upstream on the creek by virtually eliminating its head of water. The Court indicated that a property right under State law had been taken, for which compensation must be paid. Among other things the Court said: "Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. *Id.* at 330.

In *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960), the Court said *inter alia*, "When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one. * * *" *Id.* at 233. But any effect of this sweeping statement on the taking of private property along nonnavigable waters was *dicta*, not a direct holding in view of the Court's statement that: "The Government contends that the navigational servitude of the United States extends also to nonnavigable waters, pre-empting state-created property rights in such waters, at least when asserted against the Government. In the view we take in this case, however, it is not necessary that we reach that contention. * * *" *Id.* at 232. The Authority was created as an agency of the State of Oklahoma to develop hydroelectric power on a nonnavigable tributary of a navigable river. As part of a multipurpose project for regulation of navigation, flood control, and power production, the Federal Government constructed a project on the nonnavigable river at Fort Gibson. The Government compensated the Authority for a condemned tract of land, flowage rights over its lands, and relocation of its transmission lines. The Authority sued for additional compensation for the "taking" of its State-granted water power rights to construct a project at the same location, but the Court held that since the frustration of the Authority's plans resulted from the Federal Government's exercise of its superior power under the Commerce Clause to construct the project, the Government "did not take property from [the Authority] in the sense of the Fifth Amendment." The Court also said, "[T]he United States did not appropriate any business, contract, land, or property of the respondent." *Id.* at 236. The Court did not mention the *Cress* case, *supra*. See also *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950).

These cases were decided prior to the 1970 legislation discussed at note 135 *supra*. Its possible impact upon such questions regarding nonnavigable tributaries of federally navigable waters is conjectural.

condemnation, an action for compensation may be brought under the so-called Tucker Act.[138]

In the 1963 case of *Arizona* v. *California*,[139] the Court construed and upheld the Boulder Canyon Project Act of 1928[140] as creating a comprehensive scheme for developing the Colorado River and for apportioning the Lower Basin's share of the mainstream waters among California, Arizona, and Nevada. The Secretary of the Interior could make contracts for the sale and delivery of water stored in Lake Mead above Hoover Dam, and the use of such waters was prohibited without such a contract. But, as discussed under "The Commerce Power–Limitations on Applicability of State Laws," it is not entirely clear what the Court would hold about the extent and application of such powers to nonfederally stored or nonnavigable waters,[141] nor what the Court might have held if the act had not included the provisions it did for protecting present perfected rights or the stated priority it gave to navigation improvement, river regulation, and flood control.[142] The Court said, "Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes."[143] But the extent to which the Court might uphold an enlargement of such Federal powers is unclear.

United States v. *Gerlach Live Stock Company*[144] is important for its doctrine that Congress may use less than all its powers and that it may elect to recognize State-created rights and pay for them if taken. It was urged that the Government, in constructing a multipurpose water control project on a navigable stream, did not have to pay for irrigation water rights destroyed by the project. The large Central Valley Project in California was a joint undertaking of the Corps of Engineers, acting under the power to control navigable water, and the Bureau of Reclamation, operating under the

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[138] See *Dugan* v. *Rank*, 372 U.S. 609 (1963), discussed in note 146 *infra*, referring to 28 U.S.C. §1346. 28 U.S.C. §1346(a)(2) (1970) provides that the district courts shall have original jurisdiction, concurrent with the Court of Claims, of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

With respect to tort claims under the Federal Tort Claims Act, see 28 U.S.C. §1346(b) (1970) and related sections; *Richards* v. *United States*, 369 U.S. 1, 6 (1962); *Spillway Marina, Inc.* v. *United States*, 445 Fed. (2d) 876 (10th Cir. 1971).

[139] *Arizona* v. *California*, 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964).

[140] 43 U.S.C. §§617-617t (1970).

[141] See the discussion at notes 136 and 137 *supra*, regarding other cases dealing with nonnavigable waters.

[142] While the Court indicated the Act was an exercise of the commerce power, it said it was equally sustained by the general welfare power. 373 U.S. 546, 587. The significance of this is problematical, as discussed under "Other Federal Powers–The Welfare Power," *infra*.

[143] 373 U.S. 546, 594.

[144] *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950).

reclamation laws. The project literally dried up the river, putting an end to natural irrigation of riparian land by seasonal overflows—rights which had received recognition from the California courts. The waters were sold for irrigation of other lands, and the owners of the riparian lands sued for compensation. The United States Supreme Court found in the authorizing legislation an intent that the projects were to be governed by the Reclamation Act as an exercise of the welfare power (as discussed later under "The Welfare Power") which was construed to require payment for irrigation water rights taken in aid of a reclamation project.[145] (Later cases, however, appear to have raised substantial doubts and questions about the Court's earlier construction of that act regarding the question of compliance with State laws.[146]) Thus, the

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[145] 43 U.S.C. §383 (1970) provides: "Nothing in [specified] sections * * * of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

43 U.S.C. §421 (1970) provides that in carrying out the provisions of specified sections of the legislation, if it becomes necessary to acquire any rights or property, they may be acquired by purchase or condemnation.

[146] E.g., *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275, 291-292 (1958); *Fresno* v. *California*, 372 U.S. 627, 629-630 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Arizona* v. *California*, 373 U.S. 546, 585-586 (1963).

In the *Fresno* case, *supra*, the Court said *inter alia* that §8 of the Reclamation Act, 43 U.S.C. §383 (1970), set out in note 145 *supra*, "does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958). Rather, the effect of §8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 372 U.S. 627, 630. The Court also indicated that Fresno had no preferential rights to contract for project water, as claimed under California law, but could receive it only if, in the Secretary of the Interior's judgment, the project's efficiency for irrigation purposes would not be impaired, as provided by 43 U.S.C. §485h(c) (1970). 372 U.S. 627, 630-631.

With respect to the overriding effect of the irrigation acreage limitation in 43 U.S.C. §431 (1970) on recipients of reclamation project water, see *Ivanhoe Irr. Dist.* v. *McCracken, supra.*

In *Dugan* v. *Rank*, 372 U.S. 609, 611, 619 (1963), involving a Federal reclamation project, the United States Supreme Court said, *inter alia*: "We have concluded * * * that the United States either owned or has acquired or taken the water rights involved in the suit and that any relief to which the respondents may be entitled by reason of such taking is by suit against the United States under the Tucker Act, 28 U.S.C. §1346 [see note 138 *supra*]. * * *

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"The Court of Appeals correctly held that the United States was empowered to acquire the water rights of respondents by physical seizure. As early as 1937, by the

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Court never reached the constitutional issue regarding the commerce power, and stated: "[W]e need not ponder whether by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it * * *."[147]

In a number of quite different settings, the Court has similarly held that the United States need not insist on exercising the navigation servitude and may assign values to private rights in navigable waters. We have already seen that the Government may exercise its powers over navigable waters by delegating them to licensees, but in so doing, the Federal Power Act does not give the licensee the Government's extensive powers to impair the water rights of others.[148]

As mentioned earlier,[149] the basic permit form of permits administered by the Corps of Engineers for works in or affecting navigable waters includes, among other things, the following condition: "That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations."

The following provision was included in conformity with the declaration of policy in the Flood Control Act of 1944:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth

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Rivers and Harbors Act, 50 Stat. 844, 850, the Congress had provided that the Secretary of the Interior 'may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes. . . .' Likewise in *United States* v. *Gerlach Live Stock Co.* [339 U.S. 725 (1950)], this Court implicitly recognized that such rights were subject to seizure when we held that Gerlach and others were entitled to compensation therefor. The question was specifically settled in *Ivanhoe Irrigation District* v. *McCracken* [357 U.S. 275 (1958)], where we said that such rights could be acquired by the payment of compensation 'either through condemnation or, if already taken, through action of the owners in the courts.' 357 U.S., at 291."

Regarding doubts and questions that have been raised regarding the Court's earlier construction of the Reclamation Act, see also Meyers, C.J., "The Colorado River," 19 Stan. L. Rev. 1, 58-65 (1966); Sax, J. L., "Federal Reclamation Law," in 2 "Waters and Water Rights" §117.2 (R. E. Clark ed. 1967); "Study of the Development, Management, and Use of Water Resources in the Public Lands." prepared for the Public Land Law Review Commission, 321-329 (1969); Trelease, F. J., *supra* note 135, at 83-87. Cf. Bain, J. S., Caves, R. E., and Margolis, J., "Northern California's Water Industry" 118-122 (1966).

[147] *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950).

[148] See, e.g., *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378 (1930), discussed in note 33 *supra*.

[149] See the discussion at note 21 *supra*.

> meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.[150]

Such a provision also has been included in subsequent legislation authorizing projects of the Corps of Engineers for flood control, rivers and harbors, and water resources development purposes and some related projects.[151]

This provision does not appear to have been construed by the United States Supreme Court through 1974. A Federal court of appeals indicated that it applies only to the Federal use of water for navigation and that in the project in dispute, the Pine Flat dam and reservoir in California, authorized under the 1944 Flood Control Act, "[a]ppellants do not allege that Pine Flat water is being used in aid of navigation. * * *"[152] It added that while the Act's words "reflect a concern that state-created private water rights be protected, the hazard sought to be avoided was not that federal officers would take such rights by eminent domain, in return for just compensation. Rather, the language was intended to prohibit destruction of state-created water rights without any compensation at all by the assertion of an overriding federal easement for navigation."[153] In the latter regards, the court had reference to this provision and the Act's declaration policy.[154]

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[150] Flood Control Act of 1944, §1(b), 58 Stat. 889, 33 U.S.C. §701-1(b) (1970). Section 701-1 *inter alia* declares regarding authorized works the policy to recognize interests and rights of the States in water utilization and control, protect all existing and potential water uses to the fullest possible extent, and limit navigation works to those consistent with appropriate and economic use by others.

[151] See River and Harbor Act of 1945, §1(b), 59 Stat. 11; River and Harbor Act of 1946, §1, 60 Stat. 634; Flood Control Act of 1946, §2, 60 Stat. 641; River and Harbor Act of 1948, §101, 62 Stat. 1172; Flood Control Act of 1948, §202, 62 Stat. 1175; River and Harbor Act of 1950, §101, 64 Stat. 163; Flood Control Act of 1950, §202, 64 Stat. 170; River and Harbor Act of 1954, §101, 68 Stat. 1248; Flood Control Act of 1954, §202, 68 Stat. 1256; River and Harbor Act of 1958, §101, 72 Stat. 297; Flood Control Act of 1958, §202, 72 Stat. 305; River and Harbor Act of 1960, §101, 74 Stat. 480; Flood Control Act of 1960, §202, 74 Stat. 488; River and Harbor Act of 1962, §101, 76 Stat. 1173; Flood Control Act of 1962, §202, 76 Stat. 1180; River and Harbor Act of 1965, §203, 79 Stat. 1074; Flood Control Act of 1965, §301, 79 Stat. 1089; River and Harbor Act of 1966, §101, 80 Stat. 1405; Flood Control Act of 1966, §202, 80 Stat. 1418; River and Harbor Act of 1968, §101, 82 Stat. 731; Flood Control Act of 1968, §202, 82 Stat. 739; River and Harbor Act of 1970, §101, 84 Stat. 1818; Flood Control Act of 1970, §201, 84 Stat. 1824; Water Resources Development Act of 1974, §2, 88 Stat. 14. See note 27 *supra* regarding other provisions.

[152] *Turner* v. *Kings River Conservation Dist.*, 360 Fed. (2d) 184, 192-193 (9th Cir. 1966).

[153] *Id.* at 193.

[154] *Id.* at 190, 193, and see note 150 *supra.* See also *Anderson* v. *Seeman,* 252 Fed.(2d) 321, 323-325 (5th Cir. 1958).

A Federal district court made the following statements in a 1970 case: "If it appears that the defendant [United States] had the authority to regulate the water level at Tuttle Creek and that the exercise of this authority was a discretionary function, the Government must prevail. Affidavits attached to the defendant's motion

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OTHER FEDERAL POWERS

The commerce power to control navigable waters, discussed above, is the most important base upon which Federal jurisdiction over water has rested. Some other powers that have been less frequently drawn upon to justify Federal actions with respect to navigable or nonnavigable waters are discussed below. The law relating to these other sources of Federal jurisdiction over water generally is less well developed than the law relating to the commerce power.

The Proprietary Power and the Reservation Doctrine

Questions may arise concerning the use of water originating on or flowing through land owned by the Federal Government within the boundaries of the States. The land may be owned as part of the public domain or may have been acquired for the performance of various governmental functions.

There are several large areas, notably in the West, that the Federal Government owns as a proprietor and upon which it exercises governmental functions.[155] Its powers in this regard generally have emerged from the property clause of the Constitution which reads: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the

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show that the purpose of the drawdown was to facilitate navigation on the Missouri River. The authority for the Corps of Engineers to act in this capacity is found in 33 U.S.C.A. §§701-1(b) and 701b. Plaintiff argues in its briefs that 701-1(b) [set out at note 150 *supra*] nullifies governmental authority for the drawdown for navigation here. The Court is not impressed with this contention. The statute, on its face, does not include recreational purposes as one of the beneficial consumptive uses * * *." *Spillway Marina, Inc.* v. *United States*, 330 Fed. Supp. 611, 612 (D. Kans. 1970), aff'd on other grounds, 445 Fed.(2d) 876 (10th Cir. 1971). Plaintiff had a marina. Another Federal district court has said, "The record is not clear, but the question arises as to whether [the] subordination of water usage [by a city and river authority] to navigation [in a certain Corps of Engineers' project] is in conflict with federal law. 33 U.S.C.A. §701-1(b)." *Sierra Club* v. *Froehlke*, 359 Fed. Supp. 1289, 1315 (S.D. Tex. 1973), rev'd sub nom. on other grounds, *Sierra Club* v. *Callaway*, 499 Fed.(2d) 982 (5th Cir. 1974).

[155] The percentage of federally owned land (excluding Indian reservation and other trust properties) in Western States, as of June 30, 1974, reportedly was:

Alaska	96.432%	Montana	29.646%	South Dakota	6.731%
Arizona	43.953%	Nebraska	1.414%	Texas	1.889%
California	45.027%	Nevada	86.494%	Utah	66.194%
Colorado	36.058%	New Mexico	33.551%	Washington	29.458%
Hawaii	10.177%	North Dakota	5.193%	Wyoming	48.005%
Idaho	63.727%	Oklahoma	3.486%		
Kansas	1.345%	Oregon	52.330%		

"Inventory Report on Real Property Owned by the United States Throughout the World as of June 30, 1974," App. I, table 4, and pp. 17, 34, Gen. Serv. Adm.

Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[156] This may be supplemented by the supremacy clause which reads: "This Constitution, and laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[157]

In some cases, the United States Supreme Court has applied elements of the so-called reservation doctrine. *Winters* v. *United States*,[158] decided in 1908, dealt with the use of water by the Fort Belknap Indian Reservation bordering a nonnavigable stream in Montana.[159] In construing an agreement which resulted in the creation of the reservation, the United States Supreme Court indicated that it was impliedly intended that the stream water be used for irrigation and other purposes on the reservation.[160] The Court rejected the contention that admission of the State of Montana to the Union after creation of the reservation and "upon an equal footing with the original States" destroyed the implied reservation of water for the Indians. Among other things, the Court said:

> The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be. *The United States* v. *Rio Grande [Dam] & Irrigation Co.*, 174 U.S. 690, 702 [1899]; *United States* v. *Winans*, 198 U.S. 371 [1905]. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.[161]

The right to use water for the reservation was protected against asserted rights acquired later under State law.[162]

Federal Power Commission v. *Oregon*,[163] decided in 1955, which has come to be known as the *Pelton Dam* case, brought concern over a Federal reservation doctrine for non-Indian, as well as Indian, purposes to the forefront. The Supreme Court affirmed the granting of a license from the

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[156] U.S. Const. art. IV, § 3. See also "The War Power," *infra*.

[157] *Id.* art. VI. See also note 206 *infra*.

[158] *Winters* v. *United States*, 207 U.S. 564 (1908).

[159] *Id.* at 565-566.

[160] *Id.* at 575-577. Regarding Indian grantees of allotted reservation lands, and their successors, see *United States* v. *Powers*, 305 U.S. 527 (1939).

[161] *Winters* v. *United States*, 207 U.S. 564, 577 (1908).

[162] A Federal district court has subsequently said, "The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well." *Tweedy* v. *Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968). But the court denied a claim for damages by landowners within an Indian reservation because the plaintiffs had "demonstrated no use of the water and no need for it." *Id.* at 386. See also note 167 *infra*.

[163] *Federal Power Comm'n* v. *Oregon*, 349 U.S. 435 (1955).

Federal Power Commission to a private power company to build a dam across the Deschutes River in Oregon, over the protests of that State which had refused to issue a State license because the proposed dam would interfere with the migration of salmon and steelhead. Since the Commission considered the river to be nonnavigable, its authority was based on the fact that the dam would be constructed on Federal lands—on one side of the river was a power site reservation, on the other side another power site reservation located within an Indian reservation.[164] The Court said that the property clause of the Constitution and the Federal Power Act gave the Federal Government the right to issue the license without the concurrence of the State.[165] Oregon claimed that the waters sought to be impounded by the dam were subject to State control, relying primarily on the Desert Land Act of 1877.[166] But this act, the

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[164] The Court stated that the Indians had given their consent to the project. "Accordingly, there is no issue here as to whether or not the title to the tribal lands is in the United States." *Id.* at 444.

[165] In discussing the Federal Power Commission's licensing authority under the Federal Power Act the Court said *inter alia*, "Here the jurisdiction turns upon the ownership or control by the United States of the reserved lands on which the licensed project is to be located.

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"There thus remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others." citing 16 U.S.C. § 821, discussed at note 93 *supra*. 349 U.S. 435, 442, 444-445.

The Court also said, "The Commission stated that the project will be subject to all existing rights to use the waters of the river, whether perfected or not.

* * * *

"The applicant has agreed to provide facilities for conserving the runs of anadromous fish in accordance with plans approved by the Federal Power Commission." *Id.* at 440-441, 451.

[166] 19 Stat. 377 (1877), 43 U.S.C. § 321 *et seq.* (1970).

The Desert Land Act provides for the sale of desert land to citizens of the United States who file a declaration of intention to reclaim the land by irrigation within 3 years, subject to the limitation that "the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." *Id.* § 321.

This act applied specifically to the following 12 States: Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. An amendment in 1891 extended its provisions to Colorado. 26 Stat. 1096, 1097 (1891).

In *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935),

Court held, was not applicable to the lands involved because they were "reservations" for designated public purposes, not "public lands" which are open for sale and disposition to the public.[167]

Although the *Pelton Dam* case caused considerable concern in the Western States, primarily because of the threat to the security of irrigation appropriations that might be deprived of water by extensions of this reservation doctrine, the possibility of a reservation doctrine for non-Indian as well as Indian purposes had been intimated by the Court's citation of *United States* v. *Rio Grande Dam & Irrigation Company* in the 1908 *Winters* case, as noted above. The *Rio Grande* decision in 1899 was based on the power over navigation;[168] but, in *dictum*, the Court noted that the United States owned much of the land riparian to the river, and said that a State could not, without

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the United States Supreme Court held that at least since the 1877 act any person acquiring ownership of Federal lands in Desert Land Act States and Territories under *any* of the land laws of the United States would obtain water rights in nonnavigable waters *only* in conformity with the laws of those States and Territories. *Id.* at 163-164.

This 1877 act and earlier legislation and the *California Oregon Power Co.* case are discussed in chapter 6 at note 61 *et seq.*, in chapter 7 at notes 158-173, and in chapter 10 at notes 67-75. For a further discussion of these matters and later legislation, see Moses, R. J., "Federal-State Water Problems," 47 Denver L.J. 194, 197-200 (1970); Morreale, E. H., *supra* note 130, §102, notably §§102.4(C) and 102.7; "Study of Development, Management, and Use of Water Resources on the Public Lands," Prepared for the Public Land Law Review Commission, 150-188 (1969).

[167] *Federal Power Comm'n* v. *Oregon*, 349 U.S. 435, 448 (1955).

The Court, in construing the definitions of "public lands" and "reservations" in the Federal Power Act, 16 U.S.C. §§796(1) and (2) (1970), noted that reservations include lands "withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." 349 U.S. 435, 444. See also *Nevada ex rel. Shamburger* v. *United States*, 165 Fed. Supp. 600, 607 (D. Nev. 1958), in which the Federal district court relied on this definition in concluding that since it was stipulated by the parties that the lands in question had been " 'withdrawn' from 'all forms of appropriation, for the exclusive use and benefit of the United States Navy,' " this constituted a " 'reservation.' "

This case involved the use of percolating ground waters on a naval reservation. The court held, largely on the strength of the *Pelton Dam* case, that the Federal Government need not obtain a permit for such use from the State Engineer of Nevada under its water laws. The parties had stipulated that "The development and operation of the wells does not interfere, and has at no time interfered, with anyone's vested right." *Id.* at 603, affirmed on other grounds, 279 Fed. (2d) 699 (1960).

See also *Tweedy* v. *Texas Co.*, 286 Fed. Supp. 383 (D. Mont. 1968), discussed in note 162 *supra* regarding percolating ground waters. Note, "Federally Reserved Rights to Underground Water–A Rising Question in the West," 1973 Utah L. Rev. 43, 50-51, also discusses an unreported Federal district court case, *United States* v. *Cappaert*, Civil No. LV 1687 (D. Nev. filed Aug. 19, 1971). In this case, the Court of Appeals recently applied the reservation doctrine to ground waters. 508 Fed. (2d) 313, 317 (9th Cir. 1974). The reservation doctrine apparently had not yet been expressly applied to such waters by the United States Supreme Court.

[168] See the discussion at notes 136-137 *supra*.

congressional consent, "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the governmental property."[169]

In *Arizona* v. *California*,[170] decided in 1963, Arizona contended that the Federal Government had no power, after Arizona became a State, to reserve navigable waters for the use and benefit of Federal reserved lands because Federal court decisions gave rise to the doctrine that title to lands underlying navigable waters were held in trust for and vested in the States upon their admission to the Union.[171] But the Court said:

> [T]hose cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, §3 [the property clause], of the Constitution. We have no doubt about the power of the United States *under these clauses* to reserve water rights for its reservations and its property.[172]

By this statement, the Court appears to have suggested that the power to reserve water rights for the Federal Government's reservations and property may derive to some extent from the commerce power to regulate navigable waters, as well as the proprietary power, but it did not explain its reasoning in this regard.[173]

Water rights for Federal reserved lands apparently would often be regarded as including rights to water for legitimate future needs[174] and as having arisen at the time the Federal reservation occurred. In States having prior appropriation laws, such rights for Federal reserved lands often may be paramount to any

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[169] *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899), also discussed in note 207 *infra*.

[170] 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964).

[171] 373 U.S. 546, 597-598.

[172] *Id.* (Emphasis added.)

[173] See Morreale, E. H., "Federal-State Rights and Relations," in 2 "Waters and Water Rights" §102.4(F) (R. E. Clark ed. 1967), regarding some suggested questions and implications relating to the quoted statement.

The commerce clause, in its entirety, provides that the Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (art. I, §8). Although the authors have not detected such a suggestion in any reported court decision or any other publication, one writer has recently suggested that reserved rights for Indian reservations could rest upon the power to "regulate Commerce * * * with the Indian Tribes" [augumented by the clause that the Congress may "make all Laws which shall be necessary and proper" for executing such powers (art. I, §8) and by the supremacy clause (art. VI)]. Estes, N., "The Water Rights of Indian Tribes," 12 Land & Natural Resources Div. J. (U.S. Dept. of Justice) 189, 197-198 (1974).

[174] This is discussed at notes 190-195 *infra*.

appropriative water rights acquired after that date and inferior to any appropriative water rights in existence before that date.[175] It appears to be less clear how the Federal reservation doctrine generally may apply in competition with riparian rights in States recognizing such rights. (The recognition, repudiation, and status of riparian rights in different Western States is discussed in chapter 10.) Unlike the prior appropriation doctrine under which rights often are based on priority in the time water is put to use,[176] riparian rights, as against other riparians,[177] need not necessarily be put to use, and the reasonableness of the use is the predominate measure of such rights.[178] In any

[175] See *Arizona* v. *California*, 373 U.S. 546, 600 (1963), 376 U.S. 340, 341-346 (1964); Warner, D. R., "Federal Reserved Water Rights and Their Relationship to Appropriation Rights in the Western States," 15 Rocky Mt. Mineral Law Inst. 399, 408 (1969).

William Veeder has asserted that, although the priority date of "investive" Federally reserved Indian rights is the date of the Federal reservation, the priority date for "immemorial" (or "aboriginal") Indian water rights precedes the date of the applicable Indian treaty, agreement, or Federal reservation. Veeder, W. H., "Indian Prior and Paramount Rights to the Use of Water," 16 Rocky Mt. Mineral Law Inst. 631, 656-657 (1971), partly relying in the latter regard (at 640-646, 648-649) upon some of the statements in *Winters* v. *United States*, 207 U.S. 564 (1908), and *United States* v. *Winans*, 198 U.S. 371 (1905). (The terms "immemorial" or "aboriginal" rights were employed by Mr. Veeder at 647-648.) But in the same publication Paul Bloom controverted Mr. Veeder's assertion regarding "immemorial" rights and claimed his position was supported by several other writers. Bloom, P. L., "Indian 'Paramount' Rights to Water Use," 16 Rocky Mt. Mineral Law Inst. 669 (1971), criticizing a 1965 manuscript by Mr. Veeder that included substantially the same assertion as his paper in the 1971 publication. Since the relevant United States Supreme Court cases are not very clear in this regard, and the arguments advanced by both writers are lengthy and rather complex, we shall not attempt to analyze these issues here.

[176] The precise priority date often may be the date of application for or initiation of such a right, if necessary works are constructed and the water is put to use with due diligence thereafter. See chapter 7 at notes 788-795. But see note 185 *infra* regarding the apparent refusal of the Court in *Arizona* v. *California* to regard such works under construction as constituting perfected rights under the Boulder Canyon Project Act.

[177] Regarding riparian versus appropriative rights, see the discussion at note 186 *infra*.

[178] In a 1966 article, Charles Meyers concluded that a coherent system of law on reserved water rights cannot be achieved unless the doctrine is limited to streams subject exclusively to the law of prior appropriation. Meyers, C. J., "The Colorado River," 19 Stan. L. Rev. 1, 69 (1966). Mr. Meyers also concluded that if Federal reserved rights were made subject to the equal-sharing, pro-rata riparian principle, "the priority of federal reservations is meaningless." On the other hand, if they were given a priority over previously unused, but not over previously used, riparian rights, this would favor the previously used riparian rights and violate the equal-sharing principle. *Id.* at 68-69. In a 1968 article, Eva Hanks stated, "One can agree with Professor Meyers that there are some difficulties in integrating the reserved rights doctrine with a state riparian system without accepting his conclusion that a coherent system cannot be achieved." Mrs. Hanks continued with a suggestion of a way in which it might be achieved. She apparently contended that if Federal reserved rights were given a preference only over previously *unused* riparian rights, this would not prevent the achievement of a coherent system because the holders of such rights "acquired their rights with at least construc-

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event, as an important element in determining whether and how any of such alternatives shall be applied, courts presumably would endeavor to ascertain the express or implied congressional and/or executive intentions in creating various Federal reservations and enacting other applicable legislation.

In *Arizona* v. *California*,[179] the United States Supreme Court discussed the relative status of Federal reserved rights and rights acquired under State laws applying the prior appropriation doctrine, but it did not expressly discuss whether or how the relative status might differ in regard to a riparian right. The Court appears to have interpreted the Boulder Canyon Project Act as requiring

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tive notice that they would be subordinated to the federal government in times of shortage." Hanks, E. H. (Morreale), "Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters," 23 Rutgers L. Rev. 33, 39-40 n. 25 (1968). But such constructive notice could have occurred only if such a rule had already been in existence when they acquired their rights, and even then, those holding riparian rights before the creation of a Federal reserved right would, at best, have had only a limited knowledge of what Federal reserved rights might be created in the future. Moreover, the equal-sharing principle as between riparians stressed by Mr. Meyers would be altered. This principle, however, may have been somewhat overstressed by Mr. Meyers. While a more or less equal-sharing principle often has been emphasized by the courts, the reasonableness of a particular use also may depend upon a variety of other factors. (See the discussions in chapter 10 at notes 435-440, 444-449, and 463-472. Also see the discussion at notes 540-545 thereof regarding preferred natural or domestic uses.) Whether Mrs. Hank's suggested alternative would result in a "coherent system" depends on one's view of what a coherent system requires.

Another alternative might be to give the Federal reserved right a preference over both previously used and unused riparian rights. But in this event, the date the reserved right was created might become largely immaterial and the reasoning upon which any such preference might be based may differ appreciably from that employed in its application to, and relative status with, appropriative rights under State laws. The date of the Federal reserved right's creation could still be material, however, if it were given a preference only over private riparian rights created after its creation, by the conveyance of riparian public domain lands to private owners *after* such date. (This would be similar to the general approach that the California Supreme Court has employed with respect to riparian versus appropriative rights. See the discussion in chapter 6 at notes 231-233. The California court's emphasis upon the date of settlement upon public domain lands, discussed there, conceivably also might be employed in this regard.) If this approach were employed, the respective dates that Federal reserved rights and private riparian rights were created would be material. Federal reserved rights apparently often would be considered to have been created on the effective date of Federal statutes, executive orders, or Indian or other treaties or agreements creating particular reservations. See the discussion at note 175 *supra*.

Various modifications of such alternatives could be conjectured. Approaches that have been taken in some cases involving Indian fishing or hunting rights are discussed in Ellis, H. H., Beuscher, J. H., Howard, C. D., & DeBraal, J. P., "Water-Use Law and Administration in Wisconsin" 504-507 (1970). The cases discussed there include *United States* v. *Winans*, 198 U.S. 371 (1905), wherein the Court construed fishing rights expressly created by a treaty establishing an Indian reservation. This case was cited in the *Winters* case as shown at note 161 *supra*.

[179] 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964).

that a Federal reserved right, although apparently not otherwise subject to State laws, would be subservient to water rights previously perfected and beneficially used under State laws before the Federal lands were reserved. But the Court apparently concluded that the Act did not accord any protection or recognition of previously unused riparian rights. The Court derived this interpretation from the provisions in section 6 of the Act concerning "present perfected rights in pursuance of Article VIII of [the] Colorado River compact"[180] which speaks of "Present perfected rights to the beneficial use of waters * * *."[181] Although this provision does not necessarily state that the water must have been previously used to constitute a perfected right, the Court appears to have so interpreted it with respect to rights acquired under State laws, thereby not recognizing and protecting previously unused riparian rights.[182] In its decree, the Court defined a present perfected right under State law as one which "has been exercised by the actual diversion of a specific quantity of water * * *" as of the Act's effective date.[183] California, which recognizes both riparian and appropriative rights, appears to have unsuccessfully contested the Court's interpretation of the Act in this regard. California asserted in regard to "the riparian rights of private landowners along the Colorado River in California":

> As to private riparian rights, these, in 1929 [the effective date of the Boulder Canyon Project Act] were "perfected" in every conceivable sense of that word, clearly as much as were federally "reserved" rights as of that date. A riparian right is not created by use, nor lost by non-use.[184]

However, the Court did not include California's recommended language in this regard in its decree.[185]

In some other Western States, unlike California, unused nondomestic riparian rights may have been cut off or restricted, as of a certain date or time period, as against appropriative rights.[186] Any impact of such a cutoff or restriction

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[180] 373 U.S. 546, 566, referring to 43 U.S.C. §617e (1970).

[181] Colorado River Compact, art. VIII; 70 Cong. Rec. 324, 325 (1928).

[182] 373 U.S. 546, 584.

[183] 376 U.S. 340, 341.

[184] Proposals for Articles I(6), (H), II(B)(2), II(B)(4), II(B)(7) of the decree submitted by the State of California, joined by Metropolitan Water Dist. of So. Cal., City of Los Angeles, City and County of San Diego, Coachella Valley Water Dist. and Palo Verde Irrigation Dist., at 6-7 (Dec. 18, 1963).

[185] California apparently also unsuccessfully asserted that even though not yet put to use on the Act's effective date, appropriative rights that had previously been initiated under California laws, with works previously constructed or being constructed with due diligence, should be considered "perfected" rights. *Id.* at 3. See note 176 *supra*. See also Meyers, C. J., *supra* note 178, at 46-47, 68.

[186] See, in chapter 10, "The Riparian Right—Measure of the Riparian Right—As Against Appropriators—Unused riparian right."

upon riparian versus Federal reserved rights questions apparently has not been decided.

The Court in *Arizona* v. *California* treated both used and unused Federal reserved water rights for lands reserved before the Act's effective date as "present perfected rights" (although such rights would be subservient to use of the stored waters for river regulation, improvement of navigation, and flood control).[187] The Court further provided that any such rights for lands reserved after the Act's effective date would be subject to present perfected rights and rights under contracts previously made by the Secretary of the Interior under applicable legislation.[188]

One commentator has concluded:

> The criteria used in *Arizona* v. *California* in measuring the *Winters Doctrine Rights* [Federal reserved rights] are not precedents for measuring other rights of a similar nature. Those criteria, it must be remembered, were adopted to meet the exigencies which existed—the Colorado River Compact and the apportionment made to the States under the circumstances which prevailed. They would not be applicable to a different factual situation and do not constitute precedents beyond the purview of that case.[189]

In a number of cases, the United States Supreme Court has concluded that the Federal reserved water rights in dispute included rights to water for legitimate future as well as present needs. In *Arizona* v. *California*, the Court indicated it agreed with the conclusions of the Master that the United States had intended to reserve water from the navigable mainstream of the Colorado River for the "future requirements" of a national recreation area and two wildlife refuges.[190] The Court decided to impose certain maximum annual quantities for the refuges, although these maximum limitations conceivably might be altered in the future.[191] The Court also agreed with the Master's

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[187] 373 U.S. 546, 584, 600 (1963), 376 U.S. 340, 341-342 (1964).

[188] 376 U.S. 340, 344.

Priority dates were established for each Federal reservation and appropriation right, as discussed in note 191 *infra*.

[189] Veeder, W. H., "Winters Doctrine Rights—Keystone of National Programs for Western Land and Water Conservation and Utilization," 26 Mont. L. Rev. 149, 170-171 (1965).

Other aspects of the *Arizona* v. *California* case are discussed at notes 110-122 *supra*.

[190] 373 U.S. 546, 601.

[191] In its subsequent 1964 decree, in construing the status of these Federal reservations as "present perfected rights" under the provisions of the Boulder Canyon Project Act, the Court specified that each of the Federal reservations was entitled, subject to its respective priority date, to an annual quantity reasonably necessary to fulfill its purposes, although it imposed certain maximum annual quantities for the two wildlife refuges. 376 U.S. 340, 343-346. It specified the priority date for each of the designated reservations, for five Indian reservations, discussed below, and for water to be provided to Boulder City by virtue of 72 Stat. 1726 (1958). The priority date decreed for each reservation appears to be the date that Congress or the President by executive order created the reservation. See 376 U.S. 340, 344-346, 373 U.S. 546, 596, 600. The Court

conclusion that water intended to be reserved for five Indian reservations "was intended to satisfy the future as well as the present needs of the Indian Reservations * * *."[192] The Court noted that while in creating these reservations nothing had been said about their water rights, the reservations were located in an arid area where irrigation was essential. The Court approved the Master's conclusion that the amount of water reserved for the future needs of the Indian reservations, subject to their respective priority dates, should depend on the amount of their practicably irrigable land.[193] It may be questioned whether the amount of irrigable land would be employed as the principal measure of reserved water rights for reserved Federal lands located in more humid areas or for which irrigation otherwise may be less important than other Indian water uses.[194] Such criteria would appear to be particularly

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appears to have decreed that in the event of a shortage those with the earliest priority dates shall receive their allotted entitlements in full before any water may be given to those with later priority dates, although this was not necessarily required by the literal language of the Boulder Act. The Court said the Secretary of the Interior shall provide "for satisfaction of present perfected rights in the order of their priority dates without regard to State lines." 376 U.S. 340, 342. This is subject to certain overall limitations on the water to be used within each State. See chapter 22, note 143.

The Court indicated that it was retaining jurisdiction for the purpose of making any later modifications, orders, directions, or supplementary decrees that it might deem proper. The Court further provided that within 2 years of its 1964 decree [later extended to 3 years in 383 U.S. 268 (1966)], Arizona, California, and Nevada should furnish a list of present perfected rights, with their claimed priority dates, to the mainstream Colorado River waters in each State, respectively (see note 114 *supra* in this regard), except those relating to claims of the United States regarding present perfected rights for Federal establishments, which should be provided by the Secretary of the Interior. 376 U.S. 340, 351-352. It also provided that if the parties and Secretary were unable to agree on the present perfected rights and their priority dates, any party could ask the Court to determine such rights. *Id.* at 352. The Federal Government in its list of present perfected rights filed March 10, 1967, in compliance with the Court's request, claimed a present perfected right to 500 acre-feet of water for the Lake Meade National Recreation Area. The Court's decree had simply specified that this recreation area was entitled to "annual quantities reasonably necessary to fulfill the purposes of the Recreation Area." *Id.* at 345-346. The Court does not appear to have made any later decree in this regard.

In a side issue, apparently not controlled by the Boulder Canyon Project Act (see 373 U.S. 546, 594-595), the Court decreed that the United States was entitled to divert water from the "Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used * * *." 376 U.S. 340, 350.

[192] 373 U.S. 546, 600.

[193] *Id.* at 598-601.

In its decree, the Court specified for each reservation the maximum acre-feet of water to be consumptively used to irrigate a maximum number of acres "and for the satisfaction of related uses." 376 U.S. 340, 344-345.

[194] See Meyers, C. J., *supra* note 178, at 70-71. See also Sondheim, H. B., & Alexander,

(*Continued*)

inapplicable to such rights as Indian fishing rights. At any rate, any express or implied provisions about water rights made in creating such reservations no doubt would be influential. In *Arizona* v. *California*, the Court said that "the Indian claims here are governed by the [Federal] statutes and Executive Orders creating the reservations."[195]

In a 1971 case, the Supreme Court said:

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona* v. *California*, 373 U.S. 546 [1963], the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona* v. *California* we were primarily concerned with Indian reservations. *Id.*, at 598-601. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave. *Id.*, at 600-601. Here the United

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(*Continued*)

J. R., "Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?" 34 S. Cal. L. Rev. 1 (1960), written before *Arizona* v. *California* was decided.

[195] 373 U.S. 546, 597. See also the language at 595-596.

While the Court did not find that these statutes and executive orders included any express provisions about such water rights, it did find that an intention to create such rights was implied.

See *United States* v. *Winans*, 198 U.S. 371, 378 (1905), for a case in which Indian fishing rights had been expressly created by treaty.

Indian reservations are Federal lands held in trust for the Indians and have been created by treaty or other agreement, congressional legislation, executive order, or some combination of such methods. If reservations, such as Indian reservations, were created by treaty, the collective intentions of the parties presumbly would be considered. See *United States* v. *Winans*, *supra* at 380.

In *Winters* v. *United States*, 207 U.S. 564 (1908), in construing the meaning of the agreement which resulted in the creation of an Indian reservation in Montana, the Court said: "We realize that there is a conflict of implications, but that which makes for the retention of waters is of greater force than that which makes for their cession. * * * By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id.* at 576. "The Court in Winters concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona* v. *California*, 373 U.S. 546, 600 (1963). See also *United States* v. *Powers*, 305 U.S. 527, 533 (1939).

Congress may have later effectively restricted the scope of various Indian treaties. See *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568 (1903); *United States* v. *Ahtanum Irrigation Dist.*, 236 Fed. (2d) 321, 337-338 (9th Cir. 1956), certiorari denied, 352 U.S. 988 (1957). But in *United States* v. *Powers*, 305 U.S. 527, 533 (1939), the Court said, "If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes." And in *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412-413 (1968), the Court said in regard to certain Indian hunting and fishing rights in Wisconsin under a treaty, "While the power to abrogate those rights exists * * * 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " Regarding compensation for such abrogation, see *Id.* at 407, 413.

States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted into the Union in 1876.[196]

A companion case involved water rights for four national forests, for national recreational and other water uses by the Department of the Interior, and for naval petroleum and oil shale reserves.[197] In both cases, the Court indicated that under the circumstances the United States was subject to a suit in a State court under the McCarran Amendment,[198] and that if there were a collision between prior adjudicated rights in Colorado and Federal reserved rights, the Federal question could be preserved in the State court decision and brought to the United States Supreme Court for review.[199]

Although the United States Supreme Court does not appear to have definitely decided the question, different considerations may apply to the extent and nature of the Federal constitutional powers regarding Federal lands and property that have been later acquired by the Government for various public purposes, rather than being reservations of original public domain lands. The reserved water-rights doctrine appears to have been generally applied as against private lands that were a part of the original public domain lands when the Federal reservation was created.[200] It would appear that the reserved water-rights doctrine may have little or no application to later-acquired Federal lands.[201] Such lands might be accorded preferential treatment over non-Federal lands in the use of a navigable watercourse by Federal criteria. But it seems likely that this would occur primarily as a result of the Federal commerce power (and resulting

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[196] *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, 522-523 (1971).

[197] *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527, 528-529 (1971).

[198] As discussed at note 238 *infra*, the Court indicated, *inter alia*, that 43 U.S.C. §666(a)(1) (1970) applies to Federal reserved water rights as well as to water rights acquired under State laws.

[199] 401 U.S. at 526; 401 U.S. at 527-530. Justice Harlan concurred in the opinions in both cases, "explicity disclaiming, however, the intimation of any view as to the existence and scope of the so-called 'reserved water rights' of the United States, either in general or in the particular situations here involved." 401 U.S. at 530.

[200] Cases apparently of this type include *Federal Power Comm'n* v. *Oregon*, 349 U.S. 435, 444 (1955); *Winters* v. *United States*, 207 U.S. 564, 567-568, 576 (1908); *United States* v. *Winans*, 198 U.S. 371, 381-382 (1905); *Arizona* v. *California*, 373 U.S. 546, 596 (1963) (see also the Master's Report in this case at 257, 293, 298-299).

[201] A Federal district court case, *United States* v. *Fallbrook Pub. Util. Dist.*, 165 Fed. Supp. 806 (S.D. Cal. 1958), that apparently involved such later-acquired property, is discussed in note 207 *infra*. That footnote also includes a 1961 statement of then Assistant Attorney General Ramsey Clark that "the U.S. ownership of rights to use water on 'acquired' lands is completely different from its ownership of rights to use water on its public and reserved lands based on its original ownership of those lands." See also the 1966 statement of David R. Warner included therein. In any event, any "reserved" water right for later-acquired land might have a later priority date. See discussion at note 175 *supra*.

navigation servitude) over such waters, discussed earlier under "The Commerce Power."[202]

The United States Supreme Court does not appear to have clearly decided whether or to what extent (without the benefit of the reserved water-rights doctrine and merely by exercising the Federal Government's *general* proprietary power) water might be taken for use on such later-acquired Federal property without regard to State laws and without compensation to others whose water rights under State laws may be adversely affected. While the proprietary power[203] may be supplemented by the supremacy clause of the Constitution,[204] it is unclear what impact this may have upon the question presented.[205] The Federal Government often may be authorized to regulate the activities of persons on Federal property pertaining to the use of water and other matters.[206] But it is problematical whether the Federal Government, merely by reason of its general proprietary power, even if supplemented by the supremacy clause, has a preferential right to take water without compensation as against the water rights of other non-Federal landowners.[207]

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[202] As stated at notes 172-173, a statement in *Arizona* v. *California* appears to suggest the power to reserve water rights for the Federal Government's reservations and property may derive to some extent from the commerce power as well as the proprietary power, but the Court did not explain its reasoning in this regard.

[203] The property clause, art. IV, §3, of the Constitution, is set out at note 156 *supra*.

[204] The supremacy clause, art. VI, is set out at note 157 *supra*.

[205] The United States Supreme Court referred to the supremacy clause in making its quoted statements (in note 207 *infra*) from *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275 (1958). The statement of David R. Warner, also quoted in that note, discusses the "supremacy argument."

[206] And on Indian reservations there may be relevant Indian tribal jurisdiction. It also may be noted that U.S. Const. art. I, §8, gives exclusive legislative jurisdiction to the Federal Government "over all Places purchased" by the United States, *with the consent of the State in which they are located*, for "the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings." But in such cases, it appears the Federal Government may exercise less than exclusive power, and the States may have a concurrent or partial jurisdiction under the terms of specific or general limitations or conditions.

[207] Although they do not necessarily reflect the current views of anyone in the Federal Government, in 1961, then Assistant Attorney General Ramsey Clark stated: "The U.S. ownership of rights to use water on 'acquired' lands is completely different from its ownership of rights to use water on its public and reserved lands based on its original ownership of those lands. * * * It is pertinent to note that, generally speaking, the United States upon acquisition of privately owned lands acquires only such property rights as its grantor can convey." Hearings on Problems Arising from Relationships Between the States and the Federal Government with Respect to the Development and Control of Water Resources Before the Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess. 201 (1961). Rather similar views had been expressed in 1959 by then Assistant Attorney General Perry W. Morton, although he also indicated that when the Government acquires property it can exercise governmental powers with respect to such property that are not available to a private citizen. Hearings on H.R. 4567, 4604, 4607, 6140, 5555, 5587, 5618, 5718, 5748, 1234, and 2363 (Federal-State Relations

The property clause has been employed as a connecting link between the authority of the United States under the commerce clause and the production

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in the Field of Water Rights) Before the House Subcomm. on Irrigation and Reclamation, Comm. on Interior and Insular Affairs, 86th Cong., 1st Sess., ser. 9, at 126-129 (1959). Such views appear to have been in considerable contrast to earlier views expressed in 1956 by then Assistant Attorney General J. Lee Rankin to the effect that the United States, when exercising its proper powers, cannot be subordinate to a State, and Congress cannot require such acquired property to be subject to the laws of States with respect to water. Hearings on S.863 (Water Rights Settlement Act) Before the Senate Subcomm. on Irrigation and Reclamation, Comm. on Interior and Insular Affairs, 84th Cong., 2d Sess., 266-267 (1956).

Subsequently, in 1966, David R. Warner, then Chief, General Litigation Section, Land and Natural Resources Division, Department of Justice, expressed views which appear to have been more similar to those of Ramsey Clark. He stated that since certain wells were "located on acquired lands the argument with respect to them would have to be much different than [in *Nevada ex rel. Shamberger* v. *United States,* discussed in note 167 *supra,* regarding the reservation doctrine] and there is reasonable doubt that the supremacy argument alone would be adequate to establish the Government's *property right*, as distinguished from its *constitutional power*, to use water from the wells in excess of the permitted quantity." Letter to the Acting General Counsel, Department of Defense, August 9, 1966, quoted in "Study of the Development, Management, and Use of Water Resources in the Public Lands," prepared for the Public Land Law Review Commission, 149 (1969).

United States v. *Fallbrook Pub. Util. Dist.*, 165 Fed. Supp. 806 (S.D. Cal. 1958) [see also the earlier decision in this case in 101 Fed. Supp. 298 (S.D. Cal. 1951)], involved the question of water rights for land in a military reservation that apparently had been purchased from private landowners. The Federal district court held that since the Federal Government had by its pretrial stipulations agreed to have such rights ascertained in accordance with the laws of California, its arguments concerning possible special Federal water rights based on various theories of Federal sovereignty, including Federal powers derived from the property clause, were foreclosed by its stipulations. 165 Fed. Supp. 806, 814-822, 832. The court nevertheless proceeded (as *dictum*) to consider such arguments, but it concluded that under the circumstances the Federal Government held no special water rights for the land it had purchased on the basis of the proposed sovereignty theories. *Id.* at 832-846.

The court said *inter alia*, "Within the enclave or reservation the government can do as it pleases with the unappropriated water, so long as vested rights of other parties are not injured. Since there are no property rights downstream from the enclave, it is difficult to see how anyone can be hurt by the use by the government of such water as reaches the enclave. But the extensions of the contention give concern. The government claims the right to reach upstream and insist that certain waters, in addition to waters which it claims by riparian right, by prescription and by appropriation prior to 1914, flow into the reservation." *Id.* at 833.

The court apparently concluded that the Federal Government's water rights for the purchased land were subject to *vested* private water rights under State law. It appears to have suggested that such water rights conceivably might otherwise have been freed from State law requirements and procedures if Congress so intended. But the court concluded there had been no such congressional intent in any applicable legislation. *Id.* at 833, 840-846. By its language in this respect, the court perhaps suggested that although the definition of such water rights may depend on State law, the Federal Government may not be subject to State permit procedures if Congress so intends. However, it

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of hydroelectric power at Federal dams. If Congress can control the flow of a river in aid of commerce, it can control the waterpower inherent in that flow.

(*Continued*)
would seem that to the extent the definition of such rights under State law depends on the discretionary granting of or conditions imposed in State-granted permits, such permit requirements would necessarily be applicable if the definition of water rights depends on State law. In this 1958 opinion, the views expressed in 1956 by J. Lee Rankin referred to above were called "extreme." *Id.* at 843-844.

Ivanhoe Irr. Dist. v. *McCracken*, 357 U.S. 275 (1958), involved constitutional issues regarding the Central Valley and Santa Barbara County projects in California, considered to be Federal reclamation projects. The Court said: "At the outset we set aside as not necessary to decision here the question of title to or vested rights in unappropriated water. * * * If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the project, * * * paying just compensation therefore, either through condemnation or, if already taken, through action of the owners in the courts. As we see it, the authority to impose the conditions of the contracts here comes from the power of the Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements. And, again, if the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts. [*Id.* at 290-291.]

* * * *

"* * * In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose * * *. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution [discussed later, under "The Welfare Power"] but also from Art. IV, § 3, relating to the management and disposal of federal property. * * *

"Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. * * * Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. * * * Article VI of the Constitution, of course, forbids State encroachment on the supremacy of federal legislative action. [*Id.* at 294-295.]

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"In any event, the provisions under attack are entirely reasonable and do not deprive appellees of any rights to property or water. * * * [I]f the United States takes any compensable water or property right the courts are open for redress. [*Id.* at 296-297.]"

The fifth amendment to the Constitution provides. "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In *United States* v. *Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899), as discussed earlier at note 169, the Court in *dictum* said that a State could not without congressional consent "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the governmental property." But it is unclear whether or to what extent the Court may have had reference to the Federal proprietary power generally, perhaps augmented by the supremacy clause, but without the benefit of a reserved rights doctrine. Moreover, the quoted statement does not appear to provide much clarification regarding the nature of such proprietary rights.

Some cases that pertain to interrelationships between the commerce and proprietary powers, that conceivably have some bearing on our question here, are discussed below.

There may be additional considerations, notably regarding any later-acquired Federal property for Indian use.

This was hinted at as early as 1898[208] and was spelled out in 1936 in *Ashwander* v. *Tennessee Valley Authority*,[209] where the objection was that the Government could not enter into a deliberate plan to generate and sell electricity at a dam constructed for navigation control and defense purposes. The court said:

> The Government acquired full title to the damsite, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electrical energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. * * *
>
> Authority to dispose of property constitutionally acquired by the United States is expressly granted to Congress by §3 of Article IV [the property clause] of the Constitution.[210]

The Government could sell or lease the property and fix the terms of the contract.

The War Power

The Federal Constitution gives Congress the power to declare war and to levy taxes and appropriate money to provide for the common defense of the United

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[208] *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58 (1898).

[209] *Ashwander* v. *TVA*, 297 U.S. 288 (1936).

[210] *Id.* at 330.

No question of rights of other riparian landowners or of compliance with State water-rights laws was in issue. The Court noted, however, that in the National Defense Act, ch. 134, §124, 39 Stat. 166, which provided authority for the dam: "The President was authorized to lease, or acquire by condemnation or otherwise such lands as might be necessary * * *." 297 U.S. 288, 327. The Court also noted that in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76 (1913): "We said that the Government 'had dominion over the water power of the rapids and falls' and could not be required to pay 'any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use.' " The Court noted that in that case the riparian, whose land was condemned by the Government, had been issued a revocable permit for a power dam but the permit had been revoked by the act authorizing the Federal project to improve navigation. 297 U.S. 288, 334. See "The Commerce Power—Effect on Private Rights Obtained Under State Law," *supra*, regarding such matters.

Incidentally, in some cases in which the Court has spoken of the exercise of the commerce power over navigable waters as a navigation or dominant servitude or easement, it has sometimes used property-sounding language as well as regulatory-power language to describe the commerce power. See *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-225, 227 (1956); *United States* v. *Rands*, 389 U.S. 121, 122-123 (1967). See in this regard, Morreale, E. H., "Federal-State Rights and Relations," in 2 "Waters and Water Rights" §101.3(A) (R. E. Clark ed. 1967); Note, "Constitutional Law—Eminent Domain—Condemnation of Riparian Lands Under the Commerce Power," 55 Mich. L. Rev. 272 (1956); Bartke, R. W., "The Navigation Servitude and Just Compensation—Struggle for a Doctrine," 48 Oreg. L. Rev. 1 (1968).

States.[211] Some phases of Federal resource development have been based on this power. The most notable was the Wilson Dam at Muscle Shoal on the Tennessee River, begun in 1917 and later incorporated into the system of the Tennessee Valley Authority. Under the 1916 National Defense Act, Congress authorized the President to investigate the best means for the production of nitrates and other products for munitions of war and to designate such sites on rivers and public lands as he deemed best suited for generation of power for their production. The Wilson Dam was constructed under this authority and, in peacetime, its hydroelectric energy was sold for distribution in the Tennessee Valley area. This arrangement was challenged in *Ashwander* v. *Tennessee Valley Authority*[212] but was upheld by the Supreme Court. Taking judicial notice of the international situation in 1916, the Court concluded that the Wilson Dam and power plant were "adapted to the purposes of national defense"[213] and that the maintenance of these properties in operating condition and the resulting assurance of an abundance of electric energy in the event of war were national defense assets which the Government might constitutionally construct and acquire.

The Government's exercise of the war power ordinarily has not been undertaken in such a way as to bring its resource development projects into direct conflict with State water laws or water rights. Property taken under the war power for national defense purposes usually has been condemned under the power of eminent domain.[214]

The Welfare Power

Although the Constitution gives Congress the power to levy taxes and to

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[211] U.S. Const. art. I, §8. See also note 206 *supra*, regarding a related provision in this section of the Constitution.

[212] *Ashwander* v. *TVA*, 297 U.S. 288 (1936).

[213] *Id.* at 327.

[214] Regarding the question of compensation in exercising the war power, in *International Paper Co.* v. *United States*, 282 U.S. 399 (1931), the Court said: "This is a proceeding by the petitioner to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes.

* * * *

"* * * It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States under * * * 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. * * * The petitioner's right was to use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. * * * [T]he Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay." *Id.* at 404, 407.

provide for the general welfare of the United States,[215] it was not until 1936 that it was decided that this clause delegated a separate power to the National Government. In that year, in *United States* v. *Butler*,[216] the Supreme Court decided that the general welfare clause was not restricted by the specific powers enumerated in the Constitution, such as the power to regulate commerce.[217] Congress and the Supreme Court have extended the power over commerce to considerable lengths in asserting Federal power over navigable waters to an extent that even the Supreme Court has called "strained."[218] The necessity for such fictions decreased with the *Butler* case, and in *United States* v. *Gerlach Live Stock Company*,[219] the Court said that one of the largest Federal basin-wide development projects—the Central Valley Project in California—may be sustained under this power.

> Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. * * *[220] Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation.[221]

The limits of this power have not been clearly defined. The general welfare power is expressly one "To lay and collect Taxes, Duties, Imposts and Excises, to * * * provide for * * * the general Welfare of the United States."[222] The above quotation from the *Gerlach* case implies that money collected for general welfare purposes also can be spent for such purposes. The extent to which money might validly be collected or spent for *regulatory* purposes under this general welfare power apparently has not been definitely decided.

In the 1963 case of *Arizona* v. *California*, the Court, after stating that the Boulder Canyon Project Act[223] was passed "in the exercise of the congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects" (as discussed earlier under "The Commerce Power"), added that the Act "*is equally sustained* by the power of Congress to promote the general welfare through projects for reclamation,

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[215] U.S. Const. art. I, § 8.

[216] *United States* v. *Butler*, 297 U.S. 1 (1936).

[217] This was recognized in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950).

[218] *Id.*

[219] *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

[220] The Court added that "If any doubt of this power remained, it was laid to rest * * * in Helvering v. Davis, 301 U.S. 619, 640 [1937]." *Id.* at 738.

[221] *Id.*

[222] U.S. Const. art. I, § 8.

[223] 43 U.S.C. §§ 617-617t (1970).

irrigation, or other internal improvements."[224] The Court cited the *Gerlach* case as support for the latter conclusion. The Court construed and upheld the Act as congressional authority for carrying out a comprehensive scheme for developing, managing, and apportioning the mainstream waters of the lower basin of the Colorado River.[225] The Act was construed to give the Secretary of the Interior discretionary authority to apportion such waters among water users by making contracts for the sale and delivery of the stored waters, subject to limitations and directives included in the Act, but without being bound by any inconsistent State laws.[226] The Act was further construed as prohibiting anyone from taking any of such mainstream waters without such a contract.[227] But regulation of the use of the tributaries was left to the States.[228] The Court said:

> [T]he United States assumed the responsibility for the construction, operation, and supervision, of Boulder [now Hoover] Dam and a great complex of other dams and works.[229] Behind the dam were stored virtually all the waters of the main river * * *. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin.[230]

In view of the above factors and other aspects of the *Arizona* v. *California* case, discussed previously under "The Commerce Power,"[231] it is not entirely clear what the Court would hold about the extent and application of such Federal powers in regard to nonnavigable or nonfederally stored waters.[232]

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[224] *Arizona* v. *California*, 373 U.S. 546, 587 (1963) (emphasis added).

The Boulder Canyon Project Act stated that it was for "the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy * * *." 43 U.S.C. §617 (1970).

[225] 373 U.S. 546, 564-565.

[226] *Id.* at 579-584.

[227] *Id.*

[228] *Id.* at 588.

[229] See note 118 *supra*.

[230] 373 U.S. 546, 589.

[231] See the discussion at notes 104-122 *supra*.

[232] Nor is it clear what the Court would hold about the exercise of the general welfare power alone, rather than in combination with the commerce power. The Court's assertion, quoted above, that the act "is equally sustained" by the general welfare power, may imply that the entire project and apportionment scheme could have been sustained by exercising either power alone. But since the Court mentioned that the act was sustained by both powers, it may not be entirely clear what the Court would have held about the exercise of each power by itself. In the earlier *Arizona* v. *California* case, the Court had indicated that the act was a valid exercise of the commerce power regarding navigable waters and said, "[T]he fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if

The *Gerlach* case had upheld the Central Valley Project, built on a navigable watercourse, which it construed as an exercise of the general welfare power under the Reclamation Act. The Court did not decide the extent, if any, to which private water rights might be regulated or otherwise made subject to its exercise *without compensation.*[233]

SOVEREIGN IMMUNITY AND THE McCARRAN AMENDMENT[234]

Various and rather complicated questions have arisen concerning circumstances in which the sovereign immunity of the Federal Government may or may not be invoked.[235] Section 666(a) of Title 43 of the United States Code,

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those other purposes would not alone have justified an exercise of congressional power." 283 U.S. 423, 456 (1931). This was before the 1936 *Butler* case, discussed above, in which the Court for the first time indicated that the general welfare power might be utilized without recourse to other enumerated powers in the Constitution.

It also is unclear what the Court might have held if the act had not included the provisions it did for protecting present perfected rights, or the stated priority it gave to navigation improvement, river regulation, and flood control. See note 114 *supra*, regarding the language of the act and of the Court in this regard. See also note 122 *supra*.

[233] It is problematical, but the Court perhaps implied that compensation might be required in relying solely on the general welfare power, even as to navigable streams, by stating: "Whether Congress could have chosen to take claimant's rights by the exercise of its dominant navigation servitude is immaterial. By directing the Secretary to proceed under the Reclamation Act of 1902, Congress elected not 'to in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.' 32 Stat. 388, 390 [43 U.S.C. §383].

"We cannot twist these words into an election on the part of Congress under its navigation power to take such water rights without compensation. * * * We conclude that, whether required to do so or not, Congress elected to recognize any State-created rights and to take them under its power of eminent domain." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950).

This case and the Reclamation Act are discussed at notes 144-147 *supra*. Later cases, however, appear to have raised substantial doubts and questions about the Court's earlier construction of the Reclamation Act regarding the question of compliance with State laws, as discussed at note 146 *supra*.

[234] The essence of the authors' discussion of this subject is also included in chapter 15 at notes 334-335.

[235] In regard to such matters, see, e.g., Morreale, E. H., *supra* note 210, §106; Comment, "Adjudication of Water Rights Claimed by the United States–Appreciation of Common-Law Remedies and the McCarran Amendment of 1952," 48 Cal. L. Rev. 94 (1960).

For a related matter, see discussion at note 138 *supra* regarding suits against the United States under the so-called Tucker Act. In note 146 *supra* it is stated, *inter alia*, that in one case involving a Federal reclamation project, the U.S. Supreme Court said, "We have concluded * * * that the United States either owned or has acquired or taken

(*Continued*)

resulting from the so-called McCarran Amendment of 1952, provides:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof in the same manner and to the same extent as a private individual under like circumstances: Provided, that no judgment for costs shall be entered against the United States in any such suit.[236]

In a 1971 opinion the United States Supreme Court, among other things, said:

> The consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source" would seem to be all-inclusive. We deem almost frivolous the suggestion that the Eagle [River, a tributary of the Colorado River] and its tributaries are not a "river system" within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The "river system" must be read as embracing one within the particular State's jurisdiction. With that to one side, the first clause of §666(a)(1), read literally, would seem to cover this case for "rights to the use of water of a river system" is broad enough to embrace "reserved" waters.
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> * * * §666(a)(1) has no exceptions and * * *, as we read it, includes appropriative rights, riparian rights, and reserved rights.
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> It is said that this adjudication is not a "general" one as required by *Dugan* v. *Rank*, 372 U.S. 609, 618 [1963]. This proceeding, unlike the one in *Dugan*, is not a private one to determine whether named claimants have priority over the United States. The whole community of claims is involved and as Senator McCarran, Chairman of the Committee reporting on the bill, said in reply to Senator Magnuson: "S. 18 is not intended . . . to be used for any other purpose than to

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(*Continued*)

the water rights involved in the suit and that any relief to which the respondents may be entitled by reason of such taking is by suit against the United States under the Tucker Act, 28 U.S.C. §1346." *Dugan* v. *Rank*, 372 U.S. 609, 611 (1963).

[236] 66 Stat. 560 (1952), 43 U.S.C. §666(a) (1970). Section 666 also provides: "(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

> allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."
>
> It is said, however, that since this is a supplemental [Colorado] adjudication only those who claim water rights acquired since the last adjudication of that water district are before the court. It is also said that the earliest priority date decreed in such an adjudication must be later than the last priority date decreed in the preceeding adjudication.[237] * * *
>
> * * * The absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All such questions, including the volume and scope of particular reserved rights, are Federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court.[238]

Federal reserved rights are discussed earlier under "The Proprietary Power and the Reservation Doctrine."[239] The Court preceded the quoted language with the statement, among other things, that "Here the United States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted into the Union in 1876."[240]

A companion case involved water rights with respect to four national forests, national recreational and other water-use purposes by the Department of the Interior (by its National Park Service and Bureaus of Land Management, Mines, and Sport Fisheries and Wildlife), naval petroleum, and oil shale reserves. In this case, suit had been brought under a new (1969) Colorado water-rights determination statute. The Court, among other things, said:

> It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. It is also said that the Act makes all water rights confirmed under the new procedure junior to those previously awarded.[241]
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> It is argued from those premises that the proceeding does not constitute a general adjudication which 43 U.S.C. §666 contemplated. As we said in the *Eagle County* case, the words "general adjudication"

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[237] See the discussion in chapter 15 at notes 197-199.

[238] *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, 523-526 (1971).

[239] The quoted *Eagle County* case and the following companion case are discussed therein at notes 196-199 *supra*.

[240] 401 U.S. 520, 523.

[241] See the discussion in chapter 15 at notes 219-233.

were used in *Dugan* v. *Rank*, 372 U.S. 609, 618, to indicate that 43 U.S.C. §666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the Federal question can be preserved in the state decision and brought here for review.[242]

VARIOUS LEGISLATIVE PROPOSALS

The respective roles of Federal and State Governments in regard to water rights have been a subject of controversy for a number of years. Various bills pertaining to this matter were introduced in the Congress[243] subsequent to the *Pelton Dam* case in 1955, [244] but none were acted upon through 1974.

The report of the Public Land Law Review Commission in 1970 contained the following recommendation:[245]

> Recommendation 56: The implied reservation doctrine of water rights for federally reserved lands should be clarified and limited by Congress in at least four ways: (a) amounts of water claimed, both surface and underground, should be formally established; (b) procedures for contesting each claim should be provided; (c) water requirements for future reservations should be expressly reserved; and (d) compensation should be awarded where interference results with claims valid under state law before the decision in Arizona v. California [373 U.S. 546 (1963)].[246]

With respect to its recommendation 56(a), the Commission more specifically recommended that Congress should "Provide a reasonable period of time within which Federal land agencies must ascertain and give public notice of their projected water requirements for the next 40 years for reserved areas, and forbid the assertion of a reservation claim for any quantity or use not included within such public notice."[247] The report also stated:[248]

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[242] *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527, 529-530 (1971).

[243] See Morreale, E. H., *supra* note 210, §106. See also Witmer, T. R., "Federal Water Rights Legislation—The Problems and Their Background" in "Federal Water Rights Legislation," House Comm. on Interior & Insular Affairs. 86th Cong., 2d Sess. (Comm. Print No. 19, 1960).

[244] *Federal Power Comm'n* v. *Oregon*, 349 U.S. 435 (1955), discussed at notes 163-167 *supra*.

[245] "One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission" 146 (June 1970).

[246] The *Arizona* v. *California* case is discussed at note 170 *et seq*. *supra*.

[247] "One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission" 147 (June 1970). The report also contained some more specific recommendations regarding this and the other subparts of its Recommendation 56.

[248] *Id*.

> In those cases where it seems likely that existing uses on reserved lands will increase to significantly larger estimated future requirements at a relatively modest rate over the 40-year period, Congress may wish to provide a means for the agencies to permit interim use of reserved water until it is needed for Federal purposes. This would promote maximum beneficial use of water and could be done through formal arrangements with the states.

A more recent report, by the National Water Commission, contained a number of recommendations with respect to Federal-State jurisdiction in the law of waters. Its first and general recommendation in this regard was:[249]

> The United States should adopt a policy of recognizing and utilizing the laws of the respective States relating to the creation, administration, and protection of water rights (1) by establishing, recording, and quantifying existing non-Indian Federal water uses in conformity with State laws, (2) by protecting non-Federal vested water rights held under State law through the elimination of the no-compensation features of the reservation doctrine and the navigation servitude, and (3) by providing new Federal procedures for the condemnation of water rights and the settlement of legal disputes.

The report contained more detailed recommendations and legislative proposals for implementing the Commission's recommended policies in a proposed "National Water Rights Procedures Act."[250] Among other recommendations, the Commission proposed that, except for Indian water rights,[251] the United States in using water or carrying out any program or project involving or affecting water use should proceed in conformity with State laws regarding the appropriation, diversion, and the use of water, and the regulation, administration, and protection of water rights[252] –unless State law conflicts with the accomplishment of the purposes of a Federal program or project. It was proposed that if the Federal official charged with administering the Act

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[249] Final Report to the President and to the Congress of the United States by the National Water Commission, "Water Policies for the Future," Recommendation 13-1, at 461 (1973).

[250] *Id.* at 461-471. See Recommendation 13-10, at 471.

[251] Separate recommendations were made concerning Indian water rights in Recommendations 14-1 to 14-6, at 477-483.

[252] However, in the case of water uses existing on the Act's effective date on reserved lands of the United States, it was proposed that the priority of the water right should be the date the reserved land was withdrawn from entry. Recommendation 13-4(b), at 466. [See also Recommendation 13-6(2)(b), at 468, regarding previously authorized projects.] It was proposed that existing uses on other Federal lands, and later uses on reserved or other Federal lands, should have a priority date based on the initiation of the water use. Recommendations 13-4(b) and 13-5, at 466. See also Recommendation 13-6, at 468, regarding provisions concerning State permit procedures. Recommendation 13-4(c), at 466, provided for standards and procedures for establishing minimum flows (limited to unappropriated water) for the preservation of instream values in streams crossing Federal lands.

concludes there is such a conflict or inconsistency, he should be required to hold a hearing and provide written conclusions, subject to judicial review.[253]

In a speech commenting upon the review-draft report of the National Water Commission, Walter Kiechel, Deputy Assistant Attorney General, among other things said:

> The problem which the National Water Commission addresses, among others, is the reconciliation of reserved rights which arise under Federal law with water rights acquired under State law. It has been the position of the Department of Justice for some time that this reconciliation should not be accomplished by the subordination of reserved rights to rights acquired under State law, and that the constructive approach would be to secure a quantification of reserved rights, so that they no longer remain ambiguous, uncertain, and "mysterious." We have proposed to the National Water Commission, and to the Public Land Law Review Commission before it, a fairly simple way of achieving this quantification, as follows:
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> 1. Inventory and quantification of Federal reserved rights by administrative procedures.
> 2. Report of such inventory to Congress and State agencies.
> 3. Judicial review in Federal courts of the administrative determinations at the instance of State administrators or holders of conflicting water rights (except where the Federal rights have already been adjudicated in proceedings to which the United States has been a party).
>
> The Public Land Law Review Commission adopted our proposal with certain modifications. The National Water Commission has declined to so recommend and summarily in this review draft has dismissed our proposal on the grounds (1) that quantification would be expensive and (2) government officials would resist permanent quantification. Conceding that there is some expense involved and that there undoubtedly would be some resistance by government officials, I still say that neither of these objections are valid and that quantification would be the best solution and would be in the interest of all.[254]

FEDERAL-STATE COORDINATION AND COOPERATION

While it is apparent, as stated earlier,[255] that the Federal powers relating to water resources are quite extensive, in practice Congress has provided for or enabled various methods of recognizing State water-rights laws and has provided for consultation and participation by the States in several Federal

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[253] Recommendation 13-2, at 462.

[254] Kiechel, W., Jr., "Indian Water Rights," speech made Feb. 23, 1973, in Washington, D.C., at a luncheon meeting of the Indian Law Committee of the Federal Bar Ass'n, reproduced in 11(2) Land & Natural Resources Div. J. (U.S. Dept. of Justice) 1, 4-5 (1973). A draft bill for such a proposal was prepared in Dept. of Justice in 1974.

[255] See "General Allocation of Federal and State Powers," *supra*.

projects. Some judicial and, in some instances, Federal agency interpretations of such provisions have been included in the foregoing discussion. The Federal projects often have been initiated at the request of interested groups, local governments, or State agencies in the affected States.

Harvey Banks indicated in 1967[256] that experience in States where strong State programs in water resource planning and development are conducted demonstrate that increased State competence, initiative, and financing offers the greatest promise of an effective role for the State in the Federal-State relationship. He suggested that State planning and implementation be carried out in coordination and cooperation with Federal agencies. He described the following example of a cooperative approach to Federal-State relationships:

> In 1957, the State of California published the California Water Plan.[257] This long-range, comprehensive, master plan has received general acceptance by the Federal agencies, and subsequent planning has proceeded on a cooperative basis between the Federal agencies and the State within the concepts and general framework of the Plan. Formal cooperation in planning has been achieved through memoranda of understanding. Under leadership of the State Department of Water Resources, Federal-State inter-agency committees and task planning teams have been set up where joint interests are involved. Joint reports have been prepared on proposed joint use facilities.
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> On May 16, 1960, the United States Department of the Interior and the State of California, Department of Water Resources, entered into an agreement for the coordinated operation of the Federal Central Valley Project and the State Feather River and Delta Diversion Projects (now called the State Water Project), which divert and redivert from the same sources and will use certain facilities jointly. That agreement incorporates a formula for the sharing of any shortages that may occur in the common sources of supply for the Federal and State projects.[258]
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> Pursuant to the Act of June 3, 1960,[259] the United States Bureau of Reclamation is building the San Luis Unit, a facility to be jointly used by the United States for purposes of the Federal Central Valley Project and by the State of California for its State Water Project. The Unit comprises a 2.1 million acre-foot offstream storage reservoir formed by San Luis dam, pumping plants, a pumping-generating plant, forebay, afterbay, and canals. Both the Bureau of Reclamation and the State need storage at this site and a canal leading south from

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[256] Unpublished report prepared under contract for the U.S. Department of Agriculture from which the following quotation below is extracted. Mr. Banks was formerly Director of Water Resources, State of California.

[257] "Bulletin No. 3, California Water Plan, State of California, Department of Water Resources, 1957." (Mr. Banks' footnote.)

[258] "Agreement between the United States of America and the Department of Water Resources, State of California, for the Coordinated Operation of the Federal Central Valley Project and the State Feather River and Delta Diversion Projects, May 16, 1960, Contract No. 14-06-200-8363." (Mr. Banks' footnote.)

[259] "74 Stat. 156 (1960)." (Mr. Banks' footnote.)

the reservoir. The State's share of the cost of the joint use facilities is being paid annually as construction proceeds in accordance with an agreement entered into between the United States and the State.[260] These facilities will be operated by the State under agreement with the United States upon completion to fulfill both Federal and State needs.

The United States Department of the Interior has entered into agreements with water users along the Sacramento River below Shasta Dam in California which define the rights of those users to divert from the River as against the United States in operation of the Federal Central Valley Project.

Both the Placer County Water Agency and the Sacramento Muncipal Utility District have built projects on the American River and its tributaries above Folsom and Auburn dams and reservoirs, units of the Federal Central Valley Project. Both of these local agencies negotiated and entered into agreements with the United States defining the rights of their projects to divert, store and use water, and the operational criteria for those projects as against the United States in operation of the Federal Central Valley Project. These agreements were executed prior to the hearings by the State Water Rights Board on the applications of these local agencies to appropriate unappropriated water for their projects.

A 1970 publication of the California Department of Water Resources, among other things, stated:

As the Central Valley Project and State Water Project use common stream channels and conveyance facilities, and the water supplies conserved and distributed become physically indistinguishable, there is a need for close coordination. Such coordination also enables a high degree of very desirable operational flexibility among the facilities of the two-project systems. Coordination of the operation of the two projects will become even more important in the future as the Central Valley Basin supplies become more fully utilized.

In recognition of this need, an important operating agreement has recently been negotiated between the U.S. Bureau of Reclamation and the California Department of Water Resources. It is presently under review by the Secretary of the Interior. The agreement provides the operators of the two projects with the procedures necessary to achieve the objectives set forth in the various laws, orders, policies, and other instruments under which the Central Valley Project and State Water Project are authorized to operate. These procedures include preparation of forecasts for proposed operations, language for the transfer or exchange of facilities use, criteria for the allocation of shortages, and procedures for assigning the responsibility for maintaining the objectives of the operating agencies. While accomplishing the objectives of the agreement, the

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[260] "Agreement between the United States of America and the Department of Water Resources of the State of California for the Construction and Operation of the Joint-Use Facilities of the San Luis Unit, December 30, 1961, Contract No. 14-66-200-9755." (Mr. Banks' footnote.)

separate identity of facilities, resources, and contributions of each project is maintained.[261]

Such arrangements suggest a number of possible avenues of Federal-State coordination and cooperation. Nevertheless, a number of Federal-State conflicts or differences may be difficult to wholly resolve in a mutually satisfactory manner.[262]

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[261] "Water for California—The California Water Plan: Outlook in 1970," Cal. Dept. of Water Resources Bull. No. 160-70, at 150-151 (Dec. 1970).

"The California Water Plan—Outlook in 1974," Cal. Dept. of Water Resources Bull. No. 160-74, at 119 (1974), states, *inter alia*, "In the Central Valley, the state and federal water projects are operated through coordination to make effective use of the water supply available in the Sacramento-San Joaquin Delta.

* * * *

"An example of what can be accomplished in the area of more effective use of facilities is embodied in a cross-valley canal under construction by the Kern County Water Agency. This facility was originally intended to transport normal year deliveries of water from the State Water Project to an area near Bakersfield. Negotiations have been successfully concluded which provide for an increase in capacity of this aqueduct to facilitate the delivery of Bureau of Reclamation water, available in the Delta, through the excess capacity of the State Water Project, including the joint state-federal San Luis canal, and through the Kern County Water Agency canal to water-deficient areas on the east side of the San Joaquin Valley.

"There are many potential opportunities for surface water exchanges among water agencies."

[262] Some litigation between the United States and California involving aspects of the Central Valley Project was pending in 1974.

Chapter 22

INTERSTATE DIMENSIONS OF WATER RIGHTS*

by Harold H. Ellis and J. Peter DeBraal

The foregoing chapter has alluded to certain interstate considerations in which Federal governmental and judicial powers and functions may be involved. This chapter directly considers interstate dimensions of water rights, with particular reference to the Western States. Following are selected aspects of the numerous and complex matters that may be involved in considering interstate dimensions of water rights.

LITIGATION BETWEEN STATES

The United States Supreme Court is the forum for the judicial settlement of disputes between States over the apportionment of the waters of interstate streams and bodies of water.[1] In such disputes, the Court has applied some principles of international law[2] and has built up a significant body of interstate common law,[3] as well as a form of Federal common law[4] that may not be the law of either State party to the dispute. Thus, the law evolving from interstate controversies acts as still another limit upon the internal water law of the States.

The original jurisdiction given by the Constitution[5] to the Supreme Court over controversies between States has been used in a number of cases. Here we

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*Portions of this chapter have drawn on chapter 18 of Ellis, H. H., Beuscher, J. H., Howard, C. D., & DeBraal, J. P., "Water-Use Law and Administration in Wisconsin" (1970). The subtopic "Existing Water Apportionment Compacts Involving Western States" in part has drawn on unpublished research conducted by R. Kent Gardner while he was a law student assistant. Another source was "Documents on the Use and Control of the Waters of Interstate and International Waters: Compacts, Treaties, and Adjudications," H.R. Doc. No. 319, 90th Cong., 2d Sess. (T.R. Witmer ed. 1968). This chapter was prepared in 1974.

[1] *Kansas* v. *Colorado*, 206 U.S. 46, 85 (1907); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669 (1931).

By statute, Federal district courts may assume, concurrently with the Supreme Court, original jurisdiction of certain cases concerned with construction or application of an interstate compact involving pollution of an interstate river system if the compact expresses the signatory States' consent to be sued. 33 U.S.C. §466g-1 (1970).

[2] *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907).

[3] *Id.* at 98; *Connecticut* v. *Massachusetts*, 282 U.S. 660, 671 (1931). See also *Illinois* v. *Milwaukee*, 406 U.S. 91, 105-106 (1972).

[4] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). See also *Illinois* v. *Milwaukee*, 406 U.S. 91, 105-107 (1972).

[5] U.S. Const. art. III, §2, provides, "In all Cases * * * in which a State shall be a Party, the Supreme Court shall have original Jurisdiction."

28 U.S.C. §1251(a) (1970) provides, "The Supreme Court shall have original and exclusive jurisdication of: (1) All controversies between two or more States * * *."

present a summary of the results of exercising this jurisdiction in various interstate water controversies. While disputes over private rights held by persons in different States might in some circumstances be heard in the courts of either State,[6] or be heard in the lower Federal courts where diversity of citizenship of the parties gives Federal jurisdiction,[7] States have frequently taken up these controversies and brought suit in the Supreme Court against other States. Usually, in such cases, the State has literally been fighting the battle for its citizens. In *Kansas* v. *Colorado* the Court noted that in the earlier case of *Missouri* v. *Illinois*:

> "* * * the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution."[8]

The Court also said that here Kansas had standing to bring the suit in its own right and that when actions within an upstream State threatened the prosperity of a large area of a downstream State, the controversy rises above a mere question of private right and involves a matter of State interest.[9] Making the

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[6] See *Willey* v. *Decker*, 11 Wyo. 496, 541, 73 Pac. 210, 224 (1903); *Mannville Co.* v. *City of Worcester*, 138 Mass. 89, 91 (1884); *Slack* v. *Walcott*, 22 Fed. Cas 309, 312 (No. 12, 932) (C.C.D.R.I. 1825).

[7] See the discussion at notes 48-53 *infra*.

[8] *Kansas* v. *Colorado*, 206 U.S. 46, 99 (1907), quoting from *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902), referring to *Missouri* v. *Illinois*, 180 U.S. 208 (1901).

In a case in which Georgia sued a copper company in Tennessee to enjoin it from discharging noxious gas over lands in five Georgia counties. the Court said it would grant an injunction and said, "Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State [of Tennessee] must be accepted as a consequence of her standing upon her extreme rights." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 239 (1907). Although not included in the Court's opinion, the headnotes to the case included after the words "her own citizens" in the above quotation "many of whom may profit through the maintenance of the works causing the nuisance" (presumably because they worked for the company). See also the *dicta* in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355-356 (1908).

[9] *Kansas* v. *Colorado*. 206 U.S. 46, 99 (1907). The Court said that in this respect Kansas "is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves the matter of state interest and must be considered from that standpoint. Georgia v. Tennessee Copper Co. [206 U.S. 230 (1907)] * * *."

(*Continued*)

upstream State a defendant, although the acts complained of are in fact committed by individuals within it, is similarly justified; a State whose laws or administrative officials permit such action may be regarded as doing the acts itself and its conduct may be regarded as wrongful in relation to the other State.[10]

In another opinion in the *Missouri* v. *Illinois* litigation, the Court emphasized that in this type of action between States, the matter must be of serious magnitude before the Court should intervene. It pointed out that matters which would warrant resort to equity by one citizen against another in the same jurisdiction will not necessarily equally warrant the Court's interference in the actions of one State at the insistence of another.[11]

In such suits involving the allocation of water, the major principle is that each State bordering on a river is entitled to an equitable apportionment of the benefits resulting from the flow of the river.[12] On the principle of equitable apportionment, the Court has said generally:

> As was shown in *Kansas* v. *Colorado*, 206 U.S. 46, 100 [1907], such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an

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The eleventh amendment referred to reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Court said, "This Amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another." 206 U.S. 46,83.

Other considerations regarding this amendment are discussed at notes 28-32 *infra*.

[10] *Kansas* v. *Colorado*, 206 U.S. 46, 99 (1907). See also *Missouri* v. *Illinois*, 180 U.S. 208, 241-242 (1901).

[11] *Missouri* v. *Illinois*, 200 U.S. 496, 521 (1906). After considerable discussion, the Court decided the test of serious magnitude had not been met in this case.

In *North Dakota* v. *Minnesota*, 263 U.S. 365, 374 (1923), involving interstate water drainage, the Court similarly said, "In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. 'Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude * * *.' *New York* v. *New Jersey*, 256 U.S. 296, 309 [1921]; *Missouri* v. *Illinois*, 200 U.S. 496, 521 [1906]."

[12] See, e.g., *Colorado* v. *Kansas*, 320 U.S. 383, 393-394 (1943).

In *Arizona* v. *California*, 373 U.S. 546, 597 (1963), the Court said: "An Indian Reservation is not a State. And while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctrine of equitable apportionment. Moreover, even were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations." See chapter 21 regarding water rights for Indian reservations.

> interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters. *Wyoming* v. *Colorado*, 259 U.S. 419, 465, 470 [1922].[13]

The principle of equitable apportionment was first announced in 1907 in *Kansas* v. *Colorado*, a case between a State which recognized appropriative rights and a State which recognized riparian rights.[14] In such a case, neither appropriative rights nor riparian rights could be applied without doing violence to the internal law of one of the States. When a relatively simple dispute arose between two Western States, in which both adhered to the prior appropriation doctrine, the Court said that to apply the doctrine of priority in such a case would be the equitable apportionment.[15] However, in a similar but more

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[13] *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-671 (1931).

[14] *Kansas* v. *Colorado*, 206 U.S. 46, 95-105, 117-118 (1907), discussed in *Colorado* v. *Kansas*, 320 U.S. 383 (1943). In the 1943 opinion, the Court said, *inter alia*, that in its former 1907 opinion: "The court denied Kansas' contention that she was entitled to have the stream flow as it flowed in a state of nature. It denied Colorado's claim that she could dispose of all the waters within her borders and owed no obligation to pass any of them on to Kansas. It declared that as each State had an equality of right each stood before the court on the same level as the other; that inquiry was not confined to the question whether any portion of the river waters were withheld by Colorado but must include the effect of what had been done upon the conditions in the respective States; and that the court must adjust the dispute on the basis of equality of rights to secure, so far as possible, to Colorado, the benefits of irrigation, without depriving Kansas of the benefits of a flowing stream. The measure of the reciprocal rights and obligations of the States was declared to be an equitable apportionment of the benefits of the river. The court added that, before the developments in Colorado consequent upon irrigation were to be destroyed or materially affected, Kansas must show not merely some technical right but one which carried corresponding benefits." 320 U.S. 383, 385-386 (1943).

In the latter regard, see also chapter 8 at notes 697-698, regarding *Washington* v. *Oregon*, 297 U.S. 517 (1936).

[15] *Wyoming* v. *Colorado*, 259 U.S. 419, 470 (1922).

In doing so, however, the Court provided in effect that each State was entitled to stated quantities of water (based generally on the respective priorities of the various rights to the disputed waters in each State and the anticipated streamflows), leaving it up to each State to decide and effect the proper distribution of that State's share. See *Wyoming* v. *Colorado*, 309 U.S. 572, 576-577, 579 (1940), and the discussion at note 20 *infra*.

With respect to considerations involving storage, return flows, and transfers of water rights, see 259 U.S. at 471-476 and 309 U.S. at 578-580.

The Court's original decree was modified in some respects in 260 U.S. 1 (1922). In 1957 it was further modified, by mutual request of the parties, so as, *inter alia*, to specify the lands within the Laramie river basin in Colorado upon which water could be

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complex situation where the strict application of that doctrine would disrupt an economy built on junior appropriations and operated for years without objection, the Court said that protection of established uses would be more equitable than strict priority.[16] The variety of factors to consider that might result in a variation from strict priority as between appropriation doctrine States were thus described by the Court:

> * * * physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the

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used for irrigation. Except as modified or restricted, the distribution of Colorado's share of the disputed waters would be governed and administered by it. 353 U.S. 953 (1957).

In *Nebraska* v. *Wyoming*, 325 U.S. 589, 627 (1945), the Court said, in considering the allocation of certain waters between those two States: "A mass allocation was made in *Wyoming* v. *Colorado* [mentioned above]. But there is no hard and fast rule which requires it in all cases. The standard of an equitable apportionment requires an adaptation of the formula to the necessities of the particular situation. We may assume that the rights of the appropriators *inter se* may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified. The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State. *Hinderlider* v. *La Plata Co.*, 304 U.S. 92, 106-108 [1938]."

[16] *Nebraska* v. *Wyoming*, 325 U.S. 589, 621-622 (1945).

In this case, the Court approved an allocation of specified waters on the basis of a stated percentage of the flow. This is another variation from strict priority. In this regard, the Court said, *inter alia*, "We conclude that the early Wyoming uses, the return flows, and the greater storage water rights which Nebraska appropriators have in this section as compared with those of Wyoming appropriators tip the scales in favor of the flat percentage system recommended by the Special Master. It should be noted, moreover, that that method of apportionment, though not strictly adhering to the principle of priority, gives it great weight and does not cause as great a distortion as might appear to be the case. For on the first 412 second feet of flow the advantage would be with Nebraska, since 412 is the point at which 25 per cent of the flow would first equal the 103 second feet which on a priority basis would go to Wyoming. On the next 1,114 second feet the advantage would be with Wyoming, since Wyoming's share on a priority basis would equal 25 per cent of the flow only after the total flow had reached 1,526 second feet.

"Accordingly, we conclude that the flat percentage method recommended by the Special Master is the most equitable method of apportionment. We have considered the arguments advanced against the apportionment being made on the basis of 25-75 per cent. But we do not believe that evidence warrants a change in those percentages." *Id.* at 645-646. See also the discussion at 637-638.

The Court retained jurisdiction of the suit for the purpose, *inter alia*, of possible later modifications of its decree. *Id.* at 655, 671-672.

> practical effect of wasteful uses on downstream areas, the damage of upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.[17]

Similarly, in an Eastern case in which proposals for large withdrawals of water to supply metropolitan areas precipitated similar litigation, the Court said the fact that both States follow the riparian doctrine does not necessarily require its use as the basis for settlement of such an interstate controversy.[18]

To the extent that the application of the equitable apportionment principle is inconsistent with the internal law of a particular State, it is superimposed upon internal law in regard to the matter decided by the Court. The Court's division of water is binding upon the citizens of the litigant States. The Supreme Court has hesitated to inject itself into internal administration of water laws in order to enforce its decrees; it has preferred to declare that certain existing or threatened diversions are within the share of the diverting State,[19] or that a State may have a stated quantity of water[20] or a stated percentage of the flow.[21] In addition, the Court has sometimes placed limits upon new uses or required certain practices to be observed within the State.[22] Within these Court-imposed limits, each State may be allowed to allocate its water to private users and enforce and administer its own internal water laws.[23] But the Court has said the decree in such a suit is binding upon all claimants to the water in question, even though they may not have been parties to the suit.[24] If a private water right is impaired by the decree in an interstate suit, the water user has no right in excess of his State's share of the stream.[25] Nor may a person who claims a prospective injury to his private rights be permitted to intervene in the suit, unless perhaps he can show some compelling interest apart from those held as a class by all other citizens of the State. Under the doctrine of *parens patriae*, the State is deemed to represent all its citizens, and each is bound by the State's conduct of the litigation.[26]

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[17] *Id.* at 618.

[18] *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669-670 (1931).

[19] *Kansas* v. *Colorado*, 206 U.S. 46 (1907); *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931); *New Jersey* v. *New York*, 283 U.S. 336 (1931).

[20] *Wyoming* v. *Colorado*, 259 U.S. 419 (1922), discussed at note 15 *supra*.

[21] *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), discussed at note 16 *supra*.

[22] *Id.* See also para. 4 of note 15 *supra*, regarding the 1957 modification of the decree, by mutual request of the parties, in *Wyoming* v. *Colorado*, 353 U.S. 953 (1957).

[23] *Wyoming* v. *Colorado*, 298 U.S. 573 (1936).

[24] *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509 (1932).

[25] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

[26] The Supreme Court has said: "The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the 'royal prerogative.' Malina & Blechman, Parens Patriae Suits for Treble Damages Under the

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In *New Jersey* v. *New York*, in which the Supreme Court denied the city of Philadelphia's request to intervene in the suit, the Court said:

> The view we take of the matter makes it unnecessary to decide whether Philadelphia's intervention in the pending litigation would amount to a "... suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State ..." in violation of the Eleventh Amendment. * * * The "*parens patriae*" doctrine, however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.
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> The case before us demonstrates the wisdom of the rule. The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. * * * If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.
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> Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by

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Antitrust Laws, 65 Nw. U.L. Rev. 193, 197 (1970) * * *; State Protection of its Economy and Environment: Parens Patriae Suits for Damages, 6 Col. J. L. & Soc. Prob. 411, 412 (1970) * * *. These powers and duties were said to be exercised by the King in his capacity as 'father of the country' [citing Malina & Blechman, at 197; State Protection, at 412]. Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves [citing State Protection, at 412]. For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics' [citing 3 W. Blackstone, Commentaries *47], and as the superintendent of 'all charitable uses in the kingdom' [citing 3 W. Blackstone, Commentaries *47]. In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States.

"The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 257 (1972).

the state. See *Kentucky* v. *Indiana*, *supra*. Philadelphia has not met that burden and, therefore, even if her intervention would not amount to a suit against a state within the proscription of the Eleventh Amendment (and we do not intend to give any basis for implying that it does), leave to intervene must be denied.

Pennsylvania intervened in 1930, *pro interesse suo*, to protect the rights and interests of Philadelphia and Eastern Pennsylvania in the Delaware River. The Commonwealth opposed New Jersey's position based on common-law riparian rights, since that proposition threatened the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River and its Pennsylvania tributaries. Pennsylvania's position was based upon the doctrine of fair and equitable apportionment, and New York's proposed diversion had to be resisted to the extent it might amount to a diversion of more than a fair and equitable share. This Court recognized the propriety of Pennsylvania's peculiar position, based on the interests of its citizens, and permitted intervention over vigorous opposition that the intervenor must be aligned either with plaintiff or defendant.

Pennsylvania's position remains vigorous and unchanged in the face of the petition for additional diversion. She is opposed to any such additional diversion not justified under the doctrine of equitable apportionment. Counsel for the City of Philadelphia have been unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests. We do not see how Philadelphia's Home Rule Charter changes the situation. Though Philadelphia is now responsible for her own water system under the Charter, that responsibility is invariably served by the Commonwealth's position.[27]

Recall the first quoted sentence indicating that the Court was refraining from deciding whether Philadelphia's intervention would amount to a violation of the 11th amendment, [28] which in its entirety reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

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[27] *New Jersey* v. *New York*, 345 U.S. 369, 372-374 (1953). The Court added: "The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument miscontrues New York City's position in the case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey. Because of this position as a defendant, subordinate to the parent state as the primary defendant, New York City's position in the case raises no problems under the Eleventh Amendment. *Wisconsin* v. *Illinois and Sanitary District of Chicago*, 278 U.S. 367 (1929), and 281 U.S. 179 (1930); cf. *Georgia* v. *Tennesse Copper Co.*, 206 U.S. 230 (1907). New York City's position is not changed by virtue of the fact that she is presently the moving party, so long as the motion for modification of the 1931 decree comes within the scope of the authorization of paragraph 6 of that decree." 345 U.S. 369, 374-375. See also *Illinois* v. *Milwaukee*, 406 U.S. 91, 94-97 (1972), citing this and other cases, discussed in note 37 *infra*, and *United States* v. *Nevada*, 412 U.S. 534, 539 (1973).

[28] See note 9 *supra* for a discussion of the 11th amendment.

commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Following this first sentence the Court added:

> For the same reasons, we are not concerned with so much of the "*parens patriae*" argument as may be only a restatement of the proposition that original jurisdiction [in the United States Supreme Court] against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens. Cf. *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923).[29]

In *North Dakota* v. *Minnesota*, the Supreme Court had indicated that where a drainage system built by Minnesota had increased the flow of an interstate stream so that the water was thrown upon farms in North Dakota, the latter State had "such an interest as quasi-sovereign in the comfort, health, and prosperity of its farm owners that resort may be had to this Court for relief."[30] In addition to an injunction, North Dakota had requested a decree against Minnesota for damages of $5,000 for itself and $1,000,000 for its inhabitants whose farms were injured. But the Court said it could not award North Dakota damages for the benefit of such individuals in view of the 11th amendment. The Court noted that nearly all of the injured farmers had contributed to a fund to help finance the suit and that each contributor expected to share any damages recovered, in proportion to the amount of his loss. It concluded, "[I]t it inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled."[31] In this regard, the Court said:

> The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux Valley, is denied, for lack of jurisdiction.[32]

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[29] *New Jersey* v. *New York*, 345 U.S. 369, 372 (1953).

[30] *North Dakota* v. *Minnesota*, 263 U.S. 365, 374 (1923).

[31] *Id.* at 375.

[32] *Id.* at 375-376. The Court cited as support *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883), construing the effect of the 11th amendment. See especially the latter opinion at 90-91. After considering the facts in the case, the Court refused to grant North Dakota any of the requested relief, injunction or damages, because it concluded that Minnesota was not responsible for the floods.

In an earlier case in which Georgia sued a copper company in Tennessee to enjoin it from discharging noxious gas over lands in Georgia which caused injuries throughout five Georgia counties, the Court said that Georgia "is not lightly to be required to give

In interstate water suits, the Supreme Court has often appointed a special master[33] to investigate and report to it regarding findings of fact[34] or findings of fact, conclusions of law, and recommendations for a decree.[35]

SOME OTHER LITIGATION WITH INTERSTATE DIMENSIONS

Section 1251 of Title 28 of the United States Code provides in part:

> (a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;
>
> * * * *
>
> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
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> * * * *
>
> (3) All actions or proceedings by a State against the citizens of another State * * *.[36]

The United States Supreme Court conlcuded in Illinois v. Milwaukee:

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up *quasi*-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The Court said it would grant an injunction. Its remarks about the possible recovery of damages were added as *dicta*. The Court also said: "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power." *Id.* The exercise of this quasi-sovereign power, however, presumably would be subject to any overriding Federal jurisdiction, to rights of other States on behalf of their inhabitants, and to the State's own constitutional restrictions.

See also the discussion of *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), at note 63 *infra*, regarding the related question of the binding effect on its inhabitants of a State's entering into an interstate compact.

[33] In some cases the Court has appointed special commissioners to take testimony and submit it to the Court, without making findings of fact or stating conclusions of law. See, e.g., *Wyoming* v. *Colorado*, 287 U.S. 579 (1932).

[34] See, e.g., *New York* v. *Illinois*, 287 U.S. 578 (1932).

[35] See, e.g., *Arizona* v. *California*, 347 U.S. 986 (1954); *Wisconsin* v. *Illinois*, 271 U.S. 650 (1926). But see *Vermont* v. *New York*, 417 U.S. 270, 275 (1974), regarding sparing use of master to help carry out a decree.

[36] See also U.S. Const. art. III, § 2, which provides, *inter alia*, that "The judicial Power shall extend * * * to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State * * *.

"In all Cases * * * in which a State shall be a Party, the supreme Court shall have original jurisdiction."

> [T]he term "States" as used in 28 U.S.C. §1251(a)(1) should not be read to include their political subdivisions. That, of course, does not mean that political subdivisions of a State may not be sued under the head of our original jurisdiction, for 28 U.S.C. §1251 provides that "(b) the Supreme Court shall have original but not exclusive jurisdiction of: (3) all actions or proceedings by a State against the citizens of another State. . . ."
>
> If the named public entities of Wisconsin may, however, be sued by Illinois in a federal district court, our original jurisdiction is not mandatory.[37]

The Court noted that: "Title 28 U.S.C. §1331(a) provides that '[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.' "[38]

The Court also concluded that the instant suit could be brought in a Federal district court. The suit had been brought by Illinois against four Wisconsin cities and two local sewerage commissions for allegedly polluting Lake Michigan. The Court held that pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of section 1331(a), "that §1331(a) includes suits brought by a State," and "that §1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."[39]

In conclusion, the Court held:

> We deny, without prejudice, the motion [of Illinois] for leave to file [a bill of complaint under the Court's original jurisdiction]. While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an

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[37] *Illinois* v. *Milwaukee*, 406 U.S. 91, 98 (1972).

Earlier in its opinion the Court said: "Illinois presses its request for leave to file saying that the agencies named as defendants are instrumentalities of Wisconsin and therefore that this is a suit against Wisconsin which could not be brought in any other forum.

"Under our decisions there is no doubt that the actions of public entities might, under appropriate pleadings, be attributed to a State so as to warrant a joinder of the State as party defendant [citing and discussing various cases including some cases discussed at notes 8 and 27 *supra*, regarding the *parens patriae* doctrine].

* * * *

"We conclude that while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one." *Id.* at 94, 97.

[38] *Id.* at 98.

[39] *Id.* at 99, 100.

The U.S. Const. art. III, §2, provides, *inter alia*, that the judicial power of the United States shall extend to controversies "between a State and Citizens of another State." See note 36 *supra*.

> appropriate district court * * * whose powers are adequate to resolve the issues.[40]

In another case involving alleged pollution of interstate waters, *Ohio* v. *Wyandotte Chemicals Corporation*, decided 1 year before *Illinois* v. *Milwaukee*, the Court also declined to exercise its original jurisdiction. For various reasons, the Court indicated that the case could appropriately be dealt with, in the first instance, by the courts of Ohio.[41] The Court indicated that this particular case could not be disposed of by transferring it to a Federal district court.[42] However, in the subsequent *Illinois* v. *Milwaukee* case, the Court, after stating that the Federal Water Pollution Control Act "makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters," said that "The contrary indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n. 3, was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U.S.C. §1331(a)."[43]

In declining to exercise its original jurisdiction in the *Ohio* v. *Wyandotte* case, the Court, said, among other things:

> [A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand

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[40] 406 U.S. 91, 108. See also *United States* v. *Nevada*, 412 U.S. 534, 538 (1973).

[41] *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 495, 499-500 (1971). This opinion was criticized in Woods, W. D., Jr., & Reed, K. R., "The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case," 12 Ariz. L. Rev. 691 (1970).

[42] 401 U.S. 493, 498-499 n.3 (criticized in Woods & Reed, *supra* note 41), wherein the Court said, *inter alia*, that Federal question jurisdiction would not exist under 28 U.S.C. §1331 (discussed at note 38 *supra*) because an action such as this, if otherwise cognizable in Federal district court, would have to be adjudicated under State law.

The Court also said that 28 U.S.C. §1332 (1970), regarding diversity of citizenship (discussed at note 50 *infra*) does not deal with cases in which a State is a party. In the latter regard, see also *Illinois* v. *Milwaukee*, 406 U.S. 91, 97 n.1 (1972).

[43] *Illinois* v. *Milwaukee*, 406 U.S. 91, 102 n.3 (1972).

The Court also said, *inter alia*: "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 [1957]. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as *Texas* v. *Pankey*, 441 F. 2d 236 [10th Cir. 1971], recently held." In a footnote, the Court added: "While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." 406 U.S. at 103.

willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another, even though the dispute may be one over which this Court does have original jurisdiction.

As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. * * * This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law.

This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.

* * * What gives rise to the necessity for recognizing such discretion [in exercising original jurisdiction] is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court. * * *

[A]t this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities.[44]

The Court indicated that it would be inappropriate for it to attempt to adjudicate the issues presented. Its reasons were stated in part as follows:

History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth.* * *

The difficulties that ordinarily beset such cases are severely compounded by the particular setting in which this controversy has reached us. For example, the parties have informed us, without contradiction, that a number of official bodies are already actively involved in regulating the conduct complained of here.* * *

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[44] *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 497–499 (1971). U.S. Const. art. III, § 2, referred to by the Court, is quoted in part in note 36 *supra*.

Additionally, Ohio and Michigan are both participants in the Lake Erie Enforcement Conference, convened a year ago by the Secretary of the Interior pursuant to the Federal Water Pollution Control Act, 62 Stat. 1155, as amended. The Conference is studying all forms and sources of pollution, including mercury, infecting Lake Erie. The purpose of this Conference is to provide a basis for concerted remedial action by the States or, if progress in that regard is not rapidly made, for corrective proceedings initiated by the Federal Government.* * *[45]

In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis.

The nature of the case Ohio brings here is equally disconcerting. It can fairly be said that what is in dispute is not so much the law as the facts. And the factfinding process we are asked to undertake is, to say the least, formidable.* * *

Finally, in what has been said it is vitally important to stress that we are not called upon by this lawsuit to resolve difficult or important problems of federal law and that nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court.* * *

To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance.[46]

Although Justice Douglas wrote the unanimous opinion in the subsequent *Illinois* v. *Milwaukee* case, discussed above, he wrote a dissenting opinion in this case in which he asserted:

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[45] The Court at this point also mentioned a 1970 report and recommendations made by the International Joint Commission, United States and Canada.

These enforcement provisions are no longer in effect, having been supplanted by the new provisions of the 1972 Water Pollution Control Act Amendments, discussed in chapter 21 under "The Commerce Power—Exercise of the Commerce Power—Environmental Protection Agency."

[46] 401 U.S. 493, 501-505.

> The complaint in this case presents basically a classic type of case congenial to our original jurisdiction. It is to abate a public nuisance.* * *
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> * * * *
>
> This litigation, as it unfolds, will, of course, implicate much federal law. The case will deal with an important portion of the federal domain—the navigable streams and the navigable inland waters which are under the sovereignty of the Federal Government.* * *
>
> Congress has enacted numerous laws reaching that domain.* * *
>
> * * * *
>
> Much is made of the burdens and perplexities of these original actions. Some are complex, notably those involving water rights.
>
> The drainage of Lake Michigan with the attendant lowering of water levels, affecting Canadian as well as United States interests, came to us in an original suit in which the Hon. Charles E. Hughes was Special Master. This Court entered a decree, *Wisconsin* v. *Illinois*, 278 U.S. 367 [1929], and has since that time entered supplementary decrees * * *.
>
> The apportionment of the waters of the Colorado between Arizona and California was a massive undertaking entailing a searching analysis by the Special Master, the Hon. Simon H. Rifkind. Our decision was based on the record made by him and on exceptions to his Report. *Arizona* v. *California*, 373 U.S. 546 [1963].
>
> The apportionment of the waters of the North Platte River among Colorado, Wyoming, and Nebraska came to us in an original action in which we named as Special Master, Hon. Michael J. Doherty. We entered a complicated decree, which dissenters viewed with alarm, *Nebraska* v. *Wyoming*, 325 U.S. 589 [1945], but which has not demanded even an hour of the Court's time during the 26 years since it was entered.
>
> If in these original actions we sat with a jury, as the Court once did, * * * there would be powerful arguments for abstention in many cases. But the practice has been to appoint a Special Master which we certainly would do in this case. We could also appoint—or authorize the Special Master to retain—a panel of scientific advisers. The problems in this case are simple compared with those in the water cases discussed above. * * *
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> * * * *
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> * * * I can think of no case of more transcending public importance than this one.[47]

Disputes over water rights held by persons in different States might in some circumstances be heard in the courts of either State,[48] or be heard in the lower Federal courts where diversity of citizenship of the parties gives Federal jurisdiction.[49] Federal district courts have original jurisdiction in such cases if

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[47] *Id.* at 505-508, 510-512 (1971).

Special masters are discussed at notes 33-35 *supra.*

[48] See, e.g., *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U.S. 258, 262 (1910), discussed in chapter 15 at note 366.

[49] The U.S. Const. art. III, § 2, provides, *inter alia*, that the judicial power of the United

the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.[50] For purposes of diversity of citizenship, political subdivisions are citizens of their respective States.[51] Moreover, as noted earlier, the Federal district courts have original jurisdiction "of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and *arises under the Constitution, laws, or treaties of the United States.*"[52]

The binding effect of a judgement or decree may depend upon such considerations as jurisdiction over the persons or *res* involved in such a controversy. And in instances where State laws are deemed applicable, there may be questions regarding such matters as which State's laws shall apply and how they shall apply. Some cases dealing with such complicated matters have been discussed in previous chapters.[53]

INTERSTATE COMPACTS OR AGREEMENTS RELATING TO WATER

Interstate compacts may have various effects upon private rights and State legislation relating to water. An interstate compact may operate as a restriction upon private rights held under State law that are inconsistent with the compact.[54] Furthermore, State legislation which is inconsistent with the compact in some instances may be held to be unconstitutional.[55]

As discussed later under "Existing Water Apportionment Compacts Involving Western States," these compacts ordinarily have allowed each State to control the intrastate uses of its apportioned water, subject to such apportionment. Some compacts, however, have included some rather specific provisions

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States shall extend to controversies "between Citizens of different States." See also §1441 discussed in note 52 *infra*.

[50] 28 U.S.C. §1332 (1970).

[51] *Illinois* v. *Milwaukee*, 406 U.S. 91, 97-98 (1972).

[52] 28 U.S.C. §1331(a) (1970), discussed at notes 38-40 *supra*. (Emphasis added.) Regarding multiple claimants, see *Zahn* v. *Int'l Paper Co.*, 414 U.S. 291 (1973).

28 U.S.C. §1441 (1970) provides, *inter alia*, that if any civil action (of which Federal district courts have original jurisdiction) is brought in a State court, it may be removed to the appropriate district court by the defendant or defendants, except as may be otherwise expressly provided by Congress. This shall be without regard to the citizenship or residence of the parties if the original jurisdiction is founded on a claim or right arising under the Constitution, laws, or treaties of the United States. Any other such action shall be removable only if none of the defendants, properly joined and served, is a citizen of the State in which such action is brought.

[53] See especially "Some General Procedural Matters in Water Rights Litigation—Jurisdiction—Stream Crossing State Line" in chapter 15.

Such questions are also discussed in 2 "Waters and Water Rights," §131 (R. E. Clark ed. 1967); Woods & Reed, *supra* note 41.

[54] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

[55] See, e.g., *Green* v. *Biddle*, 21 U.S. (8 Wheat.) *1, *11-17 (1823).

regarding the use of water within all or some of the party States, in addition to the more general apportionment provisions.[56]

The Consent Requirement

The interstate compact clause of the United States Constitution provides that "No State shall, without the consent of Congress * * * enter into any Agreement or Compact with another State * * *."[57] In *Virginia* v. *Tennessee* (1893), the United States Supreme Court said, however, that the requirement of congressional consent applies only to those compact or agreements "directed to the formation of any combination tending to increase political power in the States, which may encroach upon or interfere

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[56] See the discussion at note 94 *infra*.

Regarding rather similar effects of interstate decisions of the United States Supreme Court, see the discussion at note 19 *et seq. supra.*

[57] U.S. Const. art. I, § 10.

As an instance where Congress refused to consent to an interstate (flood control) compact deemed inconsistent with Federal interests and responsibilities, the Merrimack River Compact between Massachusetts and New Hampshire failed of ratification. For its history in Congress, see 81 Cong. Rec. 7165 (1937) (introduction of Senate Joint Resolution 178); *Id.* at 7644 (reported back from Comm. on Commerce); *Id.* at 8393 (debated); Senate Report No. 952, 75th Cong., 1st Sess., 2 Senate Reports (1937); 81 Cong. Rec. 9295 (1937) (introduction of the House Joint Resolution 494 and referral to Comm. on Flood Control); *Id.* at 9549 (reported back with amendments); *Id.* at 9669 (debated); House Report No. 1632, 75th Cong. 1st Sess., House Reports (1937). However, the Congress later did consent to a subsequent compact, the Merrimack River Flood Control Compact, 71 Stat. 18 (1957).

Moreover, since the consent of Congress takes the form of legislation, it is subject to the presidential veto power. President Roosevelt vetoed the act consenting to the original Republican River Compact among Colorado, Kansas, and Nebraska, on the ground that it would withdraw the navigation jurisdiction of the United States over the river and would restrict the authority of the United States to construct irrigation projects. See H.R. Doc. No. 690, 77th Cong., 2nd Sess. (1942).

However, a subsequent version of the Republican River Compact [57 Stat. 86 (1943)] between the same States was consented to by Congress subject to certain enacted provisions, and the consenting legislation was signed by the President, with some expressed reservations, in 1943. "Documents on the Use and Control of the Waters of Interstate and International Waters: Compacts, Treaties, and Adjudications," H.R. Doc. No. 319, 90th Cong., 2d Sess. 267 (T. R. Witmer ed. 1968).

Congress has enacted some general provisions regarding interstate compacts. These include 16 U.S.C. § 552 (1970) which gives Congressional consent to each State to enter into any interstate compact or agreement, not in conflict with any Federal law, "for the purpose of conserving the forests and the water supply" of the party States. 33 U.S.C. § 1253 (Supp. II, 1972) similarly gives consent for States to enter into interstate compacts or agreements for cooperative effort to prevent or control water pollution and enforcement of their respective laws, and to establish joint or other agencies for effectuating such compacts or agreements, but states "No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress." See also 33 U.S.C. § 701d (1970), regarding interstate compacts or agreements for participation in certain flood control projects.

with the just supremacy of the United States."[58] The Court repeated this statement in some other cases.[59] But in *Dyer* v. *Sims* (1951), regarding the

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[58] *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). In this regard, the Court referred to Story's *Commentaries*, §1403, referring to a previous part of the same section of the Constitution. Engdahl, D. E., "Characteristics of Interstate Arrangements: When Is a Compact Not a Compact?," 64 Mich. L. Rev. 63 (1965), critically examines the Court's quoted criteria for determining which kinds of compacts require consent.

Earlier in its opinion, 148 U.S. at 518, the Court said, "There are many matters upon which different States may agree that can in no respect concern the United States." The Court gave some examples, none of which involved water apportionment. The Court also said that the answer to the question, "to what compacts or agreements does the Constitution apply?" can be determined "by looking at the object of the constitutional provision, and construing the terms 'agreement' and 'compact' by reference to it." *Id.* at 519.

The Court in another case also said, "Its prohibition extends only to future agreements or compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce." *Wharton* v. *Wise*, 153 U.S. 155, 171 (1894).

For the view that congressional consent to the Great Lakes Basin Compact was not constitutionally required "since it sponsors among the member States merely a consulting and advisory organization [commission], with no agreed substantive program," see Testimony of Murray Preston, Counsel for Great Lakes-St. Lawrence Association, Hearings on S. 1416 Before the Subcomm. of the Senate Comm. on the Judiciary, 85th Cong., 2nd Sess. 42 (1958). Moreover, that compact did not include any mandatory substantive provisions regarding such matters as interstate water allocation. Unlike the existing Western water apportionment compacts discussed below, the Great Lakes Basin Compact did not expressly require the consent of Congress to make it effective. Nevertheless, Congress did consent to the Compact, with various limitations and reservations. 82 Stat. 414 (1968).

[59] *Wharton* v. *Wise*, 153 U.S. 155, 170 (1894); *Louisana* v. *Texas*, 176 U.S. 1, 17 (1900); *Stearns* v. *Minnesota*, 179 U.S. 223, 246 (1900).

In *North Carolina* v. *Tennessee*, 235 U.S. 1 (1914), without establishing a formal compact, North Carolina and Tennessee had both enacted statutes appointing commissioners to determine a disputed boundary between them. Each statute provided that the commissioners' joint decision would be binding on that State and their joint decision was subsequently ratified by legislation in each State. *Id.* at 6-9. In this regard, the Court said, *inter alia*, "But it is contended by Tennessee that if the commissioners located such line the location was a departure from the cession act and the act of Congress adopting it and that such line not having received the consent or sanction of Congress is invalid and in conflict with Article I, §10, Clause 3 of the Federal Constitution providing that 'No state shall, without the consent of Congress, . . . enter into any agreement or compact with another State,' etc. If the fact of such departure could be conceded the conclusion might be disputed. *Virginia* v. *Tennessee*, 148 U.S. 503. But the fact cannot be conceded. The cession act is very general and necessarily demanded definition to satisfy the requirements of a boundary line, a line not only necessary to mark private property but political jurisdiction. This was realized and commissioners were appointed to run and settle the line exactly. Their work as executed was confirmed by the States." *Id.* at 15-16. The Court did not expressly quote or deal with the language quoted above from the earlier *Virginia* v. *Tennessee* case.

Ohio River Valley Water Sanitation Compact, the Court said, "Not only was congressional consent required, *as for all compacts*; direct participation by the Federal Government was provided in the President's appointment of three members of the Compact Commission. Art. IV; Art. XI, §3." (Emphasis added.)[60] While both quoted statements appear to have been *dicta*, rather than direct holdings regarding required congressional consent, the statement in the *Virginia* case and its repetition in some subsequent cases appears to have been much more carefully considered than the later statement in the *Dyer* case that such consent was required "for all compacts," which appears to have been merely an offhand remark.[61]

At any rate, the existing water apportionment compacts involving the 19 Western States generally have expressly required the consent of Congress to make them effective. Some of the provisions in this regard in such compacts and the consenting legislation are discussed later under "Existing Water Apportionment Compacts Involving Western States."[62]

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[60] *Dyer* v. *Sims*, 341 U.S. 22, 27-28 (1951).

[61] In general accord, see Muys, J. C., "Interstate Compacts and Regional Water Resources Planning and Management," 6 Nat. Res. Lawyer 153, 173 (1973).

Moreover, the context of the statement in the *Dyer* case suggests the possible construction that the Court may have had reference only to required congressional consent *by the terms of the Compact itself.* There was such a requirement in this Compact. See art. XI of the Compact, set out in 54 Stat. 752 (1940). But since not all compacts have expressly required such consent, this construction is perhaps unlikely.

In *Virginia* v. *West Virginia*, 246 U.S. 565, 601 (1918), the Court said, "The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement." To the extent this language may have implied that congressional consent to *all* interstate compacts and agreements is required, which is unclear, it appears to have been *dicta* in this regard, and, like the statement in the *Dyer* case, it did not consider the Court's earlier statement to the contrary in *Virginia* v. *Tennessee*.

Each of these cases was referred to in *Opinion of The Justices*, 344 Mass. 770, 184 N.E.(2d) 353, 355 (1962).

[62] See the discussion in note 69 and at notes 94-97 *infra.*

The Animas-LaPlata Project Compact did not by its terms expressly require congressional consent. But this apparently was because congressional consent was given prior (and subject to) its later ratification by each of the party States. 82 Stat. 897 (1968). See the discussion at note 97 *infra.*

Effects of Interstate Compacts Upon Private or Public Rights Under State Law

Interstate compacts may adversely affect private or public water rights previously established by State law. Perhaps the most instructive case in this regard is *Hinderlider* v. *La Plata River & Cherry Creek Ditch Company*, decided by the United States Supreme Court in 1938.[63] Under the laws of Colorado and by decree of a Colorado court, in 1898 the ditch company was declared to have an appropriation right to divert 39¼ c.f.s. of water from the La Plata River, subject to five senior priorities aggregating 19 c.f.s. If the ditch company drew all that water in midsummer, none would be available to New Mexico water claimants downstream. These claimants had made appropriations, some of which were earlier in time than the ditch company's, under New Mexico's appropriation law. In 1923, Colorado and New Mexico agreed to the terms of the La Plata River Compact, and Congress consented to it in 1925. Pursuant to this compact, the respective State engineers had agreed that in order to put the water to its most efficient use in the hot summer months when the river was very low, the whole available supply should be rotated between the two States during alternating 10-day periods. The ditch company claimed unconstitutional interference with its vested property rights. The Colorado Supreme Court agreed:

> There is not the slightest pretense, either in this compact itself or in the proceedings leading up to it, to a decision of the question of what water Colorado owns, or what water New Mexico owns, or what their respective citizens own. It is a mere compromise of presumably conflicting claims, a trading therein, in which the property of citizens is bartered, without notice or hearing, and with no regard to vested rights.[64]

The United States Supreme Court disagreed and reversed, upholding the power of the engineers to rotate the river under the terms of the Compact. The Court assumed that the right of the ditch company was a property right so far as concerned Colorado, but it pointed out that "the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof."[65] It further pointed out that the declared purpose of the compact was the equitable

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[63] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), rehearing denied, 305 U.S. 668 (1938). This case also is discussed in chapter 9 under "Rotation in Use of Water—Interstate Compact."

[64] *La Plata River & Cherry Creek Ditch Co.* v. *Hinderlider*, 93 Colo. 128, 133, 25 Pac. (2d) 187, 189 (1933).

[65] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). The equitable apportionment doctrine is discussed under "Litigation Between States," *supra*.

distribution of the waters of the river and said:

> The assumption that a judicial or quasi-judicial decision of the controverted claim is essential to the validity of a compact adjusting them, rests upon misconception. * * * The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations.[66]

The Court said that resort to the judicial remedy is never essential to adjustment of interstate controversies unless the States are unable to agree or Congress refuses its consent to an interstate compact. Consequently, apportionment of interstate waters by compact is as binding as apportionment by judicial decree, and the alternate-flow arrangement was an acceptable method for accomplishing such apportionment. The Court said:

> Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.
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> As the States had power to bind by compact their respective appropriators by division of the flow of the stream, they had power to reach that end either by providing for a continuous equal division of the water * * * or by providing for alternate periods of flow to the one State and to the other of all the water in the stream. * * * [T]he rotating supply which the compact authorized, and the two State Engineers agreed upon, was clearly more beneficial to the Ditch Company than to have given to it and other Colorado appropriators steadily one-half of the water in the river. The delegation to the State Engineers of the authority to determine when the waters should be so rotated was a matter of detail clearly within the constitutional power. There is no claim that the authority conferred was abused.[67]

However, there seems to be no reason why a State may not compensate for water rights which it has impaired or destroyed by interstate compact.[68]

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[66] 304 U.S. at 104.

[67] *Id.* at 106, 108.

The Court also noted: "It has been suggested that this Court lacks jurisdiction to determine the validity and effect of the Compact because Colorado and New Mexico, the parties to it, are not parties to this suit and cannot be made so. The contention is unsound." *Id.* at 110-111. See also the discussion of this case's statements in this regard in *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 427 (1940).

[68] In some instances, a State might take this possibility into account when negotiating a compact, in that the prospect of such compensation might deter it from coming to an agreement or cause it to seek apportionment advantages which would offset such compensation.

Existing Water Apportionment Compacts Involving Western States

Some 21 interstate compacts providing for the apportionment or allocation of water, involving one or more of the 19 Western States, had been consented to by Congress and were in effect through 1974.[69] A few of these also involved

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[69] These compacts (and the party States) include, in alphabetical order (with the applicable congressional consenting legislation, which, with the exception of the Colorado River Compact, includes the text of the compact):

Animas-La Plata Project Compact (between Colorado and New Mexico), 82 Stat. 897 (1968).

Arkansas River Basin Compact (between Kansas and Oklahoma), 80 Stat. 1409 (1966).

Arkansas River Basin Compact (between Oklahoma and Arkansas), 87 Stat. 569 (1973).

Arkansas River Compact (between Colorado and Kansas), 63 Stat. 145 (1949).

Bear River Compact (among Idaho, Utah, and Wyoming), 72 Stat. 38 (1958).

Belle Fourche River Compact (between South Dakota and Wyoming), 58 Stat. 94 (1944).

Canadian River Compact (among New Mexico, Texas, and Oklahoma), 66 Stat. 74 (1952).

Colorado River Compact (among Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming), 45 Stat. 1057, 1064 (1928). The text of this Compact appears in 70 Cong. Rec. 324 (1928).

Costilla Creek Compact (between Colorado and New Mexico), 77 Stat. 350 (1963).

Kansas-Nebraska Big Blue River Compact, 86 Stat. 193 (1972).

Klamath River Basin Compact (between California and Oregon), 71 Stat. 497 (1957).

La Plata River Compact (between Colorado and New Mexico) 43 Stat. 796 (1925).

Pecos River Compact (between New Mexico and Texas), 63 Stat. 159 (1949).

Republican River Compact (among Colorado, Kansas and Nebraska), 57 Stat. 86 (1943).

Rio Grande Compact (among Colorado, New Mexico, and Texas), 53 Stat. 785 (1939).

Sabine River Compact (between Texas and Louisiana), 68 Stat. 690 (1954).

Snake River Compact (between Idaho and Wyoming), 64 Stat. 29 (1950).

South Platte River Compact (between Colorado and Nebraska), 44 Stat. 195 (1926).

Upper Colorado River Basin Compact (among Arizona, Colorado, New Mexico, Utah, and Wyoming), 63 Stat. 31 (1949).

Upper Niobrara River Compact (between Nebraska and Wyoming), 83 Stat. 86 (1969).

Yellowstone River Compact (among Montana, North Dakota, and Wyoming), 65 Stat. 663 (1951).

While the date of the consent of Congress is generally the effective date of the compact, there are two exceptions. In the case of the Animas-La Plata Project Compact, congressional consent was given to the Compact on September 30, 1968, subject to ratification by both of the party States, at which time the Compact would become effective. 82 Stat. 897 (1968). The Compact was ratified by both States in 1969. Colo. Laws 1969, ch. 375; N. Mex. Laws 1969, ch. 57. The congressional legislation consenting to the Compact provided that the Animas-La Plata Federal

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States lying to the East.[70] Each of the 19 Western States, except Washington, Alaska, and Hawaii, was party to at least one such compact. Some were party to as many as 7 (Wyoming), 8 (New Mexico), or 9 (Colorado) such compacts.

These compacts appear to have as their primary purpose the apportionment or allocation of the waters involved. This appears to be the sole express purpose of some of the compacts.[71] But a number of them also have provisions with respect to such related purposes as the construction and utilization of new storage reservoirs,[72] flood control,[73] and pollution control.[74]

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reclamation project should not be undertaken until and unless the party States ratified the Compact. See the discussion at note 97 *infra*. In the case of the Colorado River Compact, the effective date was 1929, the year following the congressional "approval" of the Compact. Congressional "approval" was granted subject to (1) ratification by the seven States, or (2) ratification by California and five of the remaining States, and, further, California's irrevocable and unconditional legislative acceptance of certain limitations on its use of the waters of the Colorado River. 45 Stat. 1057, 1058, §4(a) (1928). See Cal. Stat. 1929, p. 38, for California's acceptance of this condition. See 46 Stat. 3000 (1929) for the President's proclamation declaring that the conditions had been fulfilled and the compact was in effect.

The first water apportionment compact negotiated by the States was the Colorado River Compact, signed by the negotiating commissioners in 1922. The first to be consented to by Congress was the La Plata River Compact, in 1925.

[70] See the Sabine River Compact (between Texas and Louisiana) and the Arkansas River Basin Compact (between Oklahoma and Arkansas).

[71] See, e.g., the La Plata River Compact and the Animas-La Plata Project Compact.

[72] See, e.g., the Bear River Compact, art. VI; the Sabine River Compact, art. VI; the Pecos River Compact, art. IV(c).

Some provisions regarding storage reservoirs as they pertain to interstate water apportionment are discussed at notes 107, 113, and 121 *infra*.

[73] See, e.g., the Pecos River Compact, art. IV(g).

[74] With respect to pollution control functions, the Klamath River Basin Compact (between California and Oregon) has provided, *inter alia*, that the Commission may make recommendations to the State and Federal Governments regarding reasonable minimum standards for the quality of the waters involved. Upon the complaint of the water pollution control agency of either State that interstate pollution originating in the other State is not being prevented, the Commission shall investigate, hold a conference, and recommend appropriate action. If such action is not taken within a reasonable time, the Commission shall hold a hearing and make a finding as to whether interstate pollution exists, and if so, shall order that corrective action be taken by those found to be causing it. A State or Federal court may, on petition of the Commission, be requested to enforce such an order. Klamath River Basin Compact, art. VII.

Also see note 121 *infra*, regarding a provision in the Rio Grande Compact, art. III, that Colorado shall not receive credit for any water delivered into the Rio Grande from the Closed Basin by works constructed after 1937 unless such water contains no more than a certain proportion of sodium ions to positive ions. The Rio Grande Compact also declares that all controversies between New Mexico and Texas regarding the quantity and *quality* of the water of the Rio Grande "are composed and settled." However, the Compact specifically provides that should one signatory State change the character or *quality* of the water to the injury of another signatory State, "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme

These compacts have dealt with areas ranging in size from huge river basins, such as the Colorado River Basin, to relatively small watershed areas, such as the Costilla Creek watershed area on the Colorado-New Mexico border.

The compacts generally provide only for the direct apportionment of the use of waters of surface watercourses. However, the Kansas-Nebraska Big Blue River Compact, consented to by Congress in 1972, provides that (in addition to regulating diversions from natural stream flows by appropriators junior to November 1, 1968) to maintain specified minimum stream flows from May through September at the State-line gaging stations, Nebraska shall, among other things, regulate (in the same manner that diversion of natural stream flow is regulated) withdrawals of water from those irrigation wells (excluding certain replacement wells) installed after November 1, 1968, in the alluvium and valley side terrace deposits within 1 mile from the thread of the river along specified sections of certain streams. However, if the Compact Administration determines that this regulation fails to yield any measurable increase in the stream flows at the State-line gaging stations, the regulation of such wells shall be discontinued.[75]

The Upper Niobrara Compact, consented to by Congress in 1969, authorized ground water investigations to begin within 1 year from the Compact's effective date in the area of the Wyoming-Nebraska State line, to be conducted

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Court of the United States for redress * * *." In addition, the parties agreed that "Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law." *Id.* art. XI.

In providing for exchange of water, the Bear River Compact declares, *inter alia*, that "in making such exchange the replacement water shall not be inferior in quality for the purpose used * * *." Art. VIII.

Some compacts provide that their purpose, among other things, is to encourage active pollution-abatement programs of the States involved and to seek further reduction of water pollution. See Arkansas River Basin Compact (between Kansas and Oklahoma), art. I; Kansas-Nebraska Big Blue River Compact, preamble; Arkansas River Basin Compact (between Oklahoma and Arkansas), art. I. The Arkansas River Basin Compact (between Kansas and Oklahoma) provides, *inter alia*, that the party States agree (1) that the appropriate State agencies shall cooperate to investigate and abate sources of alleged interstate pollution within the basin whenever such matters are called to the attention of the agencies by the Commission, (2) to enter into joint programs to identify and control sources of natural pollution within the basin which the Commission finds are of interstate significance, and (3) to the principle of individual State efforts to abate man-made pollution within each State. In addition, "[N]either state may require the other to provide water for the purpose of water-quality control as a substitute for adequate waste treatment * * *." Art. IX. See also art. I(D). Similar provisions are contained in the Kansas-Nebraska Big Blue River Compact art. VI, and the Arkansas River Basin Compact (between Oklahoma and Arkansas), art. VII.

The Pecos River Compact, art. IV, provides, *inter alia*, that the party States, New Mexico and Texas, shall cooperate with agencies of the United States to devise and effecutate means of alleviating the salinity conditions of the Pecos River.

[75] Kansas-Nebraska Big Blue River Compact, § 5.2(b).

by the two States in cooperation with the United States Geological Survey. The Compact provided that if and when the results of such investigations indicate interstate apportionment of ground water would be desirable, the two States are to negotiate a supplement to the Compact for this purpose.[76]

Following are some provisions that have been commonly included in Western interstate compacts regarding water apportionment or allocation. The compacts usually have included in the preamble or introduction statements regarding their general purposes and motives. These usually have included statements to the effect that they are entered into in the interests of "interstate comity" and are intended to remove causes of present and future controversies and to provide for the equitable apportionment, division, or distribution of the use of waters of the river, river basin, or river system to which the compacts pertain.[77] A number of compacts also have included statements to the effect that they are to promote continued development of such river, river basin, or river system and/or to promote efficient use of the waters for multiple purposes.[78]

Succeeding articles of the compacts usually have set forth the methods and terms for apportioning the water usage[79] and often contain definitions of certain terms used in the compacts.[80] If a commission or administration has been provided for, provisions have been included regarding the designation and general powers and duties of the commissioners or representatives.[81]

The compacts generally have included a statement substantially to the effect that the compact is based upon the physical and other conditions peculiar to the affected river, river basin, or river system, and none of the party States, nor the United States Congress by its consent to the compact, concedes to the establishment of any general principle of law or precedent with respect to any other interstate stream.[82]

Some interstate compacts have not provided for any interstate agency to carry out the compact provisions; the administration of such compacts has been assigned to specified officials of the party States. A majority of such

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[76] See art. VI of the Compact.

Article VI(A) states, "Nebraska and Wyoming recognize that the future use of ground water for irrigation in the Niobrara River Basin may be a factor in the depletion of the surface flows of the Niobrara River * * *."

[77] See, e.g., the Upper Niobrara River Compact, art. I(A), and the Pecos River Compact, art. I.

[78] See, e.g., the Bear River Compact, art. I(A), and the Snake River Compact, art. I(A).

[79] See, e.g., the Kansas-Nebraska Big Blue River Compact, art. V, and the Upper Niobrara River Compact, art. V.

[80] See, e.g., the Arkansas River Basin Compact (between Kansas and Oklahoma), art. II, and the Klamath River Basin Compact, art. II.

[81] See, e.g., the Arkansas River Basin Compact (between Colorado and Kansas), art. VIII, and the Bear River Compact, art. III.

[82] See, e.g., the Kansas-Nebraska Big Blue River Compact, §5.1, and the Belle Fourche River Compact, art. I(B).

compacts have provided:

> It shall be the duty of the [signatory] States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.[83]

However, most compacts have provided for an interstate commission or administration, having one or more members from each party State,[84] to carry

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[83] Upper Niobrara River Compact, art. III. See also the Belle Fourche River Compact, art. III; and the Snake River Compact, art. VI(A). Somewhat different provisions are included in the South Platte River Compact, art. VIII.

The majority of such compacts also provide, *inter alia*, that the U.S. Geological Survey or any successor agency may collaborate with the State officials in the collection, correlation, and publication of relevant data. See, e.g., the Upper Niobrara River Compact, art. III.

Under the Colorado River Compact, the chief official charged with the administration of water rights in each signatory State and the heads of the U.S. Geological Survey and Bureau of Reclamation are to cooperate in determining and coordinating the facts as to flow, appropriation, consumption and use of water in the Basin, and the annual flow at Lee Ferry, and also perform such other duties as may be assigned. Colorado River Compact, art. V. In addition, commissioners shall be appointed by the Governors, if requested by any Governor, to adjust any claim or controversy, subject to ratification by the legislatures of the affected States, should any claim or controversy arise between any two or more signatory States over the meaning or performance of the Compact's terms and other specified matters. *Id.* art. VI.

The Snake River Compact provides, in art. VI(C), that if the State agencies of the two signatory States fail to agree on any matter necessary to the administration of the Compact, the Director of the U.S. Geological Survey, or any successor to his duties, shall be asked to appoint a Federal representative to participate in deciding the points of disagreement by majority vote.

[84] There is considerable variation in the compact provisions for designating, appointing, or selecting the members of the commission or administration. The provisions declare that the members shall be designated according to the applicable State laws; or shall be appointed by the Governor; or shall be certain named State officials or officials in charge of administering State water laws, water rights, or water supplies; or shall be appointed from designated geographic areas; or some combination of the foregoing.

A number of compacts require a unanimous vote of the representatives to effectuate all or certain decisions. Arkansas River Compact (between Colorado and Kansas), art. VIII(D); Canadian River Compact, art. IX(a); Costilla Creek Compact, art. VIII; Klamath River Basin Compact, art. IX(A)(2); Rio Grande Compact, art. XII; Kansas-Nebraska Big Blue River Compact, § 3.3. The Bear River Compact requires the "vote of at least two-thirds of the Commissioners when a quorum [defined as six Commissioners, which shall include two Commissioners from each State] is present * * *." Art. III(A). The Upper Colorado River Basin Compact requires the concurrence of four of the five Commissioners, unless otherwise provided in the Compact. Arts. VIII(a) and (e). The Sabine River Compact requires a three-fourths vote of the members. Arts. VII(b) and (e).

out designated functions.[85] The compacts usually also have provided that the President (or in a few cases, an authorized Federal official or agency[86]) be requested to designate a Federal commissioner or representative.[87] When so designated, the Federal commissioner or representative is to function as the chairman or presiding officer but usually without any voting powers.[88] However, the Upper Colorado River Compact, consented to by Congress in 1949, provides that the Federal Commissioner shall be the presiding officer and have the same voting and other powers and rights as the State Commissioners.[89] [The Delaware River Basin Compact pertaining to an Eastern river basin, consented to by Congress in 1961, provided not only for a Federal voting member of the Commission,[90] but it also made the Federal Government a party to the Compact (subject to certain disclaimers, conditions, or reservations) upon its consent to and joinder in the Compact.[91]]

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[85] The Yellowstone River Compact created a Commission to administer the Compact's provisions as between Montana and Wyoming but no such Commission was considered to be necessary to administer its provisions as between Montana and North Dakota. Art. III(A).

[86] *Id.* art. III(A); Arkansas River Basin Compact (between Oklahoma and Arkansas), art. VIII(A).

[87] See, e.g., the Upper Colorado River Basin Compact, art. VIII(a), and the Rio Grande Compact, art. XII.

The Costilla Creek Compact does not provide for the appointment of a Federal member. See art. VIII.

[88] See, e.g., the Bear River Compact, art. III(A); the Pecos River Compact, art. V(a); the Arkansas River Basin Compact (between Kansas and Oklahoma), art. X(A).

[89] Upper Colorado River Compact, art. VIII.

The Yellowstone River Compact, consented to by Congress in 1951, provided that the requested Federal member could vote only to break a deadlock. Arts. III(A) and (F).

The Arkansas River Compact, consented to by Congress in 1949, provided that the requested Federal member, although without vote, could be unanimously requested to serve as a binding arbitrator in the event of a divided vote of the State members on any matter. Arts. VIII(C) and (D).

[90] However, unlike the Upper Colorado River Compact, the Delaware River Basin Compact did not provide that the Federal member automatically become chairman of the Commission. The chairmanship is voted upon annually by the members. See § 2.6 of that Compact which is set out in 75 Stat. 688, 692 (1961).

[91] 75 Stat. 688 (1961).

Section 1.4 of the Compact provides, "Nothing in this compact shall be construed to relinquish the functions, powers or duties of the Congress of the United States with respect to the control of any navigable waters within the basin, nor shall any provision hereof be construed in derogation of any of the constitutional powers of the Congress to regulate commerce among the states and with foreign nations. The power and right of the Congress to withdraw the federal government as a party to this compact or to revise or modify the terms, conditions and provisions under which it may remain a party by amendment, repeal or modification of any federal statute applicable thereto is recognized by the signatory parties."

In addition, the legislation consenting to the Compact, 75 Stat. 688, 713, § 15.1,

Congress often has expressly given advance authorization to particular States to conduct negotiations for a specified interstate compact.[92] Moreover, a Federal representative has been designated to participate in the negotiations and report to Congress.[93]

Certain conditions and restrictions to protect Federal interests usually have been expressly included in the compacts, in the consenting Congressional legislation, or both. The Upper Colorado River Basin Compact includes, among other provisions, the following exclusions or restrictions:

> Nothing in this Compact shall be construed as:
>
> (a) Affecting the obligations of the United States of America to Indian tribes;

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contained several conditions, reservations, prohibitions, or disclaimers regarding a variety of matters, including the Commission's projects and charges for water withdrawals and diversions, and the Commission's and Federal agencies' financial and other obligations and authorities. [On the other hand, the Compact and consenting legislation includes certain provisions for coordinating Federal projects with the Commission's activities. See art. 11 of the Compact and 75 Stat. 688, 715, § 15.1(s).]

Subject to such provisions, the Commission shall develop and effectuate plans, policies, and projects relating to the water resources of the Basin. See § 3.1 of the Compact. Section 3.3 provides that the Commission may from time to time equitably apportion the basin's waters among the party States, within certain limitations (including some specific limitations regarding a decree of the U.S. Supreme Court set out in § 3.5, and subject to judicial review). Subject to § § 3.3 and 3.5, no new project that would have a substantial effect on the basin's water resources shall be undertaken by any person, corporation, or governmental authority without the Commission's approval (subject to judicial review), which shall be granted if the project would not substantially impair or conflict with the comprehensive plan. See § 3.8. The Commission also may designate "protected areas" and regulate water use by permits therein, and may declare a "water supply emergency" in an area and govern the water use by general regulation or special permit therein. See art. 10 of the Compact.

Rather similar provisions were included in the Susquehanna River Basin Compact, regarding another Eastern river basin, consented to and joined in by Congress in 1970. 84 Stat. 1509 (1970). For the correspondingly similar provisions in the Susquehanna Compact and consenting legislation, see § 1.4 of the Compact (powers of Congress; withdrawal); 84 Stat. 1509, 1537, § 2 of the consenting legislation (reservation of congressional power); art. 12 of the Compact and 84 Stat. 1509, 1539, § 2(r) of the consenting legislation (intergovernmental relations); § § 3.1, 3.8 and 3.10 of the Compact (powers and duties of the Commission); and art. 11 of the Compact (protected areas and emergencies).

[92] See, e.g., 65 Stat. 736 (1951), authorizing negotiations for the Sabine River Compact. But no such advance congressional authorization for such negotiations appears to have been expressly given in regard to some of the compacts, including the Costilla Creek Compact, the La Plata River Compact, and the South Platte River Compact.

[93] See, e.g., 65 Stat. 736 (1951), regarding the Sabine River Compact.

In 1955, Congress provided that the Federal representative would participate as chairman of the negotiations for the Arkansas River Basin Compacts between Kansas and Oklahoma, and between Oklahoma and Arkansas. 69 Stat. 184, 631 (1955).

(b) Affecting the obligations of the United States of America under the Treaty with the United Mexican States (Treaty Series 994);

(c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System, or its capacity to acquire rights in and to the use of said waters;

(d) Subjecting any property of the United States of America, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States of America, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, State agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(e) Subjecting any property of the United States of America, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact.[94]

In consenting to a number of compacts, the Congress has expressly reserved the right to "alter, amend, or repeal" the compact.[95]

On the other hand, some compacts have included provisions that may, in some respects, constitute Federal concessions to the party States and to holders of certain private water rights acquired under their laws. Two compacts provided that they would become operative when Congress consented to the compacts, including the following provision, which Congress expressly agreed to in its consenting legislation:

(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be made within the allocations hereinabove made

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[94] Upper Colorado River Compact, art. XIX.

Related provisions in the Compact include a provision that any preferential water uses to which Indians are entitled shall be exempt from curtailment of uses of the San Juan River and its tributaries in times of shortage. *Id.* art. XIV(c).

The Kansas-Nebraska Big Blue River Compact, §§7.2(1) and (2), consented to in 1972, provides:

"DISCLAIMER. Nothing contained in this Compact shall be deemed:

"1. To impair, extend, or otherwise affect any right or power of the United States, its agencies, or its instrumentalities involved herein;

"2. To subject to the laws of the States of Kansas and Nebraska any property or rights of the United States that were not subject to the laws of those States prior to the date of this Compact."

[95] See, e.g., the consenting legislation for the Yellowstone River Compact, 65 Stat. 663, 671, §2 (1951), which, however, also stated, "This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this Act [which contains the provisions of the Compact] shall be held to affect rights so vested." See also 68 Stat. 690, 697, §2 (1954), for similar language in the congressional consent to the Sabine River Compact.

for use in that State and shall be taken into account in determining the extent of use within that State.

(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.[96]

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[96] Republican River Compact, art. XI. See also the Belle Fourche Compact, art. XIV, for substantially similar language. Language similar to that in part (c) of the quoted provision also has been employed in legislation regarding navigation aspects of Western flood control projects which is discussed, along with some lower Federal court cases construing that legislation, in chapter 21 at notes 150-154.

The Klamath River Basin Compact between Oregon and California provided that Congress in consenting to the Compact should substantially agree to several provisions. including: (a) The United States (or any agency thereof or entity acting under its license or other authority), in subsequently undertaking developments under Federal laws, shall recognize and be bound by the Compact's provision recognizing preexisting, vested rights acquired under State laws to waters originating in the Upper Basin, and subsequent domestic and irrigation uses within the Klamath Project; (b) The United States shall not, without payment of just compensation, impair water-use rights subsequently acquired (as provided in the Compact) for domestic or irrigation purposes within the Upper Basin by exercising its powers or rights to use or control water for other purposes within the Basin, or for any purpose outside the Basin by diversions in California, so long as the annual depletions resulting from such domestic and irrigation water-use rights do not exceed a specified quantity; (c) The United States shall be subject to certain limitations or restrictions on diversions of certain designated waters; and (d) The United States, with respect to any irrigation or reclamation development it undertakes in the Upper Basin in California, shall provide that substantially all the return flows and waste water shall return to the River above certain points. Art. XIII(B).

The United States agreed to these provisions in its consenting legislation provided that this does not (a) affect its obligations to Indians, (b) affect the jurisdiction of the United States courts, or (c) impair or affect existing beneficially used rights of the

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Federal legislation in 1968 provided that the authorized Animas-LaPlata Federal reclamation project should not be undertaken until and unless the States of Colorado and New Mexico shall have ratified the Animas-LaPlata Project Compact, to which Congress thereby gave its consent.[97] Those States ratified the Compact in 1969. The Compact declares that its purpose is to implement the operation of the reclamation project. It contains some specific provisions regarding allocation of the waters involved in the project, including such allocation as made by the previously executed Upper Colorado River Basin Compact.

There are considerable differences in the scope and kinds of powers and duties that the compacts have given to the interstate commissions or administrations. Commissions usually have been assigned functions such as the gathering and reporting of needed data regarding streamflows and water usage and making relevant findings.[98] Some compacts also have expressly given them certain authority to make recommendations. Commissions have also been given certain specific or more general powers and duties of a regulatory nature. Following are some of these various provisions:

(1) The Bear River Compact has given the Commission broad powers to enforce the Compact and the Commission's orders made under it, by suit or other appropriate action.[99] Among other things, the Commission may declare a water emergency in any or all river divisions based upon its determination that there are diversions which violate the terms of the Compact and which encroach upon water rights in a lower State. It may make appropriate orders to prevent such encroachments and may enforce its orders by action before State administrative officials or by court proceedings.[100]

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United States to waters of the Basin or its power or capacity to acquire rights to waters of the Basin by purchase, donation, or eminent domain. 71 Stat. 497, 508, § § 3 and 4 (1957).

[97] 82 Stat. 897 (1968).

[98] A number of compacts have provided substantially that such findings "shall not be conclusive in any court or before any agency or tribunal, but shall constitute prima facie evidence of the facts found." Pecos River Compact, art. V(f).

[99] Bear River Compact, art. III(D).

The Kansas-Nebraska Big Blue River Compact Administration may institute court actions to compel compliance with the Compact's provisions and its rules and regulations thereunder. Kansas-Nebraska Big Blue River Compact, § 3.4.

[100] Bear River Compact, art. IV(B).

The Compact also provides: "When the flow of water in an interstate tributary across a State boundary line is insufficient to satisfy water rights on such tributary in a lower State, any water user may file a petition with the Commission alleging that by reason of diversions in an upstream State he is being deprived of water to which he is justly entitled and that by reason thereof a water emergency exists, and requesting distribution of water under the direction of the Commission. If the Commission finds that a water emergency exists and that interstate control of water of such tributary is necessary, it shall put into effect water delivery schedules based on priority of rights

(2) The Arkansas River Basin Compact between Oklahoma and Arkansas has provided for a Commission with authority to issue such appropriate, court enforceable orders as it deems necessary for the proper administration of the Compact.[101] Any depletion of annual yield in excess of that allowed by the Compact shall, subject to the control of the Commission, be delivered to the downstream State (as no less than a stated percentage of the current basin runoff).[102]

(3) The Sabine River Compact between Texas and Louisiana has provided for an Administration which, in addition to such usual functions as the gathering of needed data and making relevant findings, may approve all points of water diversion from the river or its tributaries below the point where the river first forms the common boundary between the States, provided the appropriate State agency has first approved such diversion points. Changes of approved diversion points require similar approvals.[103] The Administration may investigate violations of the Compact and report findings and recommendations thereon to the chief State official charged with the administration of water rights, or to the Governor.[104] It also may require the installation of certain measuring devices, to be supervised by such State official.[105]

(4) Under the Costilla Creek Compact, in addition to such usual functions as the gathering of needed data, when it appears to the Commission that any part of the water allocated to a State will not be used by it during a particular year, the Commission may permit its use by the other party State during that year.[106]

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and prepared without regard to the State boundary line. The State officials in charge of water distribution on interstate tributaries may appoint and fix the compensation and expenses of a joint water commissioner for each tributary." *Id.* art. IV(C).

[101] Arkansas River Compact (between Oklahoma and Arkansas), art. IX(A)(7).

Under the Yellowstone River Compact, arts. III(E), (G), and (C), and IV(F), the Commissioners have been given the power "to perform any act which they may find necessary to carry out the provisions of this Compact," "to sue and be sued in its official capacity in any Federal Court of the signatory States." to gather and present relevant data, "to make recommendations to such States upon matters connected with the administration of this Compact," and, upon unanimous agreement, to recommend modifications of the water allocations made in the Compact.

[102] Arkansas River Compact (between Oklahoma and Arkansas), art. V(B).

Among other things, the Commission also may cooperate with Federal and State agencies and political subdivisions in developing principles for the storage and release of water from reservoirs, consistent with the Compact and Federal and State policies. Art. IX(A)(6).

[103] Sabine River Compact, arts. VII(g)(1) and (5).

[104] *Id.* art. VII(g)(7).

See also the Rio Grande Compact, art. XII, regarding that Commission's power by unanimous action to make recommendations to the party States upon matters connected with the Compact's administration.

[105] Sabine River Compact, art. VII(g)(6).

[106] Costilla Creek Compact, arts. VIII and V(h).

(5) Under the Pecos River Compact, the Commission, in addition to such usual functions as the gathering of needed data and making relevant findings, may determine the conditions under which Texas may store water in works built and operated by New Mexico; and no reservoir shall be built in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.[107]

There also are considerable variations in the substantive compact provisions for water allocation or apportionment. The following discussion describes a few of the various provisions.

(1) The Colorado River Compact has provided, in general, for the apportionment of much of the waters of the Colorado River System between the Upper and Lower Basins.[108] This has been expressly made subject, however, to

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[107] Pecos River Compact, arts. V and IV(e) and (f).

Under the Canadian River Compact, in addition to such usual powers and duties, the Commission may permit the party States to temporarily impound more water than amounts specified in the Compact so long as no State is thereby deprived of water needed for beneficial use. Canadian River Compact, art. VII. Under the Rio Grande Compact, the Commission by unamious action may authorize the release of any water being held in storage by reason of accrued debits of Colorado or New Mexico, provided it is replaced at the first opportunity. Rio Grande Compact, art. VI. The system of debits and credits is discussed at notes 120-121 *infra*.

[108] Art. III of the Colorado River Compact has provided in part:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

* * * *

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

"(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

A procedure was provided for further apportionment of unappropriated waters by further agreement of the States and further consent of Congress. *Id*. art. III(g).

Congressional "approval" of the Compact was granted in the Boulder Canyon Project Act subject, *inter alia*, to California's irrevocable and unconditional legislative acceptance of the following limitation: "that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact,

present perfected rights and to obligations of the United States to Indian tribes and any rights of Mexico recognized by the United States.[109]

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plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." 45 Stat. 1057, 1058, §4a (1928). See Cal. Stat. 1929, p. 38 for California's acceptance of this condition. See 46 Stat. 3000 (1929) for the President's proclamation declaring that the conditions had been fulfilled and the Compact in effect.

Article IV of the Compact provides, *inter alia*, that the use of water for navigation shall be subservient to uses for domestic, agricultural, and power purposes "[i]nasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of the Basin"; and that the use of water for electrical power purposes shall be subservient to its use for agricultural and domestic purposes. However, §6 of the Boulder Canyon Project Act, 43 U.S.C. §617(e) (1970) [which was construed in *Arizona* v. *California*, 373 U.S. 546 (1963), as providing for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters, virtually all stored above Boulder (now Hoover) Dam], provides that the dam and reservoir shall be used, "First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power." In an earlier *Arizona* v. *California* case, 283 U.S. 423 (1931), the Court said that one purpose of the Act was to improve navigation and regulate the flow of the river. Notwithstanding the language of Article IV of the Colorado River Compact, the Court concluded, "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation * * * the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. * * *

"* * *[T]he Act specifies that the dam shall be used: 'First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights . . . ; and third, for power.' It is true that the authority conferred is stated to be 'subject to the Colorado River Compact,' and that instrument makes the improvement of navigation subservient to all other purposes. But the specific statement of primary purpose in the Act governs the general references to the compact." *Id.* at 455-456.

This Act, as construed by the Supreme Court in the 1963 case, is discussed later under "Water Allocation Affected by Federal Regulatory Laws and Projects." See also note 143 *infra*, regarding the 1968 Colorado River Basin Project Act.

[109] Colorado River Compact, arts. VIII, VII, and III(c). Art. VIII provides:

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

Provisions are included in art. III(c) of the Compact for meeting obligations resulting from any rights of Mexico recognized by the United States. The 1968 Colorado River Basin Project Act provided that satisfaction of requirements of the Mexican Water Treaty from the Colorado River constitutes a national obligation and that the party

(*Continued*)

(2) The subsequent Upper Colorado River Basin Compact, the provisions of which were made subject to the Colorado River Compact, has apportioned, with some qualifications,[110] the share of the Upper Basin waters (as apportioned by the Colorado River Compact) among the signatory States. One of the States has been allotted a specific amount of such water and the other States have been allotted various specific percentages of the remainder annually available for consumptive use.[111] The Compact has also established the obligations of the respective States to assure the delivery of the Lower Basin's share at Lee Ferry. Whenever curtailment of water is necessary to assure such delivery, any State that has used more than its allotted share during the preceeding 10 years shall be required to supply a quantity of water equal to the overdraft before a demand is made on any State that has not exceeded its share. Otherwise, curtailments of each State's usage, as it affects the quantity delivered at Lee Ferry, shall bear the same relation to the total required curtailment as its consumptive use made during the immediately preceeding water year has borne to the total consumptive use of the party States during each year (excluding uses made under rights perfected before November 24, 1922).[112] Provisions are included with respect to how losses from reservoirs

(*Continued*)
States shall be relieved of the obligations in art. III(c) of the Compact so long as the Secretary of the Interior shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system so as to satisfy such requirements. It was provided, however, that such requirements shall be satisfied pursuant to the treaties, laws, and compacts presently relating thereto until such time as a feasibility plan showing the most economical means of augmenting the water supply has been congressionally authorized and is in operation as provided in the Act. 82 Stat. 885, 887, §202 (1968), 43 U.S.C. §1512 (1970). And §201 of the Act, 43 U.S.C. §1511 (1970), imposed a 10-year moratorium on undertaking reconnaissance studies of any plan for importing water into the Colorado River Basin.

The 1974 Colorado River Basin Salinity Control Act provides "Replacement of the reject stream from the desalting plant and of any Wellton-Mohawk drainage water bypassed to the Santa Clara Slough to accomplish essential operation," except when there is surplus water of the Colorado River under the terms of the 1944 Mexican Water Treaty, is a "national obligation" as provided in §202 of the Colorado River Basin Project Act. 88 Stat. 266, §101(c) (1974).

[110] Upper Colorado River Basin Compact. art. III(b)(3).

No water apportionment compact had been executed for the Lower Colorado Basin through 1974. However, the Boulder Canyon Project Act, which included a comprehensive scheme for developing the Colorado River, also included provisions for apportioning the Lower Basin share of the mainstream waters of the Colorado River among California, Arizona, and Nevada. 45 Stat. 1057 (1928), 43 U.S.C. §§617-617t (1970). This Act, as construed by the Supreme Court in *Arizona* v. *California*, 373 U.S. 546 (1963), is discussed later under "Water Allocation Affected by Federal Regulatory Laws and Projects." See also note 143 *infra*, regarding the 1968 Colorado River Basin Project Act.

[111] Upper Colorado River Basin Compact, art. III.

[112] *Id*. art. IV.

Consumptive use by the United States, or its agencies, instrumentalities or wards, shall be charged to the State where used, "provided that such consumptive use incident

built before and after the signing of the Upper Colorado River Basin Compact shall be borne and regarding which States shall be entitled to use their stored waters.[113]

In addition to the allocation of water discussed above[114] and subject thereto, separate provisions of the Compact provide for the apportionment of the consumptive use of the waters of certain named rivers and several tributaries.[115]

The Compact provides that it "shall not affect the apportionment" made in the La Plata River Compact between Colorado and New Mexico, which was previously executed. However, under the allocation discussed above,[116] all consumptive use of that river and its tributaries ordinarily shall be charged to the State in which the use is made.[117]

(3) The La Plata River Compact between Colorado and New Mexico (subject to the provisions of the Upper Colorado River Basin Compact, which in turn is subject to the provisions of the Colorado River Compact as noted above) has provided that each State shall have the unrestricted right to use all the water flowing within its boundaries at all times between December 1 and the succeeding February 15. Between February 15 and December 1 of each year, this unrestricted right shall also apply on each day that the mean daily flow at the interstate station equals or exceeds a stated amount. On the days when it does not, Colorado shall deliver at the interstate station a quantity equivalent to one-half of the mean flow at another designated measuring station on the preceeding day, but not to exceed the equivalent of a stated rate of flow. If the river flow becomes so low that the State engineers jointly determine that the greatest beneficial use may be secured by doing so, the water may be distributed to each State in rotation through alternate periods of use for such time as they may jointly determine.[118] This authorized rotation provision was upheld by the United States Supreme Court, as discussed earlier.[119]

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to diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State." *Id.* art. VII. However, as discussed at note 94 *supra*, art. XIX(c) of the Compact provides, *inter alia*, that nothing in the Compact shall be construed as "Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System * * *."

For similar provisions in some other compacts see, e.g., art. IX of the Upper Niobrara River Compact.

[113] Upper Colorado River Basin Compact, art. V.

[114] See the discussion at note 111 *supra*.

[115] Upper Colorado River Basin Compact, arts. XI to XIV.

[116] See the discussion at note 111 *supra*.

[117] This is subject to the proviso that such use incident to the diversion, impounding, or conveyance of water in one State for use in the other shall be charged to the latter State. *Id.* art. X, referring to the La Plata River Compact.

[118] La Plata River Compact, art. II.

[119] See the discussion at notes 63-67 *supra*.

See also the discussion of another related compact, the Animas-LaPlata Project Compact, at note 97 *supra*.

(4) The Rio Grande Compact, among other provisions, has a rather complex system of credits and debits in its water apportionment provisions. Annual credits or debits are amounts by which actual deliveries of water exceed or fall below, respectively, the scheduled deliveries in any calendar year.[120] There are also provisons pertaining to accrued credits or debits and the relationship of such factors as water storage or releases to such annual or accrued credits or debits.[121]

(5) While the compacts provide for the apportionment of water between or among the party States, they ordinarily have allowed each State to control the intrastate uses of its apportioned water (subject to the interstate apportionment and any overriding Federal laws and projects). Several of the compacts include a disclaimer substantially like that in the Kansas-Nebraska Big Blue River Compact which provides that nothing therein shall be deemed "To interfere with or impair the right or power of either signatory State to regulate within its boundaries the appropriation, use and control of waters within that State consistent with its obligations under this Compact."[122] However, some compacts have included some rather specific provisions regarding the use of water within all or some of the party States in addition to the more general provisions for apportionment of water between or among them. Among other things, the Klamath River Basin Compact has provided that, subject to vested rights and certain modifications, conditions, and exceptions: (a) in granting permits to appropriate waters of the Upper Klamath River Basin within each party State, when there is insufficient water to satisfy all conflicting applications, a particular order of preferences, by type of use, shall be followed; and (b) subject to certain types of superiority of domestic uses and a specified overall acreage of irrigation uses within each State, upon a permit being granted and a right becoming vested and perfected by use, priority in right within the

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[120] Rio Grande Compact, arts. I(g) and (h).

[121] *Id.* art. VI.

Following are two other interesting aspects of the system of credits and debits: (1) Any State having the right to use any water imported into the Rio Grande Basin shall be given proper credit therefor (art. X), and (2) Colorado shall not receive credit for any water delivered into the Rio Grande from the Closed Basin by works constructed after 1937 unless such water contains no more than a certain proportion of sodium ions to the total positive ions (art. III). See also note 107 *supra*.

Article V of the Sabine River Compact (between Texas and Louisiana) provides, *inter alia*, that waters stored in reservoirs jointly built by the States in a certain portion of the river lying along the interstate boundary, shall be shared by each State in proportion to its contribution to the cost of storage (except for domestic and stock water uses and reservoirs). Subject to meeting obligations for amortizing the storage cost, the rate and manner of withdrawing each State's share may vary. Neither State shall withdraw more than its share in any water year, except by authority of the Compact Administration. Except for such jointly stored water, each State must use its apportionment of the natural stream flows as they occur and there shall be no allowance of accumulation of credits or debits for or against either State.

[122] Kansas-Nebraska Big Blue River Compact, § 7.2(3).

entire Upper Basin, regardless of State boundaries, shall be governed by priority in the time the application was filed.[123]

It is frequently provided that the compact may be terminated or modified by the mutual consent of the signatory States in the same manner in which it was ratified by the party States and consented to by Congress.[124] However, the compacts usually have contained a provision to the effect that in the event the compact is modified or terminated, all rights established under it shall continue unimpaired.[125]

Some compacts include more specific provisions regarding their possible amendment. The Arkansas River Basin Compact between Kansas and Oklahoma, consented to by Congress in 1966, expressly recognized the uncertainty of each State's ultimate water needs and provided that after the expiration of 25 years "following the effective date of this compact, the commission may review any provisions of the compact for the purpose of amending or supplementing the same * * *."[126] The Kansas-Nebraska Big Blue River Compact, consented to by Congress in 1972, provides for review of any provision of the Compact after 5 years following the effective date of the Compact.[127]

Some of the compacts contain no express provisions regarding amendment[128] or termination[129] of the compact.

WATER ALLOCATION AFFECTED BY FEDERAL REGULATORY LAWS AND PROJECTS

Federal regulatory laws and projects may affect the allocation of water among and within States in various ways, as has been suggested in chapter 21 and earlier in this chapter, notably under "Existing Water Apportionment

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[123] Klamath River Basin Compact, art. III.

[124] See, e.g., the Sabine River Compact, art. VIII.

A number of the compacts have provisions to the same general effect which provide more specifically, in effect, that any amendments must be unanimously agreed upon by the States acting through their commissioners, ratified by the affected State legislatures, and consented to by Congress. See, e.g., the Arkansas River Basin Compact (between Kansas and Oklahoma), art. XII(A). Some of the compacts provide for one or a combination of these requirements. See. e.g., the La Plata River Compact, art. VI, and the Belle Fourche River Compact, art. X.

[125] See, e.g., the Arkansas River Basin Compact (between Oklahoma and Arkansas), art. X(C).

[126] Arkansas River Basin Compact (between Kansas and Oklahoma), art. XII(A).

[127] Kansas-Nebraska Big Blue River Compact, § 7.4. For a similar provision, but at 20-year intervals, see the Bear River Compact, art. XIII.

The Rio Grande Compact provides for Commission review, by unanimous consent, at 5-year intervals after the effective date of the Act. but the review shall be only of those provisions "which are not substantive in character and which do not affect the basic principles upon which the Compact is founded * * *." Art. XIII.

[128] See, e.g., the Republican River Compact.

[129] See, e.g., the Upper Niobrara River Compact.

Compacts Involving Western States."[130] The extent to which such allocation might be affected by such laws and projects has been highlighted by the 1963 case of *Arizona* v. *California.*[131] In that case, the United States Supreme Court concluded that by enacting the Boulder Canyon Project Act in 1928,[132] the Congress created, and the Court upheld, a comprehensive scheme for developing the Colorado River and for apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River under the Colorado River Compact.[133] It put the Secretary of Interior in charge of the operation of Boulder (now Hoover) Dam and other works constructed by the Federal Government. The Court said: "Behind the dam were stored virtually all the waters of the main river * * *. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin."[134]

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[130] See particularly the discussion at notes 94-97 and in notes 91, 108, and 110 *supra.*

[131] *Arizona* v. *California*, 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964). This important case has been discussed in a number of secondary sources, including Trelease, F. J., "Arizona v. California: Allocation of Water Resources to People, States, and Nation," 1963 Supreme Court Rev. 158; Meyers, C. J., "The Colorado River," 19 Stan. L. Rev. 1 (1966). See also Hanks, E. H. (Morreale), "Peace West of the 98th Meridian—A Solution to Federal-State Conflicts over Western Waters," 23 Rutgers L. Rev. 33, 40-41 n.32 (1968), citing other sources.

[132] 45 Stat. 1057 (1928), 43 U.S.C. § § 617-617t (1970).

[133] The Court indicated that the Boulder Canyon Project Act resulted from the gravity of the Southwest's water problems; "the failure of the States to agree on how to conserve and divide the waters; and the ultimate action by Congress at request of the States creating a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water." 373 U.S. at 552.

Regarding this Act, the Colorado River Compact, and the subsequent 1968 Colorado River Basin Project Act, see also the discussion at notes 108-109 *supra.* With respect to the 1968 Act, see also note 143 *infra.*

[134] 373 U.S. at 589. The Court noted that after the dam was constructed, the Secretary of Interior made contracts with various water users in California, Nevada, and Arizona for water stored at Lake Mead (the reservoir created by the dam). The allocation of waters under these contracts appears to have provided the principal issues in the case. *Id.* at 562. The Court noted that § 5 of the Act provides that no person shall have or be entitled to have the use for any purpose of the stored water except under such a contract. *Id.* at 561.

The Court upheld the Secretary's provision in his contracts with Arizona and Nevada that any waters diverted by those States out of the 275-mile stretch of the mainstream above Lake Mead to Lee Ferry (where the Lower Basin begins) must be charged to their respective apportionments of the Lower Basin's share of the waters. The Court said, "What Congress was doing in the Project Act was providing for an apportionment among the Lower Basin States of the water allocated to that basin by the Colorado River Compact." *Id.* at 591. The Court also indicated that the location of Hoover Dam so far below Lee Ferry was because " 'There is no place to impound the flood waters except at the lower end of the canyon.' " *Id.* at 590 n.95. The Court added, "Were we to refuse the Secretary the power to charge States for diversions from the mainstream between Lee Ferry and the damsite, we would allow individual States by making

The Court concluded that the Act left "regulation of the use of the tributary water" to the States, as well as "protection of present perfected rights. What other things the States are free to do can be decided when the occasion arises."[135]

In view of the above factors and other aspects of the case discussed in chapter 21,[136] it is not entirely clear what the Court would hold about the extent and application of such Federal powers in regard to nonnavigable or nonfederally stored waters.[137]

The Court concluded that the Act specified each State's share of the mainstream lower-basin water,[138] and gave the Secretary of the Interior authority to apportion the water accordingly by making contracts for delivery of water, thereby allocating the water among the States. In doing so, the Act was construed to give the Secretary discretionary authority to determine which users within each State would get that State's share of water from the mainstream, subject to limitations and directives in the Act.[139] The Court said such apportionment was not controlled by State laws, by the doctrine of equitable apportionment, or by the Colorado River Compact.[140]

The Court said that in previous cases in which it had used the doctrine of equitable apportionment, "Congress had not made any statutory

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diversions that deplete the Lower Basin's allocation, to upset the whole plan of apportionment arrived at by Congress to settle the long-standing dispute in the Lower Basin." *Id.* at 591.

[135] *Id.* at 588. See also the discussion at 565.

[136] See the discussion at notes 110-122.

[137] See Trelease, F. J., *supra* note 131, at 176-177, 180-182, and 203.

It also is not entirely clear what the Court might have held if the Act had not included the provisions it did for protecting present perfected rights, mentioned at note 135 *supra*, or the stated priority it gave to navigation improvement, river regulation, and flood control.

[138] The Court held that in enacting the Act "Congress decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California each would get one-half of any surplus." 373 U.S. at 565. The Court in its subsequent decree added, "provided however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada * * *." 376 U.S. 340, 342.

[139] The reasons were explained in 373 U.S. at 583-585. See also the discussion at 552-562.

[140] *Id.* at 565. In a subsequent non-water case, the Court said that in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), discussed at notes 63-67 *supra*, "Although the suit was between two private litigants and the relevant States could not be made parties, the Court considered itself free to determine the effect of an interstate compact regulating water apportionment. The decision implies that no State can undermine the Federal interest in equitably apportioned interstate waters even if it deals with private parties. This would not mean that, absent a compact, the apportionment scheme could not be changed judicially or by Congress, but only that apportionment is a matter of Federal law. Cf. *Arizona* v. *California*, 373 U.S. 546, 597-598." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-427 (1964).

apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the compact."[141] The Court also concluded that while the Compact pertained to a division of waters between the Upper and Lower Basin States, it did not purport to make any division among the Lower Basin States, which division was the principal issue in this case.[142] In the event of a shortage of available water, the Secretary was required to follow certain provisions set out in the Act,[143] but he otherwise had discretion to choose among recognized methods of apportionment or devise reasonable methods of his own.[144]

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[141] 373 U.S. at 565.

[142] *Id.* at 566.

[143] These included provisions regarding river regulation, navigation, flood control and "present perfected rights." *Id.* at 593-594. But "in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights * * *." Art. II(B)(3) of the Court's decree. See also 373 U.S. 546, 560-562, 567-568, and note 108 *supra*. See note 138 *supra*, regarding the States' respective shares when the available mainstream water is sufficient to supply them.

The 1968 Colorado River Basin Project Act, §301(b), 82 Stat. 885, 888 (1968), 43 U.S.C. §1521(b) (1970), provided that art. II(B)(3) of the Court's decree in 376 U.S. 340 "shall be so administered that in any year in which, as determined by the Secretary [of the Interior], there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada [see note 138 *supra*], diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection 301(b). This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree." Section 301(c), 43 U.S.C. §1521(c) (1970), provided that this limitation "shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada."

Section 602 of the Act, 43 U.S.C. §1552 (1970), provided that in order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary of the Interior should propose, submit to the State Governors for review, and adopt criteria for the coordinated long-range operation of reservoirs built under this Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act. Certain mandatory criteria were included in this section of the Act.

[144] The Court added, "Congress still has broad powers over this navigable international

VALIDITY OF STATE LEGISLATIVE RESTRICTIONS ON TAKING WATER OUT OF STATE

Several statutes have been enacted in the Western States regarding the question of the appropriation of water in one State for use in another State. A number of such statutes pertaining to the use of water from surface watercourses are discussed in chapter 7.[145] Some of these statutes, as well as some statutes pertaining to the use of ground water,[146] include prohibitions or restrictions of varying kinds and degrees, with respect to the taking of water out of one State for use in another State. Some of the variations in such legislation include: (1) Colorado legislation which provides that it is unlawful to divert or transport the waters of streams or other sources of water in the State into any other State for use therein;[147] and (2) Utah legislation which provides that water may be appropriated from interstate streams in Utah, to be conveyed into any border State for use therein, provided the sister State has reciprocal legislation.[148] Some of the statutory provisions pertain only to certain interstate projects[149] or certain other States.[150]

A number of statutes have required specific legislative approval for any or certain out-of-state transport of water, such as the Texas statute held unconstitutional in the *Altus* case, as discussed below. As another variation, Arizona legislation provides that while water may be appropriated from surface watercourses for projects that overlap the statelines, the State Land

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stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes." 373 U.S. at 594.

The Court said the Act was passed "in the exercise of the congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects," and added that the Act "*is equally* sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements." *Id.* at 587 (emphasis added). It is not entirely clear what the Court would have held if the Act had been regarded as only an exercise of either the commerce power or general welfare power alone, not in combination. The Act stated that it was "[f]or the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy * * *." 43 U.S.C. §617 (1970).

[145] See the discussion in chapter 7 at notes 842-852.

One of the statutes, however, has recently been repealed. Mont. Rev. Codes Ann. §89-809 (1964), cited in chapter 7 n. 846, repealed by Mont. Laws 1973, ch. 452, §46. Wyo. Stat. Ann. §41-151 (1957), cited in chapter 7 n. 852, was repealed by Wyo. Laws 1974, ch. 25, which also repealed §41-1.4 regarding ground waters and enacted modified provisions. *Id.* §41-10.5 (Interim Supp. 1974).

[146] N. Mex. Stat. Ann. §75-11-20 (1968). See note 145 regarding Wyoming.

[147] Colo. Rev. Stat. Ann. §§37-81-101 and -102 (1973), formerly §§148-1-1 and -2.

[148] Utah Code Ann. §73-2-8 (1968).

[149] See, e.g., Ariz. Rev. Stat. Ann. §45-153 (1956), discussed below.

[150] See, e.g., Idaho Code Ann. §§42-401 and -410 (Supp. 1969).

Department may decline to issue a permit if the proposed point of diversion is within Arizona and the place of use in another State.[151]

The validity of such statutory restrictions on taking water out of the State appears to be rather unsettled, and may depend upon the nature of such restrictions and affected rights and waters, and other circumstances. In a case decided by the United States Supreme Court in 1908, *Hudson County Water Company* v. *McCarter*, New Jersey had enacted a statute which, after reciting the need to preserve the fresh water of the State for the health and prosperity of its citizens, made it unlawful to transport or carry the waters of any stream, lake, or pond into any other State for use therein. After its enactment, a New Jersey water company contracted to transport water from the Passaic River to New York City, at a minimum rate of 3 million gallons a day, and the New Jersey Attorney General brought suit under the statute to enjoin such transport. The company asserted that the statute was unconstitutional in that "it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other States, and denies to them equal protection of the laws."[152] But the Court upheld the validity of the statute as applied to the defendant water company. The Court, through Justice Holmes, said, "The courts below assumed or decided and we shall assume that the defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special charter powers that give it greater rights than those."[153] The Court also said, among other things:

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[151] Ariz. Rev. Stat. Ann. §45-153 (1956).

[152] *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 354 (1908).

[153] *Id.*

The Supreme Court added that on these assumptions the lower appellate court had "pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale.

"We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors collectively were the absolute owners of the stream, on the ground that it authorized a suit by the State in their interest where it does not appear that they all have released their rights. See *Kansas* v. *Colorado*, 185 U.S. 125, 142 [1902]. But we prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas* v. *Colorado*, 185 U.S. 125, 141, 142 [1902]; 206 U.S. 46, 99 [1907]; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 238 [1907]. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer* v. *Connecticut*, 161 U.S. 519, 534 [1896].[154]

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. * * * But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement.

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is independent of the more or less attenuated residuum of title that the State may be said to possess." *Id.* at 354-355.

[154] In the *Geer* case, the Court upheld the lower court's decision that the State of Connecticut "had power to make it an offense to have in possession, for the purpose of transportation beyond the State, birds which had been lawfully killed within the State during the open season, and that the statute in creating this offence did not violate the interstate commerce clause of the Constitution of the United States." 161 U.S. 519, 522. (The commerce clause, art. I, §8, is set out in note 158 *infra*). The Court thereby indicated that the State had "the power to regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State." *Id.* The Court said, *inter alia*, "The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. * * *

* * * *

"Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected." *Id.* at 529, 534.

> of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.
>
> We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessity is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. * * *
>
> The defense under the Fourteenth Amendment [due process clause] is disposed of by what we have said. That under Article I, §10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter [citing cases]. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.
>
> The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U.S. 519,[155] and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See *Asbell* v. *Kansas* [209 U.S. 251 (1908)]. The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the State within which the river flows, even if they are made to coincide with the state line.[156]

However, a three-judge Federal district court, in *Altus, Oklahoma* v. *Carr* (1966), held unconstitutional, as a violation of the commerce clause,[157] a Texas statute (article 7477b, section 2) which provided that "No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of

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[155] This case is discussed at note 154 *supra.*

[156] 209 U.S. 349, 355-358. The Court added that "Within the boundary citizens of New York are as free to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation." *Id.* at 358.

[157] The commerce clause, U.S. Const. art. I, §8, provides in part that the Congress shall have power "to regulate Commerce * * * among the several States * * *."

the Texas Legislature and thereafter as approved by it."[158] This decision was affirmed *per curiam*, without any reported opinion, by the Supreme Court.[159]

The district court, among other things, said:

> By virtue of the Commerce Clause, the Congress of these United States was specifically granted the power to regulate commerce among the several states, and the states may not unreasonably burden or interfere with interstate commerce. This is not to say that a state may not, in the absence of conflicting legislation by Congress, make laws governing matters of local concern which may in some measure affect interstate commerce, or even, to some extent, regulate it. Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 767 * * * (1945). Rather, it means that a state may not enact a law which imposes a direct burden on interstate commerce or discriminates against interstate commerce. H. P. Hood & Sons v. DuMond, 336 U.S. 525 * * * (1949); The Minnesota Rate Cases, 230 U.S. 352 * * * (1913). In the recent case of Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444 * * * (1960), an undue or unreasonable burden was defined as one which materially affects interstate commerce where uniformity of regulation is necessary.[160]

The district court agreed with plaintiffs' contention that two United States Supreme Court decisions involving natural gas should control the outcome of this case. The district court said that in one of those cases, *Pennsylvania* v. *West Virginia* (1923), "the Supreme Court had before it the question whether a State wherein natural gas is produced and is a recognized subject of commercial dealings may enact a statute which requires that the consumers of such State shall be accorded a preferred right of purchase over consumers in other States."[161] The statute was held to be an interference with interstate commerce. The district court said that in the other case, *Oklahoma (West)* v. *Kansas Natural Gas Company* (1911), "the Supreme Court had before it an Oklahoma statute which denied the right of eminent domain and the right to use the highways of the state for the purpose of transporting natural gas without the state. The effect of the statute was to deny owners of the natural gas the right to transport it out of the state." This statute also was held to be invalid under the commerce clause.[162]

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[158] *Altus, Oklahoma* v. *Carr*, 255 Fed. Supp. 828 (W.D. Tex. 1966), invalidating Tex. Laws 1965, ch. 568, § 2, at 1245, Tex. Rev. Civ. Stat. Ann. art. 7477b, § 2 (Supp. 1965).

[159] 385 U.S. 35 (1966).

In this regard, Corker, C. E., "Water Rights in Interstate Streams," in 2 "Waters and Water Rights" § 132 (R. E. Clark ed. 1967), has expressed the view, *inter alia*, that "Per curiam opinions by the Supreme Court are not currently reliable predictors." citing *Swan* v. *Adams*, 385 U.S. 440, 444 (1967).

[160] 255 Fed. Supp. 828, 837.

[161] *Id.*, citing *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).

[162] *Id.* at 838, citing *Oklahoma (West)* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

The district court quoted portions of each of these two opinions, including the following statement from the *Oklahoma (West)* case: "We place our decision on the

(*Continued*)

In the *Altus* case the district court, in referring briefly to the *Hudson* case, discussed above, and some other cases, said:

(Continued)

character and purposes of the Oklahoma statute. * * * It denies to appellees the lesser right to pass under * * * or over [the highways] * * *. This discrimination is beyond the power of the state to make. * * * [N]o state can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." *Oklahoma (West)* v. *Kansas Natural Gas Co.*, *supra* at 262.

In the *Oklahoma (West)* case the Supreme Court discussed and distinguished its earlier opinion in the *Hudson* case, discussed above, as follows: "*Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, is urged, we have seen, on our attention. A statute of the State of New Jersey was involved, which made it unlawful for any person or corporation to transport or carry through pipes the waters of any fresh-water lake, river, etc., into any other State for use therein. Two propositions may be said to be the foundation of the decision of the court below sustaining the statute. (1) 'The fresh-water lakes, ponds, brooks and rivers, and the waters flowing therein, constitute an important part of the natural advantages of the' State, 'upon the faith of which its population has multiplied in numbers and increased in material welfare. The regulation of the use and disposal of such waters, therefore, if it be within the power of the State, is among the most important objects of government.' (2) 'The common law recognized no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others.' It was further declared that the common law authorized the acquisition of water 'only by riparian owners, and for purposes narrowly limited. Not that the ownership is common and public.' And the contention was rejected that the title of the individual riparian owner was to the water itself—the fluid considered as a commodity—and exclusive against the public and against all persons excepting other riparian owners. [For the actual language of the *Hudson* case, see the quotation at note 153 *supra*.]

"It is clear that neither of these propositions will support the contentions of the appellant in the case at bar. Nor does any principle announced upon the review of the case here, though the power of the State to enact the statute was put 'upon a broader ground than that which was emphasized below.' The police power of the State was discussed and the difficulty expressed of fixing 'boundary stones between' it and the right of private property which was asserted in the case. There were few decisions, it was said, that were very much in point. But certain principles were expressed, of which *Geer* v. *Connecticut*, 161 U.S. 519 [1896; see note 154 *supra*], was considered as furnishing an illustration and *Kansas* v. *Colorado*, 185 U.S. 125 [1907], and *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 [1907], some suggestions.

"That principle was that it was for the 'interest of the public for a State to maintain the rivers that are wholly within it substantially undiminished, except by such drains upon them as the guardian of the public welfare may permit for the purpose of turning them to more perfect use.' And this principle was emphasized as the one determining the case and the opinion expressed that it was 'quite beyond any rational view of riparian rights that an agreement of no matter what private owners, could sanction the diversion of an important stream outside of the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of the lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.'

"It is hardly necessary to say that there was no purpose in the case to take from property its uses and commercial rights or to assimilate a flowing river and the welfare

The Defendant seeks to support his position that Section 2 of Article 7477b is a valid and reasonable exercise of the police power on the theory that Section 2 acts only upon uncaptured water, which has no owner, or, if there is an owner, it is the common property of the State of Texas. To support this theory and his general position that under any view the statute is a reasonable exercise of the police power, the Defendant relies primarily upon Greer [sic] v. State of Connecticut, 161 U.S. 519 * * * (1896); *Hudson County Water Company* v. *McCarter* 209 U.S. 349 * * * (1908); Knight v. Grimes [80 S.D. 517, 127 N.W. (2d) 708 (1964)]; and Williams v. City of Wichita [190 Kans. 317, 374 Pac. (2d) 578 (1962)].[163]

In our opinion, none of the above cases presents sufficient authority for this court to disregard the holdings of the cases of Commonwealth of Pennsylvania v. State of West Virginia, and [Oklahoma] West v. Kansas Natural Gas Co., which are found to be controlling on the issue presented herein. Considering the statute in question only with regard to whether it regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appear[s] to us that Section 2 of Article 7477b does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of [Oklahoma] West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation.[164]

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which was interested in its preservation to the regulation of gas wells, or to take from the gas when reduced to possession the attributes of property decided to belong to it in *Ohio Oil Co.* v. *Indiana* [177 U.S. 190 (1900)], and recognized in *Lindsley* v. *Natural Gas Co.* [220 U.S. 61 (1911)]. Indeed, pains were taken to put out of consideration a material measure of the benefits of a great river to a State. And surely we need not pause to point out the difference between such a river flowing upon the surface of the earth and such a substance as gas seeping invisibly through sands beneath the surface.

"We have reviewed the cases at some length as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve (we use this word in the sense appellant uses it) the resources of the State, and that the statute finds no justification in such purpose for its interference with private property or its restraint upon interstate commerce." *Oklahoma (West)* v. *Kansas Natural Gas Co., supra* at 258-260.

The *Hudson* case was not mentioned in the other natural gas case, *Pennsylvania* v. *West Virginia*, relied on in the *Altus* case, although the Supreme Court in the *Pennsylvania* case approvingly drew upon the *Oklahoma (West)* case for support. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596-597, 598-600 (1923).

[163] Emphasis added. The *Hudson* and *Geer* cases are both discussed above. With respect to the *Geer* case, see note 154 *supra*. The *Knight* and *Williams* cases are discussed in chapter 6, at notes 293 and 245, respectively.

[164] The district court also said that "the fact that Section 1 of Article 7477b declares that

(*Continued*)

> Under the law of the State of Texas, a landowner has the right to drill wells and appropriate all the underground percolating waters found to his own purposes, and if, in the exercise of such right, he intercepts or drains off water from beneath his neighbor's land, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot be the ground of an action [citing cases]. * * * Further, after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off the land and outside the basin where produced, just as he could sell any other species of property [citing cases].[165] These rights, although not codified, have been generally recognized by statute as property rights of sufficient character for ownership [citing statutes]. Thus, except for Section 2 of Article 7477b, the general law of the State of Texas, which recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce, would allow the Plaintiffs to withdraw water from the Mock's land and transport same to the City of Altus [Oklahoma].
>
> This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and [Oklahoma] West cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce. Clearly, then, Section 2 of this statute constitutes an unreasonable burden upon interstate commerce.[166]

The district court apparently concluded that the Texas statute which prevented the transport of ground water outside the State without specific legislative approval, while the general law of Texas regarding percolating ground water allowed "unrestricted intrastate production and transportation of water between points within the State, no matter how distant," was invalid and could not be legitimately considered a water conservation measure that might not unreasonably burden interstate commerce.

(*Continued*)
the purpose and intent of such Article is 'to conserve and protect all water resources both public and private' does not bind Plaintiffs, and they may show that the statute in its practical operation is an unreasonable burden on interstate commerce. Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 * * * (1928)." 255 Fed. Supp. 828, 839.

[165] In this regard, see, in chapter 20, "Texas–Percolating Waters–Right of Use."

[166] 255 Fed. Supp. 828, 839-840.

Earlier in the opinion, the district court said: "There is no question of state ownership of captured underground water, for the law of Texas is well settled that the landowner has the right to drill wells and appropriate the water beneath his land [citing cases]. We are not here concerned with state regulation of a public property, but rather the impediment of an interstate shipment of an article of commerce." *Id.* at 833.

From the foregoing language of the court's opinion and the way it briefly referred to the *Hudson* case discussed above,[167] it would appear that, among other factors, the district court particularly might have been less likely to have held the Texas statute to be unconstitutional if the Texas laws with respect to the use and transportation of percolating ground waters *within* the State had been *more restrictive*, as were the New Jersey laws regarding riparian rights to use a surface watercourse involved in the *Hudson* case.[168] However, like the Supreme Court in the *Hudson* case, the district court appears to have laid down few definitive guidelines to determine whether a different statute, or the same kind of statute under different circumstances, would be valid or would be invalid as an "unreasonable burden upon and interference with interstate commerce."[169]

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[167] See also note 162 *supra*, regarding the way in which the *Hudson* case was discussed and distinguished in the *Oklahoma (West)* opinion of the Supreme Court, which the Court relied upon for support in the *Altus* case.

[168] Variations in the State laws governing the use of percolating ground water are discussed in chapters 19 and 20. The various State laws applicable to the use of surface watercourses are discussed in earlier chapters.

In this general regard, see the type of considerations discussed in White, M. D., "Reasonable State Regulation of The Interstate Transfer of Percolating Water," 2 Natural Res. Lawyer 383 (1969); Comment, "Legal Planning for the Transfer of Water Between River Basins: A Proposal for the Establishment of the Interbasin Transfer Commission," 55 Cornell L. Rev. 809, 827-828 (1970).

[169] A considerable variety of speculative views regarding the *Altus* and the *Hudson* cases have been expressed in a number of publications. See, e.g., White, *supra* note 168; Comment, *supra* note 168, at 826-828; Johnson, R. W., "Law of Interbasin Transfers," prepared for the National Water Commission, Nat'l Tech. Inf. Service, Springfield, Va., Accession No. PB 202 619, at 48-51 (1971); and other articles or publications cited therein.

It was stated in chapter 7 that "Whatever power a State may have to prevent the acquisition of an appropriative right within its territory for use of water in another State cannot be exercised to the impairment of a preexisting validly established appropriative right of a project that overlaps the state line. Protection of such a right is secured to its holder by the Constitution of the United States," relying on a 1922 Supreme Court decision involving water transport from Colorado to Nebraska that is discussed there. See chapter 7, at note 833 and the discussion of *Weiland* v. *Pioneer Irr. Co.*, 259 U.S. 498 (1922), in note 833. This case did not involve any legislative ban or restriction on out-of-State use and was not mentioned in the *Altus* case.

Chapter 23

INTERNATIONAL LAW AFFECTING WATER RIGHTS

G. Graham Waite *

INTRODUCTION

Watercourses, watersheds, and demands to use water do not respect national frontiers. Disputes over the use of resources common to more than one nation are resolved by application of international law, which, in addition to treaties, includes generally accepted principles limiting national sovereignty. These principles are called "customary international law" and guide the International Court of Justice, or other international tribunals, in pronouncing judgment.[1] The substance of customary international law may be inferred from similar provisions in a number of treaties.[2] In 1958, William Griffin (of the State Department) analyzed over 100 treaties[3] that at some time governed systems of international waters. He summarized the substance of customary international law as follows:[4]

> Bearing in mind that as used in this study "system of international waters" refers to an inland watercourse or lake, with its tributaries and distributaries any part of which lies within the jurisdiction of two or more states, and "riparian" and "coriparian" refer to states having jurisdiction over parts of the same system of international waters—it is believed that an international tribunal would deduce the applicable principles of international law to be along the following lines:

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[1] Griffin, "Legal Aspects of the Use of Systems of International Waters," State Department Memo., S. Doc. No. 118, 85th Cong., 2d Sess. 63 (1958).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 89-91. The International Law Association at its Helsinki Conference in 1966 approved a statement of customary international law more detailed than that of Mr. Griffin. See Int'l Law Ass'n Report, "Committee on the Uses of the Waters of International Rivers," Helsinki, February 1966 (hereinafter cited as the Helsinki Rules). The two statements are not in disagreement, but the ILA statement explicitly applies to underground as well as surface waters. Article II. Portions of the Helsinki Rules are described in notes 7 and 60 (and in text accompanying note 60) *infra.*

1. A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right of each coriparian.

Comment[5]—The doctrine of sovereignty is a fundamental tenet of the world community of states as it presently exists. Sovereignty exists and it is absolute in the sense that each state has exclusive jurisdiction and control over its territory. Each state possesses equal rights on either side of a boundary line. Thus riparians each possess the right of exclusive jurisdiction and control over the part of a system of international waters in their territory, and these rights reciprocally restrict the freedom of action of the others.

2. (a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

(b) In determining what is just and reasonable account is to be taken of rights arising out of—

(1) Agreements,

(2) Judgments and awards, and

(3) Established lawful and beneficial uses; and of other considerations such as—

(4) The development of the system that has already taken place and the possible future development, in the light of what is a reasonable use of the water by each riparian;

(5) The extent of the dependence of each riparian upon the waters in question; and

(6) Comparison of the economic and social gains accruing, from the various possible uses of the waters in question, to each riparian and to the entire area dependent upon the waters in question.

Comment—The foregoing is an attempt to formulate the factors which would be considered in applying the doctrine of "equitable apportionment" because whatever the situation—whether in negotiation or before a tribunal—more guidance is needed than is contained in the words "equitable apportionment." Other factors should doubtless be included.

Perhaps an additional factor would be that the order of priority of uses of a particular system would be the relative importance of the possible different uses to the international area served by the system. It is doubtful that a statement of priority among uses of water for all systems could be made as a matter of existing law. On some systems the navigational use is of paramount importance; on others irrigation would surely come next after drinking and domestic uses.

It is believed that existing law gives priority to factors 1-3 in the order named, but not to other factors. Even so it may be difficult to balance the various factors because they would have different weights in different situations. For example, one riparian may have delayed developing uses of the part of a system in its territory much behind another riparian. On the one hand, the latter should not have its investment impaired by subsequent uses by the former; on the other hand, the former should not be deprived of the opportunity for its own

[5] Comments are those of Mr. Griffin.

development. In such a situation the benefits accruing to the latter under the priority factors would be taken into account in determining the just and reasonable apportionment of the total possible uses and benefits of the system. The balancing of rights with the obtention of maximum benefits to all riparians in most situations can probably only be done by joint planning and/or construction with agreed distribution of benefits. E.g., irrigation and power.

3. (a) A riparian which proposes to make, or allow, a change in the existing regime of a system of international waters which could interfere with the realization by a coriparian of its right to share on a just and reasonable basis in the use and benefits of the system, is under a duty to give the coriparian an opportunity to object.

(b) If the coriparian, in good faith, objects and demonstrates its willingness to reach a prompt and just solution by the pacific means envisaged in article 33(1) of the Charter of the United Nations, a riparian is under a duty to refrain from making, or allowing, such change, pending agreement or other solution.

Comment—It seems clear that there is no rule of international law that a riparian must have the consent of coriparians as a condition precedent to the use and development within its territory of a system of international waters. In other words, a coriparian does not have what in effect would amount to a veto over changes in the system.

However, in current international practice no riparian goes ahead with exploitation of its part of a system when a coriparian may possibly be adversely affected, without consulting the latter and coming to an understanding with it. It is to be noted that the latter's consent need not be expressly given; having been given an opportunity to object, its silence may be taken as consent. If a coriparian frivolously objects that injury may possibly be caused in its territory, the riparian has the power to proceed. The crux of this aspect of the matter is that friendly states desirous of conducting their mutual relations in good faith under the rule of law do in fact—

> seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice—

as envisaged in article 33(1) of the United Nations Charter.

Riparians are also doubtlessly motivated to seek agreement because of recognition that under the international law of responsibility of States, a riparian which alters the character of the bed or flow of a system of international waters is responsible if injury is thereby caused to a coriparian. The concept of injury in international law is very complex; and it is difficult to set an absolute limit beyond which the injury is sufficient to provide legitimate grounds for opposing action taken by a riparian. Moreover, responsibility means a duty to make reparation for an injury; and reparation may consist of pecuniary or specific restitution, specific performance, monetary damages, or some combination of these. It might be a vast responsibility to make pecuniary reparation or restore a status quo. Consequently, it is very important that riparians come to an agreement in advance, so that such responsibility would not arise. Their agreement upon the distribution of benefits is in effect an indemnification in advance.

The spirit of accommodation running through the principles Mr. Griffin states is a far cry from U.S. Attorney General Judson Harmon's conclusion in 1895 that because a nation has sovereignty over water found within its boundaries (even though in its natural channel the water flows into another nation) the upstream nation has no obligation to share the water with the downstream nation.[6] It appears likely that the Harmon doctrine is an incorrect statement of international law.[7]

Treaties between nations establish by agreement of the signatory parties explicit rules by which particular problems are to be resolved. The explicit rules to some extent supplant customary international law, while at the same time customary international law may be used to interpret doubtful language of the rules.

The Federal Government has power to enter into treaties with foreign nations;[8] this power is explicitly denied the States.[9] Treaties into which the United States enters with other countries become part of the supreme law of the land[10] and therefore take precedence over State law to the extent there is conflict. The Constitution contains no express reference to customary international law; but, at least to the extent it is used to interpret treaty language, customary international law also supplants conflicting State law. Further, the possibility exists that a given problem might be deemed, as a choice-of-law matter, to be controlled by customary international law rather than by State or Federal law.

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[6] 21 Op. Att'y Gen. 278 (1895).

[7] Article IV, Helsinki Rules, states that "Each basin State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the international drainage basin." The Comment to Article IV remarks that the article reflects a "key principle" of international law, that it "rejects" the Harmon doctrine, and that "The Harmon Doctrine has never had a wide following among States and has been rejected by virtually all States which have had occasion to speak out on the point." The Comment cites the dispute between Bolivia and Chile over the Lauca River and the Jordan Basin dispute between Israel and various Arab States as examples of recent water controversies in which all parties adhered to the principle of reasonable sharing. See Helsinki Rules, p. 10.

In commenting on the Harmon doctrine, Griffin, *supra* note 1 at 9-10, treats it as a case of special pleading, an *ad hoc* legal principle invented for convenience in dealing with claims of Mexico to share the waters of the Rio Grande. Mr. Griffin points out that even in disposing of the claims that gave rise to the doctrine, the United States did not act upon it, but instead apportioned the water. Moreover, in the case of Canada the United States did not stand upon its territorial sovereignty to deny all obligation to share the water, but, again, apportioned. At 60-61 Griffin shows the United States' negotiators of the Boundary Waters Treaty of 1901, note 11 *infra*, did not believe the Harmon doctrine legally sound. And see Piper, "The International Law of the Great Lakes," 101, n. 85 (1967), where Mr. Piper states the United States considers the Harmon doctrine incorrect.

[8] U.S. Const. art. II §2. Treaties are made by the President with the Senate's advice and consent.

[9] U.S. Const. art. I, §10.

[10] U.S. Const. art. VI.

The power of Western States to create water rights is limited by treaties with Canada and Mexico. Those with Canada are the Boundary Waters Treaty of 1909,[11] and the Columbia River Treaty of 1961;[12] those with Mexico are the Rio Grande Irrigation Convention of 1906,[13] and the Rio Grande, Colorado, and Tijuana Treaty of 1944.[14] The effects of each treaty will be considered in turn.

THE BOUNDARY WATERS TREATY OF 1909

The treaty defines boundary waters "as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof."[15] Not included are "tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."[16] The only waters west of the Lake of the Woods coming within the definition, other than small sections of rivers, are said to be those of the Portland Canal between British Columbia and the Alaska Panhandle.[17] Nonetheless, the Boundary Waters Treaty has a large potential for affecting water rights—a potential now achieved only in minor degree. As discussed hereafter, the treaty also affects use of waters flowing across the boundary. Not counting waters draining less than 100 square miles upstream from the international boundary,

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[11] Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), effective May 13, 1910 (hereinafter cited as Boundary Waters Treaty).

[12] 15U.S.T. 1555, T.I.A.S. No. 5638, effective Sept. 16, 1964.

[13] Rio Grande Irrigation Convention with Mexico, May 21, 1906, 34 Stat. 2953 (1907), T.S. No. 455, effective Jan. 16, 1907.

[14] Treaty of February 3, 1944, with Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, 59 Stat. 1219 (1945), T.S. No. 994, effective Nov. 18, 1945. A third treaty with Mexico, the Rio Grande Rectification Convention of 1933, 48 Stat. 1621 (1933), T.S. No. 864, effective Nov. 13, 1933, concerns straightening the course of the Rio Grande River in the El Paso-Juarez Valley. The treaty resulted in some transfers of land parcels between the two nations and previously acquired water rights within such parcels apparently were wiped out. Article VII, at 1625, of the treaty states that such parcels "shall pass to each Government respectively in absolute sovereignty and ownership, and without encumbrance of any kind, and without private national titles." However, the treaty did not affect States' control of water rights pertaining to land within their boundaries; it simply changed the boundary somewhat. Hence the treaty is not pertinent to this study.

[15] Boundary Waters Treaty, Preliminary Art., 36 Stat. 2448.

[16] *Id.* at 2449.

[17] Bloomfield & Fitzgerald, "Boundary Water Problems of Canada and the United States," (1958). Appendix 7, at 248. The treaty provides for free commercial navigation of boundary waters by inhabitants and vessels of both countries, subject to appropriate, nondiscriminatory regulations of either country within its own territory. Boundary Waters Treaty, Art. I, at 2449.

67 western rivers cross the boundary.[18] Investigations that might be requested under the treaty could affect rights to use surface and ground water as well.

Its preamble indicates the broad scope of this treaty. There, both the governments of Canada and the United States say they are

> "* * * equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise * * *."[19]

The treaty created the International Joint Commission[20] (IJC) as the agency through which questions arising along the frontier might be resolved. The IJC, with the national government within whose territory the action is to take place, controls the establishment of any new use, obstruction, or diversion of boundary waters affecting the natural level or flow of boundary waters on the other side of the boundary,[21] of waters flowing from boundary waters,[22] and of waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary.[23] The treaty states each national government on its own side of the boundary has equal and similar rights to use boundary waters,[24] and establishes use preferences the Commission is to follow in disposing of applications. Most preferred are uses for domestic and sanitary purposes; next are uses for navigation, including servicing canals for navigation; lowest in preference are uses for power and irrigation. A use substantially conflicting with a use of higher precedence must not be allowed.[25] An application may be denied if the proposed use would pollute boundary waters or waters flowing across the boundary. The treaty does not specifically place pollution problems within the Commission's judicial power; but it does declare "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other,"[26] and the Commission treats the quoted language as a rule of general application.[27]

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[18] Bloomfield & Fitzgerald, *supra* note 17, Appendix 8, at 250-251, lists rivers in detail.
[19] Boundary Waters Treaty, Proclamation, at 2448.
[20] *Id.* Art. VII, at 2451.
[21] *Id.* Art. III, at 2449-50.
[22] *Id.* Arts. IV and VIII, at 2450, 2451-52.
[23] *Id.*
[24] *Id.* Art. VIII, at 2451-52.
[25] *Id.* at 2451.
[26] *Id.* Art. IV, at 2450.
[27] Welsh & Heeney, "International Joint Commission–United States and Canada," in 5 "International Conference on Water for Peace" 104-109 (1967). The authors were,

(*continued*)

The IJC also has jurisdiction to investigate "questions or matters of difference" arising between the two countries "involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier."[28] This jurisdiction may only be invoked by the national governments.[29] Unlike its power when exercising other jurisdictions,[30] the Commission cannot make a binding decision of matters it investigates, but it can state its conclusions and recommendations to the two governments.[31] Most of the Commission's work in recent years has fallen within its investigative power.[32]

One portion of the treaty not within IJC jurisdiction reserves to the two national governments, or to the several State and Provincial governments "exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters * * *."[33] At the same time, the treaty provides that "any interference with or diversion from their natural channel of such waters * * * resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs * * *."[34] And each nation reserves its right to object to any interference or diversion of water within the other nation that will materially injure navigation interests within the first nation.[35]

It is hard to know what the quoted provisions mean. Does "legal remedies"

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respectively, the chairmen of the United States and Canadian Sections of the International Joint Commission (hereinafter cited as the IJC).

[28] Boundary Waters Treaty, Art. IX, 36 Stat. 2452.

[29] *Id.* The treaty says "either" government may refer a question for investigation, but the practice of each government has been to make only those references the other government desires also. Waite, "The International Joint Commission–Its Practices and Its Impact on Land Use," 13 Buff. L. Rev. 93, 111 (1963).

[30] See notes 21-25 *supra* and note 31 *infra*.

[31] Boundary Waters Treaty, Art. IX, 36 Stat. 2452. Article X, at 2453, of the treaty does provide for decision by the IJC, if the national governments request it. No such request had been made through 1974. Interview with W. A. Bullard, Exec. Secty., and J. G. Chandler, Legal Advisor, U.S. Section, IJC, Jan. 29, 1975.

[32] From 1944 through 1974, its investigative power was invoked 27 times compared to only 19 times for the judicial. Interview with Bullard & Chandler, *supra* note 31. For further discussion of the treaty and of the IJC, see Bloomfield & Fitzgerald, *supra* note 17; Mann, Ellis, & Krausz, "Water-Use Law in Illinois" 271-276 (1964); Waite, *supra* note 29.

[33] Boundary Waters Treaty, Art. II, 36 Stat. 2449.

[34] *Id.* Article II excludes from "this provision" cases existing when the treaty became law and cases expressly covered by special agreement. It is unclear whether "this provision" refers to the reservation of exclusive control or to the creation of remedies for certain injuries, or both. The existence of the Chicago diversion of Lake Michigan at the time the treaty was negotiated and the United States' desire to preserve the diversion makes it probable only the remedies are excluded. See Piper, *supra* note 7, at 90-102.

[35] Boundary Waters Treaty, Art. II, 36 Stat. 2449.

exclude equitable remedies, or does the phrase simply mean "judicial remedies?" The view has been expressed that equitable remedies are excluded,[36] one commentator saying that otherwise the exclusive jurisdiction and control given each country over water on its own side of the boundary would be undermined.[37] But surely no such inconsistency arises, as the equitable remedy is enforced by a court of the country where the action complained of occurs. The most that can be said is that the exclusive control is being exercised by the judicial branch of government. If a State or Provincial court is involved there still is no inconsistency—the State court simply would be enforcing a Federal right. As in other such situations, its decision would be appealable to the Federal courts.[38]

When one thinks of a private citizen of one country seeking a remedy for harm caused by the government of the other country it does seem unlikely that the other sovereignty would have agreed to subject itself to injunctive relief sought by a foreigner. But does it seem much more likely that it would submit to an injunction sought by one of its own people? If in some circumstances a nation does allow equitable remedies to its citizens against the national government, is it so unlikely that in similar circumstances it would allow similar relief to persons of a neighboring country? It is not necessary to interpret "legal remedies" as used in Article II restrictively in order to protect sovereign nations from injunctive relief sought by their own citizens, since such protection is already provided by doctrines of sovereign immunity; Article II only calls for the "same" remedies for the foreign injury as the domestic. Furthermore, Article II contemplates remedies for injuries caused by "any" interference with or diversion of waters, not just those caused by government. One may doubt whether a nation would subject its own private citizens to the remedy of money damages if properly sought by an alien, yet protect them from injunctive relief. The meaning of "legal remedies" must remain speculative until attempts to obtain the remedies are made.[39]

And what of the "exclusive jurisdiction" language of Article II? If it were taken literally, the Harmon doctrine would appear to have been incorporated

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[36] Mann, Ellis, & Krausz *supra* note 32, at 273; Scott, "The Canadian-American Boundary Waters Treaty: Why Article II?" 36 Can. Bar Rev. 511, 516-517, 528 (1958)

[37] Scott, *supra* note 36, at 528.

[38] The statement of Secretary of State Root before the Senate Foreign Relations Committee is not inconsistent with the views set forth in the text. In speaking of Article II, the Secretary said, "This provision creates the same situation on the part of the people on either side of the line between the United States and Canada as now exists on either side of the respective lines between our State (New York) and Pennsylvania, for example." But he then illustrated the expected operation of Article II with a situation contemplating the payment of damages. "Proceedings of the Senate Committee on Foreign Relations," 270, 271 (Jan., Feb., 1909). Quotation in Scott, *supra* note 36, at 516.

[39] No attempts had been made through 1974. Interview with Bullard & Chandler, *supra* note 31.

into the treaty. It has been said that the Canadian negotiator, Sir George Gibbons, believed this to be so.[40] But is such incorporation consistent with preserving each nation's right to protest interference harming navigation? One student of the treaty has concluded that the American negotiator, Chandler P. Anderson, did not share this belief and that, in fact, Article II does not incorporate the Harmon doctrine.[41] Another writer has suggested Mr. Anderson may have viewed the article as an appropriate distinction between boundary waters and tributary waters.[42] It is also possible the article was largely prompted by American desires to protect the Chicago diversion of Lake Michigan water. The diversion existed at the time the treaty was negotiated, had already engaged the two nations' attention, and definitely was considered by negotiators of both countries.[43] Article II excepts the remedy provision from application to "cases already existing," which is consistent with protecting the Chicago diversion, if "cases" mean incidents and activities such as the diversion.[44] Elihu Root, who was Secretary of State when the treaty was negotiated, stated to the Senate Committee on Foreign Relations, that the treaty excluded the Chicago diversion.[45] A 1958 memorandum of the State Department interpreted Article II as follows:

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[40] Piper, *supra* note 7, at 77.

[41] Griffin, *supra* note 1, at 60-61. Apparently, Mr. Anderson made no direct, written statement regarding the Harmon doctrine and its relation, or lack thereof, to Article II. Mr. Griffin reports that no mention of the Harmon doctrine in any connection appears in the letters and memoranda of Mr. Anderson to the Secretary of State or in the Secretary's correspondence with the British Ambassador. Further, in a report to the Secretary of State submitted to the Secretary in December, 1907, on the draft treaty, Mr. Anderson commented that the doctrine of boundary waters being held in common is inconsistent with the principle of absolute sovereignty of each nation up to the international boundary. Mr. Anderson went on to say that "absolute sovereignty carries with it the right of inviolability as to such territorial waters, and inviolability on each side imposes a coexistence restraint upon the other, so that neither country is at liberty to so use its own waters as to injuriously affect the other." Mr. Anderson then summarized the uses international law would permit each country to make of water on its side, as being those "which did not interfere with the coexistence rights of the other, and was not injurious to it * * *." The quotations appear in Griffin, at 60-61. Considering the quotations and the failure to mention the Harmon doctrine in correspondence, Mr. Griffin concludes that Mr. Anderson did not believe the Harmon doctrine legally sound, and that neither Mr. Anderson nor other Americans connected with negotiating the treaty intended the doctrine to be incorporated into the treaty.

[42] Piper, *supra* note 7, at 78. Mr. Piper gives no specific reason for suspecting Mr. Anderson considered Article II expressed a distinction that should be drawn generally.

[43] See Griffin, *supra* note 1, at e.g., 7-9, 15-21, 31-33, 35-37.

[44] See Mann, Ellis & Krausz, *supra* note 32, at 272-273.

[45] U.S. Congress, "Senate Committee on Foreign Relations Hearings and Proceedings on Treaty Between United States and Canada Concerning Boundary Waters," 61st Cong. 2d Sess. 3-5 (1910).

> 1. The "use and diversion" in each country of waters "which in their natural channels would flow across the boundary or into boundary waters" is not subject to the consent of the other country.
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> 2. The "use and diversion" in each country of such waters is subject to applicable principles of customary international law; except that neither country may assert through diplomatic channels, on behalf of private parties sustaining injury in its territory, the international legal responsibility of the other country if there is available to them compensation under the law of the latter country.[46]

The IJC has used language inconsistent with the second portion of the quotation. In an official report to the governments of Canada and the United States, the Commission discussed apportionment between the two countries of waters in a river crossing the boundary. It quoted the exclusive jurisdiction language as being a "principle" stated by Article II, pointed out that the river the Commission was considering crossed and recrossed the boundary, thereby making each country an upstream nation under Article II; the IJC concluded that this circumstance required each country "to agree" to limit exercise of its jurisdiction to allow cooperative development.[47] The inference appears to be that lacking such agreement, the Commission assumes each country untrammelled in its power over water within its boundaries.

It should be noted that the puzzling aspect of "exclusive jurisdiction" language in Article II may become less important as matters are referred to the IJC for investigation. Immediately following the above mentioned language in its report, the Commission revealed that it was itself guided by customary international law in determining the water apportionment it recommended.[48] If the Commission turned to customary international law for guidance in resolving one matter—water apportionment—not covered by the Boundary Waters Treaty, it might do the same concerning other matters not covered by the treaty. To the extent it does so, adoption of Commission recommendations by the national governments will bring each nation's activities within the customary international law limitations without regard to Article II.

Article VI[49] of the treaty effects an apportionment of St. Mary and Milk

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[46] Griffin, *supra* note 1, at 62.

[47] "Report of the International Joint Commission, Canada and United States, on the Cooperative Development of the Pembina River Basin," 48 (Comm. Print 1967).

[48] *Id.*

[49] Boundary Waters Treaty Art. VI, 36 Stat. 2451. Article VI treats the two rivers and their tributaries as one for purposes of irrigation and power, and gives each country an equal share of the water. If it affords a more beneficial use to each country, either country may take more than half the water from one river and less than half from the other. Each year between April 1 and October 31, the United States receives priority to 500 cubic feet per second of Milk River water, or three-fourths of its normal flow—whichever is less—and Canada receives a similar priority to St. Mary River water. Since the time during which the priorities exist is the irrigation season, as, in fact, Article VI itself, states, it appears that the priority water may only be used for irrigation.

Rivers water and thereby influences Montana water uses directly. The potential influence on water uses in Western States of the International Joint Commission through its investigatory work is far greater. The IJC's work in the Pembina River basin of North Dakota and Manitoba shows the influence in action.

The governments of Canada and the United States on April 3, 1962, asked the IJC to "investigate and report on what measures could be taken to develop the water resources of the Pembina River in * * * Manitoba and * * * North Dakota * * * [and to] determine what plan or plans of co-operative development * * * would be practicable, economically feasible, and to the mutual advantage of the two countries."[50] The Commission, in determining the plan, was to consider "(a) domestic water supply and sanitation; (b) control of floods; (c) irrigation; and (d) any other beneficial uses."[51] In addition, the Commission was to recommend an apportionment of water to achieve the benefits of the plan.[52]

The Commission later recommended a plan expected to provide adequate flood control protection, water of suitable quality for municipal and industrial purposes, and irrigation for 12,800 acres in Manitoba plus 8,500 acres in North Dakota, as well as to provide one water-related recreational site in Manitoba, three in North Dakota and better recreational fishing in the area.[53] Either nation would be free to use water apportioned to it in ways other than those envisaged by the plan so long as the works affecting both countries would be built and operated according to the plan, and there would be no interference with the similar right of the other nation.[54]

Adoption of the recommended plan by the two national governments would make it part of the Federal law of the United States. Being Federal law, the adopted water use plan would take precedence over any conflicting water rights based on the State law of North Dakota.[55] When the plan was recommended, there were only a few water rights actually in use in the Pembina basin,[56] and they would not conflict with the planned

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[50] Identical letters from the Canadian Minister for External Affairs, and the United States Secretary of State addressed, respectively, to the Canadian and United States Sections of the IJC. IJC Report, 83.

The reference resulted from IJC recommendations stemming from a 1948 reference to study water uses in the Souris and Red Rivers basins, the Pembina being a tributory of the Red. IJC Report, 1-2.

[51] IJC Report, 83.

[52] *Id.*

[53] U.S. Department of State Press Release, Dec. 4, 1967.

[54] IJC Report, 42.

[55] This is true even if variations in uses form those recommended by the Commission are adopted, since the decision to vary would be made by Federal, not State, authorities. IJC Report, 42.

[56] There is virtually no irrigation or industrial use. Only Neche and Pembina in North Dakota, and Altona and Gretna in Manitoba draw their water supply from the river. IJC

uses,[57] so no preemption of existing, State-based water rights would occur. But the plan would leave only a little room for State creation of water rights in the future. Of the total annual water yield of the Pembina basin above Pembilier Dam, to be built near Walhalla, North Dakota, the plan called for reserving 5 percent for non-project uses in North Dakota.[58] North Dakota law would control the non-project uses in the United States.[59]

The Commission stated it was guided by customary international law in recommending an apportionment of Pembina River waters between Canada and the United States. It used the statement of principles found in the Helsinki Rules on the Uses of Waters of International Rivers, approved by the International Law Association in 1966, as indicating the substance of customary international law. The Helsinki Rules give to each basin nation a reasonable and equitable share of the beneficial uses of the waters of an international drainage basin. Determination of what is reasonable and equitable is made in light of all factors relevant in each case, including geography, hydrology, past utilization of the waters, economic and social needs, and the avoidance of unnecessary wants. The IJC considered all the factors.[60]

Report, 15-16, 19; "Summary of the Report to the IJC by the International Pembina River Engineering Board," 5 (Comm. Print 1964) (hereinafter cited as Summary, Board Report).

[57] IJC Report, 47, 68-69.

[58] IJC Report, 51. Seven percent is to be reserved for non-project use in Manitoba. *Id.* The total reservation of 12 percent accords with the opinions of the Manitoba and North Dakota officials participating in the Engineering Board's study. *Id.* 45-46.

[59] IJC Report, 76.

[60] The statements in this paragraph are drawn from IJC Report, 48-49. The text of Article V, Helsinki Rules, reveals the flexibility the Int'l Law Ass'n recommends as an approach to apportionment problems. It states:

> "(1) What is a reasonable and equitable share within the meaning of Article I is to be determined in the light of all the relevant factors in each particular case.
> "(2) Relevant factors which are to be considered include, but are not limited to:
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> (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
> (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
> (c) the climate affecting the basin;
> (d) the past utilization of the waters of the basin, including in particular existing utilization;
> (e) the economic and social needs of each basin State;
> (f) the population dependent on the waters of the basin in each basin State;
> (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
> (h) the availability of other resources;
> (i) the avoidance of unnecessary waste in the utilization of waters of the basin;
> (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(*continued*)

The Commission recommended apportioning about 60 percent of the annual water yield of the basin above Pembilier Dam to Canada, and 40 percent to the United States.[61] This proportion coincides with the proportion found in each country of the total drainage area contributing water run-off to the river, and of the total water contributed to the river.[62]

Although the plan, if adopted, would cause most water uses in the North Dakota portion of the Pembina basin to be controlled by international agreement rather than State law, local views entered into the formulation of the plan. The Commission's process[63] of investigation and study in developing the plan allowed participation by officials and residents of the region. Direct participation was greater by officials than by residents, but of those officials participating, at least in the public hearings, many held elective office in the Federal, State, or Provincial governments.[64] To some degree the views of the local people shape those of their elected officials, and thus the region residents indirectly participated in the planning process. The Commission recommended in modified form the plan most favored by those appearing at the public hearings.[65]

The development plan on which public hearings were held resulted from extensive studies of the Pembina basin by a technical board appointed by the IJC and composed of three men from each country, all engineers from appropriate agencies of the two country's Federal governments.[66] The technical

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(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

"(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole."

The Comment following Article V shows the factors listed are not exhaustive, but that still others would be applicable in particular cases. See Helsinki Rules, at 11-14.

[61] IJC Report, 76.

[62] *Id.* 46.

[63] See Waite, *supra* note 29, at 110-117 for details on IJC investigative procedures.

[64] Two public hearings were held in connection with the Pembina River Reference: one at Manitou, Manitoba; the other at Walhalla, North Dakota. The list of persons presenting briefs or testimony shows at the Manitou hearing 13 public officials, including 1 Member of Parliament and 6 members of the Manitoba Legislature, and 11 persons representing interested groups such as towns, regional water commissions, chambers of commerce, and wildlife associations; only 6 persons appeared ostensibly representing only themselves. The Walhalla hearing presents the same picture: 13 public officials, including 2 United States Senators and 2 Congressmen, the State governor, 2 State senators, 1 State representative, 11 persons representing interested groups; and 10 persons apparently representing only themselves. IJC Report, 88-90.

[65] IJC Report, 37, 50, 51. The chief modification is a relocation of land to be irrigated to place less in North Dakota, more in Canada. See IJC Report, 51 and Summary, Board Report 11.

[66] IJC Report, 405.

board was assisted in its work by various governmental agencies concerned with differing effects of land and water use on human life.[67] Thus, the plan reflects more than an engineering viewpoint. The study of the technical board included engineering and geologic field surveys of the Pembina basin, and reports of basin hydrology, economic development, and existing water problems.[68] Included in the latter were flood damage, drainage, irrigation and their impacts on farm practices, agricultural processing industries, water supply, water pollution, recreation, game fish production, wildlife habitat, and existing water control works.[69]

The activity of the Commission in the Pembina River basin suggests that Commission influence on Western water law may make a positive contribution to efficient utilization of water. Contrary to the portions of water law developed through the judicial process, allocations of water to different uses the Commission recommended reflect a detailed consideration of water resources and needs of an entire drainage basin, without regard to the happenstance of time priorities of existing uses. The international jurisdiction of the Commission avoids the disabilities State and national boundaries place on efforts of State legislatures or administrative agencies to promulgate a coherent water use regime for an entire drainage basin. The Commission allowed local participation in the planning process in about the same way a State legislature does. The principal difference between the IJC and State practice may be in enlarging the stage on which conflicting demands for water do battle from the State capitol to an international conference room. Even if a Commission plan for river basin development were not adopted, the data the IJC gathered in the course of technical investigations may help lawyers, judges, and legislatures make law a more efficient tool for achieving optimum use of water than it now is.

THE COLUMBIA RIVER TREATY OF 1961

This treaty focuses on one goal—the cooperative development by the United States and Canada of the water resources of the Columbia River basin. The treaty affects water use in parts of Washington, Oregon, Idaho, and Montana.

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[67] The participating agencies were: Canada—Canada Dept. of Agriculture, Prairie Farm Rehabilitation Admin., Economics Division; Canada Dept. of Energy, Mines and Resources, Inland Waters Branch; Manitoba Soil Survey; Manitoba Dept. of Highways, Water Control and Conservation Branch; Manitoba Dept. of Agriculture, Agriculture and Economics Division; Manitoba Dept. of Health; Manitoba Dept. of Mines and Natural Resources, Fisheries Branch, Game Branch and Parks Division. United States—U.S. Dept. of the Army, Corps of Engineers; U.S. Dept. of the Interior, Bureau of Reclamation, Bureau of Outdoor Recreation, Fish and Wildlife Service, Geological Survey, National Park Service, Fed. Water Pollution Control Administration; North Dakota State Water Commission; and North Dakota Dept. of Health. IJC Report, 87.

[68] Summary, Board Report 207

[69] *Id.* 4-7.

The bulk of its provisions deal with engineering matters and the manner in which the various improvements are to be operated to generate hydroelectric power and to afford flood protection.[70] Canada is to provide water storage space[71] and the United States is to maintain and operate hydroelectric facilities using the water stored in Canada.[72] Canada is to operate its storage facilities so as to achieve optimum power generation[73] while providing flood control beneficial to lands in the United States.[74] The detailed plans of operation are to be made by the two countries jointly,[75] with the United States having the option to cause the Canadian storage facilities to be operated to provide maximum flood control during periods when flooding is a hazard.[76] Canada is to be paid for benefits it confers on the United States.[77]

The treaty gave the United States an option for 5 years from the ratification date to start building a dam on the Kootenai River near Libby, Montana, to meet flood control and other needs in the United States.[78] Benefits from the Libby dam accrue to the country in which they occur.[79] The reservoir is to lie partially in both countries, but its operation will be under U.S. control, consistent with International Joint Commission orders relating to levels of

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[70] Treaty with Canada for the Co-operative Development of the Columbia River Basin, Art. XIX, 15 U.S.T. 1570; T.I.A.S. No. 5638 (1964) (hereinafter designated Columbia Treaty), effective Sept. 16, 1964.

[71] Columbia Treaty, Art. II, 15 U.S.T. 1558.

[72] *Id.* Art. III(1), 15 U.S.T. 1558.

[73] *Id.* Art. IV(1), 15 U.S.T. 1558-59; Annex A, Power, 15 U.S.T. 1573-74.

[74] *Id.* Art. IV(2), (3) 15 U.S.T. 1559; Annex A, Flood Control, 15 U.S.T. 1572-73.

[75] *Id.* Art. IV, 15 U.S.T. 1558-60. Each country is to designate an entity to formulate and carry out the operating arrangements necessary to implement the treaty. Art. XIV, 15 U.S.T. 1566-67. A Permanent Engineering Board is established of four members, two from each country, to oversee the operations of the entities. Art. XV, 15 U.S.T. 1567-68.

[76] *Id.* Art. IV(2)(b), (3), 15 U.S.T. 1559.

[77] Payment is partially in kind and partially in cash. For the increase in power generation capability in the United States created by the Canadian storage, Canada receives power equal to one-half—less certain deductions—(Columbia Treaty Art. V, 15 U.S.T. 1561) of that which would be generated by the increased capability if used most effectively for power generation purposes. Art. III, 15 U.S.T. 1558. See Art. V(2)(a)-(c), 15 U.S.T. 1560-61 for the deductions.

Canada receives cash payments for flood control provided by Canadian storage facilities built pursuant to the treaty (Art. VI(1) and (2), 15 U.S.T. 1560-61), cash and electric power equal to that lost by operating other storage facilities to meet flood control needs of the United States (Art. VI(3), 15 U.S.T. 1561), and, more than 60 years following treaty ratification, cash equal to Canadian operating costs in providing the flood control plus compensation for Canadian economic losses directly caused by Canada foregoing alternative uses of the storage used to provide the flood control. Art. VI(4), 15 U.S.T. 1561. Canada may elect to receive electric power for any portion of the compensation for direct economic losses representing loss of hydroelectric power. Art. VI(5), 15 U.S.T. 1561.

[78] Columbia Treaty, Art. XII(1), 15 U.S.T. 1563-64.

[79] *Id.* Art. XII(2), 15 U.S.T. 1564.

Kootenay Lake.[80] However, at Canadian request, the United States will consult with Canada regarding operating changes advantageous to Canada, and is to adopt changes not disadvantageous to the United States.[81] Canada is to prepare and make available for flooding Canadian land needed for the reservoir,[82] but as in the case of storage operation, the United States is obliged to consider modifying the Canadian duty to provide land for flooding if Canada believes any part of the land no longer needed, and requests such reconsideration.[83] If the useful life of the Libby dam endures longer than the treaty, Canada still is obliged to provide land for the storage reservoir as needed, except land Canada requires for diversion of the Kootenai River.[84]

The Kootenai diversion just alluded to is the only one the treaty permits for nonconsumptive use, if the manner of the diversion would alter the flow of any water as it crosses the boundary between the two nations within the Columbia River basin.[85] In broad terms, the diversion right allows Canada to transfer the bulk of Kootenai water to the Columbia headwaters, subject to restrictions designed to preserve the usefulness of Libby dam.[86] Either nation may refer

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[80] *Id.* Art. XII(6), 15 U.S.T. 1564.

[81] *Id.* Art. XII(5), 15 U.S.T. 1564.

[82] *Id.* Art. XII(4), 15 U.S.T. 1564. The storage must be in full operation within 7 years of the date fixed in the construction schedule for commencing construction. *Id.* Art. XII(8), 15 U.S.T. 1564.

[83] *Id.* Art. XII(9), 15 U.S.T. 1564.

[84] *Id.* Art. XII(10), 15 U.S.T. 1564-65.

[85] *Id.* Art. XIII(1), 15 U.S.T. 1565. Diversion by either nation for any other nonconsumptiveness is permitted only with consent of the other evidenced by an exchange of notes.

[86] If the Libby dam is built on schedule, Kootenay waters may not be diverted during the first 20 years of the treaty's life, but thereafter Canada may divert up to 1½ million acre-feet of Kootenay water to the Columbia headwaters if such diversion reduces the Kootenay flow just downstream from the diversion no lower than 200 cubic feet per second or the natural flow. Columbia Treaty, Art. XIII(2), 15 U.S.T. 1565. Starting 60 years after treaty ratification, and for 40 years thereafter, Canada may divert to the Columbia headwaters any water which, in its natural channel, would flow in the Kootenay across the international boundary. Columbia Treaty, Art. XIII(3), 15 U.S.T. 1565. The treaty language appears broad enough to authorize diversions of tributaries flowing into the Kootenay in Canada. The diversion must not reduce the Kootenay flow at the frontier below the lesser of 2500 cubic feet per second or the natural flow (Columbia Treaty, Art. XIII(3), 15 U.S.T. 1565), except that during the last 20 years the diversion right exists the limitation is reduced to the lesser of 1000 cubic feet per second or the natural flow. Columbia Treaty, Art. XIII(4), 15 U.S.T. 1565. If the United States does not exercise its option to build the Libby dam, or, exercising it, fails to meet the prescribed time schedule for starting construction of the dam and operation of the storage, Canada may immediately make the "any water" diversion subject to the lower limitation just started. Columbia Treaty, Art. XIII(5), 15 U.S.T. 1565-66. The United States may ask Canada to vary its use of water diverted under the 1½ million acre-feet authorization. Canada is then obliged to consult with the United States and—if Canada determines the variation would not be to its disadvantage—vary the use accordingly. Columbia Treaty, Art. XII(6), 15 U.S.T. 1566. All diversions, once started, are unlimited in the time they may continue. MacNabb, "The Columbia River

differences under the treaty to the International Joint Commission for decision,[87] or, if the IJC decision is delayed,[88] to arbitration.[89] Each country is bound to accept the decision of the IJC or an arbitration tribunal as final.[90]

Either nation that breaches the treaty is liable to compensate the other,[91] but neither government is liable to the other, to private persons or other entities for any injury, damage or loss occurring in the territory of the other country caused by acts, failures to act, omissions or delays under the treaty.[92] However, each government within its own territory will try to remove the cause and lessen the effects of injuries occurring in the territory of the other.[93] A protocol more clearly defining Canada's operating commitments and increasing the power to which Canada is entitled was signed January 22, 1964.[94]

The treaty does not in terms pre-empt State jurisdiction over any particular aspect of water law. But in requiring Canadian storage facilities to be operated for optimum power generation—subject to flood control needs in the United States, and in limiting diversion in Canada for nonconsumptive uses[95]—the treaty materially affects the amount of water in the Columbia available for appropriation under State-created rights. Also, the limitation of compensation available under the treaty appears to make it impossible for an appropriator whose allotment is curtailed (in order to implement the treaty preference of power production) to obtain compensation. It is therefore clear that the State-created rights of appropriators are not property when in conflict with

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Treaty" (Paper 357 presented at the International Conference on Water for Peace, Washington, D.C. 1967).

[87] Columbia Treaty, Art. XVI(1), 15 U.S.T. 1568.

[88] The IJC is given 3 months, or such other period as the two countries may agree, in which to decide the matter. *Id.* Art. XVI(2), 15 U.S.T. 1568.

[89] *Id.* Art. XVI(3), 15 U.S.T. 1568. The arbitration tribunal is to be composed of three members, each country to appoint one, the third to be appointed by both. If either country fails to appoint its member, or if agreement on the third member is not reached within 6 weeks of the notice of arbitration, either country may ask the President of the International Court of Justice to appoint the missing member.

[90] *Id.* Art. XVI(4), 15 U.S.T. 1568.

[91] *Id.* Art. XVIII(1), 15 U.S.T. 1569. Breaches caused by war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment are excepted. The compensation shall be either forfeiture of downstream power benefits or money not exceeding the actual loss of revenue from sale of hydroelectric power. *Id.* Art. XVIII(5), 15 U.S.T. 1570.

[92] *Id.* Art. XVIII(2), 15 U.S.T. 1569-70. Failure of Canada to start operating its storage facilities, or of the United States to start building the Libby dam on time, is not a breach if the delay is not wilful or reasonably avoidable. *Id.* Art. XVIII(4), 15 U.S.T. 1570.

[93] *Id.* Art. XVIII(3), 15 U.S.T. 1570.

[94] 15 U.S.T. 1579, T.I.A.S. No. 5638.

[95] The treaty gives each nation the right to divert water for consumptive use. *Id.* Protocol, §6, 15 U.S.T. 1581.

activities authorized by the treaty, and a hazard of potentially severe economic losses to appropriators exists.

THE RIO GRANDE IRRIGATION CONVENTION OF 1906

As its title suggests, the treaty of 1906 concerns itself only with apportioning water of the Rio Grande between Mexico and the United States, to be used in both nations for agricultural irrigation. The apportionment effected by the convention applies only to the part of the Rio Grande extending above Fort Quitman, Texas.[96] Mexico is alloted 60,000 acre-feet of water each year, to be delivered in the bed of the Rio Grande by the United States to a specified point in Mexico.[97] The water is stored behind a dam near Engle, New Mexico[98] (presently known as the Elephant Butte Dam),[99] completed in 1915 when the convention measurement became operative.[100] All costs of storage and delivery to Mexico are borne by the United States.[101] Delivery is distributed through the year according to a stated schedule, which is proportionate to the amounts delivered from Elephant Butte reservoir to irrigate Texas land.[102] If serious drought or serious accident to the irrigation system in the United States occurs, the water delivered to Mexico may be reduced proportionate to reductions in delivery to the Texas lands.[103]

Mexican protests, preceding the convention, of American diversion of Rio Grande water above the point where the river became a boundary water elicited the opinion[104] by Attorney General Harmon that each nation through which an international river flows has complete sovereignty over the portion of the river within its territory and has no obligation imposed by international law to share such portion with the other nation.[105] Echoes of the opinion may appear in two articles of the convention. Article IV disclaims recognition by the United States of any Mexican claim to the waters agreed to be delivered to her, while it recites a Mexican waiver of all claims to use water along a stated stretch of the river, and settlement or waiver of all past, present, and future claims against the United States for damages caused owners of Mexican lands by American diversions of Rio Grande water.[106] Article V disclaims concession

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[96] Rio Grande Irrigation Convention with Mexico, May 21, 1906, Art. IV, 34 Stat. 2953, 2955 (1909), T.S. No. 455. The agreement hereinafter is designated convention.

[97] *Id.* Art. I, at 2953-54.

[98] *Id.*

[99] 2 "Waters and Water Rights," 474 (Clark ed. 1967).

[100] Jordan & Friedkin, *infra* note 111.

[101] Convention, Art. III, 34 Stat. 2954-55.

[102] *Id.* Art. II, at 2954.

[103] *Id.*

[104] 21 Op. Att'y Gen. 279 (1895).

[105] Griffin, "Legal Aspects of the Use of Systems of International Waters," State Dept. Memo., Senate Doc. No. 118, 85th Cong. 2d Sess. 9 (April 21, 1958).

[106] Convention, Art. IV, 34 Stat. 2955.

by the United States of any legal basis for claims by owners of Mexican land for losses to such land caused by diverting Rio Grande waters within the United States.[107] The article also limits application of the "arrangement" contemplated by the treaty to the part of the Rio Grande forming the international boundary from the head of the Mexican Canal above Juarez, Mexico, to Fort Quitman, Texas.[108]

In spite of the hard language of Articles IV and V, and of the Harmon doctrine that seems to lie behind it, the convention does apportion the water between the two countries, a fact mentioned by the State Department some 50 years later when considering the interest of the United States in an international river on which the United States was the downstream sovereign.[109] Because the convention apportioned the water, it had been concluded that the Harmon doctrine was not part of the convention.[110]

It is noteworthy that only the United States government is protected by the language of Articles IV and V—nothing is said regarding claims for damages caused owners of Mexican lands by actions in the United States of State or local governments, corporations or other organizations, or by private persons.

Administrative responsibility of the convention has been assigned to the body today known as the International Boundary and Water Commission.[111] The Department of the Interior operates the dam and arrangements for releasing water from storage from Mexico are made with the Department through the Commission. The Commission measures and maintains records of the deliveries.[112]

THE RIO GRANDE, COLORADO, AND TIJUANA TREATY OF 1944

Water Allocation

The treaty allocates the water of the first two named rivers between the United States and Mexico, and provides for study and recommendations for

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[107] *Id.* Art. V, at 2955-56.

[108] *Id.* Arts. I and V, at 2953-54, 2955-56.

[109] Griffin, *supra* note 105, at 9-10.

[110] *Id.* at 9.

[111] Jordan & Friedkin, "The International Boundary and Water Commission–United States and Mexico," 5 International Conference on Water for Peace 192-203 (1967). The authors are, respectively, Commissioners of the Mexican and United States Sections of the Commission.

The Commission is the result of merging the International Water Commission into the International Boundary Commission established in 1889 by the Boundary Convention with Mexico, March 1, 1889, 26 Stat. 1512. The merger occurred in 1932. Act of June 30, 1932, ch. 314 §510, 47 Stat. 417; Act of July 1, 1932, ch. 361, 47 Stat. 481, 22 USC 277 note. The present name of the Commission was created by Article 2, at 1222, of the 1944 treaty with Mexico, note 113 *infra*.

[112] *Id.*

allocating the water of the Tijuana. The allocation of Rio Grande waters applies only to the river lying below Fort Quitman, Texas,[113] thereby supplementing (rather than replacing) the convention of 1906. Unlike the convention of 1906, the 1944 treaty allocates water for storage, domestic, agricultural, stockraising, or industrial purposes,[114] rather than simply for agricultural irrigation.

As indicated in the following discussion, implementation of the treaty is assigned to the International Boundary and Water Commission.[115] That body consists of two sections, one from each country; the head of each section is required to be an engineer.[116] The Commission as a whole has jurisdiction over "the limitrophe parts of the Rio Grande and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary."[117] Each national section has jurisdiction over works located wholly within the territorial limits of that country that are used only to fulfill treaty obligations.[118] Works used partly for treaty purposes and partly for other purposes are managed by a State or Federal agency of the country where they are located.[119]

The United States is allocated all Rio Grande waters entering the Rio Grande from the Pecos and Devils Rivers, Goodenough Spring, and Alamito, Terlingua, San Felipe, and Pinto Creeks;[120] one-half the flow in the main channel of the Rio Grande below the major international storage dam farthest downstream, to the extent the flow is not specifically allotted under the treaty;[121] one-third of all waters entering the main channel of the Rio Grande from the Conchos, San Diego, San Rodrigo, Escondido, and Salado Rivers and the Las Vacas Arroyo, provided the third shall not be less on the average in cycles of 5 consecutive years than 350,000 acre-feet;[122] and one-half of all other flows occurring in the main channel of the Rio Grande, except waters from the San Juan and Alamo Rivers, and return flow from land irrigated from the San Juan and Alamo.[123] It

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[113] Treaty between the United States of America and Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, Preamble, 59 Stat. 1219, 1220, T.S. No. 904. The agreement hereinafter is designated 1944 Treaty.

[114] 1944 Treaty, Art. 1(d), at 1221.

[115] *Id.* Art. 2, at 1223, states that "The application of the present treaty, the regulation and exercise of the rights and obligations which the two Governments assumed thereunder, and the settlement of all disputes to which its observance and execution may give rise are hereby entrusted to the International Boundary and Water Commission."

[116] *Id.* Art. 2, at 1222-23.

[117] *Id.* at 1224.

[118] *Id.*

[119] 1944 Treaty, Protocol, 59 Stat. 1262. See 2 "Waters and Water Rights," §152.3 (Clark ed. 1967) for further discussion of the Commission.

[120] *Id.* Art. 4, B(a), 59 Stat. 1226.

[121] *Id.* Art. 4, B(b), at 1226.

[122] *Id.* Art. 4, B(c), at 1226-1227.

[123] *Id.* Arts. 4, B(d) and A(a), at 1227, 1225.

is said the result of the division is to give the United States about one-half of Rio Grande waters below Fort Quitman, although the greater part of the water is of Mexican origin.[124] Each diversion of lower Rio Grande water actually made for use in either country must be preceded by a finding of the section of the International Boundary and Water Commission of the country in which the diverted water is to be used that water is available within that country's share for the diversion.[125]

Mexico and the United States agreed to jointly construct dams required on the Rio Grande for storage and diversion of the water, the work to be done through each nation's section of the International Boundary and Water Commission.[126] Although the treaty specifies that three dams are to be built, and their general location, the Commission may decide to build others instead, subject to the approval of the two nations.[127] Selection of the most feasible sites; determination of feasible reservoir capacities, each nation's needs at each site for conservation capacity, and capacity required for silt retention and flood control are all to be made by the Commission.[128] In determining the required conservation capacity, the Commission is to consider the "amount and regimen" of the particular nation's water allotment and "its contemplated uses."[129] Thus, the Commission is placed in a strong position to influence uses to which land dependent upon the stored water may be developed. Dams built pursuant to the treaty include the Falcon, a storage dam located 75 miles below Falcon,[130] and another storage dam, Amistad, located about 12 miles from Del Rio, Texas, and Ciudad Acuna, Coahuila.[131] In locating Amistad dam, the Commission used its power to depart from the sites specified in the treaty.[132] At both Falcon and Amistad dams electric power is, or is to be, generated for use in both nations.[133]

Colorado waters are given to the United States, except 1,500,000 acre-feet which are guaranteed to Mexico,[134] plus any other quantities arriving at Mexican points of diversion.[135] In years when the U.S. Section of the International Boundary and Water Commission determines that water exists surplus to U.S. need and to the guaranteed delivery quantity, the United States

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[124] 2 "Waters and Water Rights," 483 (Clark ed. 1967).
[125] *Id.* at 492. 1944 Treaty, Art. 9(b), 59 Stat. 1234.
[126] 1944 Treaty, Art. 5, at 1228.
[127] *Id.* Art. 5, II, at 1228-30.
[128] *Id.* Art. 5, II(a)-(e), at 1229.
[129] *Id.* Art. 5, II(c).
[130] Jordan & Friedkin, *supra* note 111, at 9-10.
[131] *Id.* at 10.
[132] 2 "Waters and Water Rights," 484 n. 86 (Clark ed. 1967).
[133] Jordan & Freidkin, *supra* note 111, at 9. Electric power production at the international storage dams is contemplated by Article 7 of the 1944 Treaty, 59 Stat. 1231.
[134] 1944 Treaty, Art. 10(a), 59 Stat. 1237.
[135] *Id.* Art. 10(b), at 1237.

will deliver additional water to Mexico. However, the total quantity delivered is not to exceed 1,700,000 acre-feet, and Mexico acquires no right by use of Colorado River waters beyond 1,500,000 acre-feet.[136] Should drought or accident make it hard for the United States to deliver the guaranteed quantity of water to Mexico, the treaty allows reduction of the required delivery in proportion to the U.S. reduction of consumptive uses.[137]

Who shall say when it is difficult for the United States to deliver all the water guaranteed to Mexico? The treaty does not expressly settle the question. A general treaty provision entrusts to the International Boundary and Water Commission the "application of the present Treaty, the regulation and exercise of the rights and obligations which the two Governments assume thereunder, and the settlement of all disputes to which its observance and execution may give rise."[138] Presumably the duty to make the determination in question falls within the quoted language. If so, the result is that both the Mexican and U.S. sections of the Commission participate in the decision. This seems logical, since the decision affects performance of the guaranty to Mexico.[139] The meaning of consumptive use may be more obscure. The treaty definition of the term includes "evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general, it is measured by the amount of water diverted less the part thereof which returns to the stream."[140] Is evaporation from a storage reservoir created simply by damming the stream a consumptive use? The second sentence quoted above suggests not. And the treaty definition of "to divert" speaks of "taking water from any channel in order to convey it elsewhere" for various purposes,[141] but it goes on to list several alternative diversion methods and among them includes "dams across the channel."[142] Since the list is in the alternative, it seems possible the above question might be answered "yes."

The Commission is to plan for flood control on the Colorado below Imperial dam, both in the United States and in Mexico.[143] The two governments will build such Commission recommended works as both approve, each government paying for the works it builds—including operating costs after construction. Supervision of construction and operation are to be provided by the particular

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[136] *Id.*

[137] *Id.*

[138] *Id.* Art. 2, at 1223.

[139] It will be recalled that the United States section alone determines that water above the guaranteed quantity exists that may be given Mexico. See text accompanying note 136.

[140] 1944 Treaty, Art. 1(j), 59 Stat. 1222.

[141] *Id.* Art. 1(d), at 1221. (Emphasis supplied.) The purposes are domestic, agricultural, stockraising, or industrial. *Id.*

[142] *Id.* "* * * dams across the channel, partition weirs, lateral intakes, pumps or any other methods."

[143] *Id.* Art. 13, at 1242.

country's section of the Commission.[144] As the works are constructed and operated to achieve flood control, an impact on private water uses results. The speed of current and the amount of water in a given reach of river during a given season of the year are likely to be changed. Water uses incompatible with flood control operations will give way before the overriding treaty provision.[145] To enable it to divert its portion of water, Mexico has built the Morelos dam at its expense about 1 mile below the international boundary.[146]

As for the Tijuana River, the treaty makes no precise water apportionment, calling instead for study and recommendations by the Commission for an "equitable distribution" to be approved by the two governments.[147] The Commission also is to recommend storage and flood control plans to promote and develop "domestic, irrigation and other feasible uses" of the water.[148] Presumably the uses for which the Commission plans to store water will influence the Commission's recommendations for equitable apportionment. Since the treaty expressly directs the Commission to plan for development of domestic and irrigation uses, with other uses to be included only as the Commission deems feasible, it may be expected the apportionment ultimately recommended will tend to accommodate demands for domestic and irrigation uses first, in preference to other types of use.[149]

General Provisions

Several general provisions of the 1944 treaty are noteworthy. First, the Commission is given guidelines to follow in providing for joint use of international waters. Border sanitation problems are to receive first preferential attention, and any sanitary measures or works agreed upon by both governments override any conflicting water use.[150] Following water use for sanitation, the following priorities are established, listed in descending importance: 1) domestic and municipal uses; 2) agriculture and stockraising; 3) electric power; 4) other industrial uses; 5) navigation; 6) fishing and hunting; and 7)

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[144] *Id.* Some works may be jointly operated and maintained by the Commission as a whole, in which case the cost will be borne equally by the two governments.

[145] Other articles of the treaty particularly related to the Colorado are Articles 12, 14 and 15. Article 12, at 1239, outlines certain works to be built by each country. Article 14, at 1242, deals with use of the All-American Canal in delivering water to Mexico and making payments to Mexico therefor. Article 15, at 1243-49, outlines the subject matter and limits of two annual schedules the Mexican Section of the Commission is to formulate each year to guide United States delivery of water to Mexico and deals with other details of delivery as well. Article 15 also limits the water to be delivered through the All-American Canal.

[146] Jordan & Friedkin, *supra* note 111, at 8-9.

[147] 1944 Treaty, Art. 16(1), 59 Stat. 1225.

[148] *Id.* Art. 16(2), at 1249.

[149] No recommendation had been made through 1974.

[150] 1944 Treaty, Art. 3, 59 Stat. 1225.

any other beneficial uses the Commission may determine.[151] None of the terms are defined in the treaty; to determine the classification into which a particular use falls, reliance might be placed on customary international law or the internal law of the two countries. With respect to the United States, this could mean largely the internal law of each of the States affected by the treaty. It would not seem proper for the Commission to place its own meaning on the classifications, since to do so would tend to frustrate the two governments' purpose to guide the Commission. Of course, in applying definitions drawn from customary international law, from internal State law, or from some other body of law, the Commission necessarily builds its own interpretation of the body of law being used, an interpretation which, being rooted in the treaty power of the Federal Government, is of such dignity in the United States as to override any conflicting State law.

Another interesting treaty provision shields each country from liability to the other country for damage caused by using the international rivers for the discharge of flood waters.[152] Responsibility for claims of private persons—apparently including those harmed in one country by flood waters released by the other country—is assumed by each government within whose territory the claim arises.[153] The claim is to be adjusted exclusively according with the responsible government's "own" laws.[154] In the case of a private claimant harmed within the United States, it would seem the treaty provision means the claimant's rights are controlled by Federal law. Whether the "law" includes choice-of-law rules is another question. The treaty is silent on the point. It may be the word "own" suggests an intention that choice-of-law rules be excluded from consideration. This perhaps is consistent with a desire to settle claims speedily. The meaning of the treaty language is to be found in the practice of the two governments.[155]

CONCLUSIONS

Treaties of the United States with Canada and Mexico have not explicitly pre-empted private water rights created by the various States adjoining the two

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[151] *Id.*

[152] *Id.* Art. 17, at 1250.

[153] *Id.* Art. 20, at 1251-52. The claim may have arisen from the construction, operation, or maintenance of any works authorized by the treaty. *Id.*

[154] *Id.*

[155] Another choice-of-law puzzle exists with reference to the law regulating public use of lake surfaces formed by international dams. The treaty states public use is to be free and common to both countries, subject to various regulations, including "the police regulations of each country in its territory." 1944 Treaty, Art. 18, 59 Stat. 1250. Does this mean, with respect to territory within the United States, police regulations of the Federal Government? Or of the several States bordering the international rivers? The latter would coincide with the tradition of our Nation that the police power is peculiarly within the sphere of the States.

frontiers. However, by apportioning the waters of international and transboundary streams, and by establishing classes of preferred water uses, the treaties do limit the States' ability to create water rights. Only uses fitting within the national share of water, and within the hierarchy of uses may be effectively established by the States. Any State-based right to use water is susceptible to obliteration should it conflict with future treaty provisions. Whether the private owners of such rights are compensated for their loss depends on the terms of the treaty, or separate congressional action—there is no constitutional requirement that they be paid. To the extent the international agencies refine the treaty-established preferences in water use, the possibility exists for planning the water uses of an entire river basin, without regard to State or national boundaries.

APPENDIX: SUMMARIES OF THE STATE WATER RIGHTS SYSTEMS

INTRODUCTION

This appendix includes summaries of water rights laws in each of the 19 Western States. The summaries portray some historical developments, principal components, and related aspects of the water rights laws of each State. This includes some principal features of statutes and reported court decisions pertaining to the use of surface watercourses, subterranean watercourses, and percolating ground waters; statutory provisions regarding the determination of conflicting water rights; administration of water rights; and distribution of water. Relevant physical characteristics of watercourses are discussed in chapters 2 and 3, and those of percolating and other ground waters in chapters 19 and 20.

Some aspects of State water rights laws that generally have not been incorporated in these State summaries include various aspects of ordinary civil actions (discussed in chapters 13 and 15), rights respecting diffused surface waters (discussed in chapter 17) and springs and waste, seepage, and return waters (in chapter 18). Discussions of the applicable laws in these regards in each or several of the Western States are included in those chapters. Other relevant matters which generally have not been included in these State summaries are Federal-State relations, interstate dimensions of water rights, and international law affecting water rights (in chapters 21, 22, and 23, respectively).

These State summaries will be useful to readers who may be interested in the water rights laws of particular States. In a number of instances, specific information is included on the statutes or court decisions of particular States which has not been included in Volumes I and II. Moreover, these State summaries provide the reader with an additional perspective regarding the State water rights systems by portraying some of their principal components as integral parts of a water rights system on a State-by-State basis. This supplements and augments the perspective acquired from reading the details of particular subjects discussed in earlier chapters of the text.

Some more recent legislation and court decisions (through 1974) are included in these State summaries than were incorporated in Volumes I and II.

STATE SUMMARIES

Alaska

Governmental Status

Alaska was purchased from Russia in 1867. In 1868, Congress enacted a statute that extended over Alaska the laws of the United States pertaining to

custom, commerce, and navigation.[1] Congress provided for a civil government for Alaska in 1884 and made further provisions therefor later.[2] The Organic Act, passed by Congress on August 24, 1912, provided that the territory ceded to the United States by Russia should constitute the Territory of Alaska.[3]

In 1958, Congress provided for the admission of Alaska to statehood and the President proclaimed the admission of Alaska to the Union on January 3, 1959.[4]

State Administrative Agency

Under the 1966 Water Use Act the Department of Natural Resources has been assigned various functions to carry out the provisions of the Act. These are discussed later under "The Alaska Water Use Act of 1966."

Water Rights Laws Regarding Watercourses Prior to 1966

On July 1, 1966, the Alaska Water Use Act became effective, superseding prior legislation then in effect. This legislation is discussed later. The intervening discussion deals with legislation and court decisions pertaining to water rights regarding watercourses prior to the 1966 Act.

Purpose of use of water.—(1) Mining, agriculture, and manufacturing. In 1866, before Alaska was ceded to the United States, Congress passed an act protecting rights to use water for mining, agriculture, manufacturing, or other purposes that had vested by priority of possession on the public domain and were recognized by local customs, laws, and decisions of courts, as well as for the necessary rights of way.[5] The amendatory Act of 1870 clarified the intent of Congress that all patents, pre-emption, or homesteads should be subject to the protection of such vested rights.[6]

The 1866 law provided for the protection of rights to use water for *mining, agriculture, manufacturing, or other purposes.* The Territorial compiled laws of 1933 deleted the words "agricultural, manufacturing, or other," thus leaving

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[1] 15 Stat. 240 (1868).

[2] 23 Stat. 24 (1884); 31 Stat. 321 (1900).

[3] 37 Stat. 512 (1912).

Spicer, G. W., "The Constitutional Status and Government of Alaska" (1927), has given considerable attention to the use of the terms "district" and "territory" in the early history of Alaska. For example, in the 1884 legislation noted above, Alaska was constituted "a civil and judicial district." The "district of Alaska" remained the official designation until 1905. In the meantime there was much doubt and discussion as to whether Alaska was a territory or a district, and on this point it was the author's belief that there was little clear thinking even on the part of Congress. Examples of apparently indiscriminate use of the terms in this context were noted. This continued until enactment in 1912 of the Organic Act, wherein the question as to whether Alaska was a district or a territory was definitively settled.

[4] 72 Stat. 339 (1958); 73 Stat. c16 (1959).

[5] 14 Stat. 253, § 9 (1866).

[6] 16 Stat. 218, § 152 (1870).

"mining" as the only purpose of use of water to be protected.[7] However, the words "agricultural, manufacturing or other" were restored to their former place by the legislature in 1951.[8]

(2) Municipal. A section of the Alaska Code declared that uses of water for municipal as well as mining and certain other purposes were beneficial to the public and were public uses. Rights of way across private property necessary for municipal use could be condemned and enforced in the manner laid down in the eminent domain statutes.[9]

(3) Early preeminence of mining water rights. As declared by statute and the courts in litigated controversies, until fairly recent times, use of water for mining was preeminent.[10] The few statutes that dealt with water rights prior to 1966 related chiefly but not exclusively to mining. Most of the cases decided by the district courts of the United States for Alaska and by the United States Court of Appeals, 9th Circuit, involved controversies over uses of water for mining and for other purposes connected therewith.

Appropriation of Water of Watercourses Prior to 1966

Doctrine of prior appropriation.—(1) Early recognition of appropriative rights by Congress. Spurred by concern for expansion in Western States and Territories, Congress in 1866 expressed its recognition of appropriative rights in a Federal mining act in which such rights were "recognized and acknowledged by the local customs, laws and decisions of the courts."[11] In 1870 and 1884, the Congress continued to recognize appropriative rights.[12] Section 9 of the 1866 Act was extended to Alaska by the Act of May 17, 1884, and by subsequent Congressional legislation.[13]

(2) Early recognition by the judiciary. In this pre-1966 period, the doctrine of prior appropriation of water had little attention in the Alaska legislature, but judicial recognition was considerable.[14]

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[7] Alaska Comp. Laws §§ 346 and 347 (1933).

[8] Alaska Laws 1951, ch. 101.

[9] Alaska Code § 57-7-2 (1949), repealed, Laws 1962, ch. 101, § 31.02.

[10] In a letter to the author dated Dec. 10, 1968, Howard J. Grey, Chief, Water Resources Section, Division of Lands, Department of Natural Resources, stated that "through recognition of all water uses, via the [1966] Water Use Act, we anticipate and are currently experiencing a change in water law orientation from mining to other uses." Extracted with permission.

[11] 14 Stat. 253, § 9 (1866).

[12] 16 Stat. 218, § 17 (1870); 23 Stat. 24, ch. 235 (1884).

[13] *Noland* v. *Coon*, 1 Alaska 36, 38 (1890); *Revenue Min. Co.* v. *Balderston*, 2 Alaska 363, 367-369 (1905); *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 90-91 (9th Cir. 1910).

[14] See *Noland* v. *Coon*, 1 Alaska 36, 37-38 (1890); *Revenue Min. Co.* v. *Balderston*, 2 Alaska 363, 367-368 (1905); *Miocene Ditch Co.* v. *Jacobson*, 2 Alaska 567, 572-574 (1905), overruled on the facts by *Miocene Ditch Co.* v. *Jacobsen*, 146 Fed. 680 (9th

(*Continued*)

As early as 1890, in *Noland* v. *Coon*, the United States District Court at Sitka recognized and applied the principle of priority as between conflicting claimants of appropriative rights. It held that prior appropriators were entitled to protection under the Act of 1866.[15] A half century later, the United States court of appeals stated in *Balabanoff* v. *Kellogg*, "The principle of appropriation is applicable in Alaska" and decided the issues on the basis of relative priorities of the parties.[16] Judicial recognition of the doctrine also appeared in the opinions in a number of cases decided in the intervening half century.

The courts held repeatedly that the Federal water acts had been extended to Alaska. Thus, according to the district court for the third division in *Revenue Mining Company* v. *Balderson*, in 1905, the two acts of Congress providing civil government for Alaska[17] extended thereto the laws of the United States relating to mining claims and incident rights, including section 9 of the Act of 1866[18] "giving prior appropriators of water flowing across the public lands to be used for mining purposes a qualified title thereto and the exclusive reasonable use thereof." Necessarily, said the court, this carried with it those authoritative judicial decisions construing the laws and appurtenant rights and declaring their legal effect.[19] Five years later, in *Van Dyke* v. *Midnight Sun Mining & Ditch Company*, the court of appeals reviewed the Act of 1866 and decisions of the United States Supreme Court. It stated that from the beginning in the arid regions of the Western States and Territories it had been the custom to divert stream waters on the public domain and to appropriate them to mining, agricultural, and other useful purposes.[20]

A dissident note was sounded in 1903 by the district court for the first division in holding that the Act of 1866 was not in force in Alaska.[21] However,

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(*Continued*)
Cir. 1906); *Madigan* v. *Kougarok Min. Co.*, 3 Alaska 63, 67 (1906); *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 310-311 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908); *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 583 (1908); *Eglar* v. *Baker*, 4 Alaska 142 (1910); *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85 (9th Cir. 1910). The general land laws of the United States were held to be not applicable in Alaska. *Martin* v. *Burford*, 181 Fed. 922, 925 (9th Cir. 1910); *Anderson* v. *Campbell*, 4 Alaska 660, 665 (1913); *Alaska Juneau Gold Min. Co.* v. *Ebner Gold Min. Co.*, 239 Fed. 638 (9th Cir. 1917); *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16. 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941).

[15] *Noland* v. *Coon*, 1 Alaska 36, 37-38 (1890).
With respect to the general structure of the Federal courts applicable to the Territory of Alaska, see "Determination and Adjudication of Existing Water Rights Prior to 1966," *infra*.

[16] *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16, 118 Fed. (2d) 597, 599 (9th Cir. 1940).

[17] 23 Stat. 26, ch. 53, § 8 (1884); 31 Stat. 330, ch. 786, § 26 (1900).

[18] 14 Stat. 253, ch. 262, § 9 (1866).

[19] *Revenue Min. Co.* v. *Balderson*, 2 Alaska 363, 367-368 (1905).

[20] *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85 (9th Cir. 1910).

[21] *Ketchikan Co.* v. *Citizens' Co.*, 2 Alaska 120, 123 (1903).

several years later, another court for the same division declared emphatically that in this respect the earlier case was clearly in error, and that for many years Congress, the miners of Alaska, and the court had acted upon the proposition that the statute in question had been extended to this jurisdiction.[22]

Procedure for appropriating water.—Prior to 1966, Alaska had no centralized State administrative procedure for appropriating water.

(1) Organized mining districts. The Act of 1900, making further provision for a civil government for Alaska, provided for the recording, among other things, of "Notices and declarations of water rights."[23] Another section of the Act, relating to accounting for fees for unrecorded instruments, contained the following grant of authority with respect to rules and regulations of organized districts governing recording of notices:

> *Provided*, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this Act or the general laws of the United States; and nothing in this Act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court * * *. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this Act.[24]

This legislation in effect sanctioned a practice that had begun long before.[25]

In October 1880, miners discovered gold near Juneau. Miners' meetings were called, the Harris mining district was organized, a local recorder was elected, and a miners' form of government was instituted. On February 18, 1882, the miners adopted additional rules and regulations governing the appropriation and diversion of water from streams for mining and other beneficial purposes. The 10 rules and regulations thus adopted in the Harris mining district in 1882, as set out in the district court's opinion in *McFarland* v. *Alaska Perseverance Mining Company*[26]—and repeated by the court of appeals in *Thorndyke* v. *Alaska Perseverance Mining Company*[27]—were a close copy of the first 10 sections of the California Civil Code water legislation of 1872.[28] This

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[22] *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 322-327 (1907).

[23] 31 Stat. 321, 327, § 15 (1900).

[24] *Id.* § 16.

[25] See *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 310-311 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908); compare *Alaska Juneau Gold Min. Co.* v. *Ebner Gold Min. Co.*, 239 Fed. 638 (9th Cir. 1917).

[26] *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308 (1907).

[27] *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908).

[28] Cal. Civ. Code § § 1410-1422 (1872).

legislation essentially codified locally recognized practices in the mining camps and set the pattern for early water appropriation statutes in a number of the Western States.

The recording of water rights claims in the Harris and other mining districts has been noted in other court decisions as well.[29]

(2) Local customs, laws, and court decisions. Prior to the organization of mining districts, appropriations of water were made in accordance with local customs[30] which, in addition to local laws and judicial decisions, formed the basis of Congressional recognition of the validity of prior appropriations on the public lands.[31] But even in the mining districts, the procedure provided in the rules and regulations of the miners was not the exclusive method of appropriating water, despite the fact that the rules were recognized and followed by almost all persons in the district. Hence failure to record a claimed right did not create a forfeiture thereof.[32]

Whether by custom or pursuant to a mining district rule, posting of notice at the point of intended diversion of water was considered the first step in making an appropriation, giving warning to others of the appropriator's intention.[33] But posting of notice and beginning construction of works on property belonging to another *without the latter's permission* were acts of trespass, which could not become the basis of a valid right to appropriate water.[34] Furthermore, posting of notice did not constitute an appropriation of the water; it was only one of the steps to be taken in making the appropriation.[35] No Territorial or State law required posting or recording of a notice of appropriation.[36] Hence the courts of Alaska did not regard formal notice as essential to the validity of a bona fide appropriation of water in that jurisdiction.[37]

The first act of appropriation by the claimant, whether posting of notice or otherwise, was considered important, because to this first act must be traced all

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[29] Harris Mining district: *Noland* v. *Coon*, 1 Alaska 36, 37 (1890); Kougarok mining and recording district: *Madigan* v. *Kougarok Min. Co.*, 3 Alaska 63, 67 (1906); Nome mining district: *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 585 (1908); Mastodon Creek mining district: *Anderson* v. *Campbell*, 4 Alaska 660, 665 (1913).

[30] *Noland* v. *Coon*, 1 Alaska 36, 37 (1890); *Alaska Juneau Gold Min. Co.* v. *Ebner Gold Min. Co.*, 239 Fed. 638, 640-641 (9th Cir. 1917).

[31] *Miocene Ditch Co.* v. *Jacobson*, 2 Alaska 567, 574 (1905); *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 323, 326-327 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908).

[32] *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 585 (1908).

[33] *Alaska Juneau Gold Min. Co.* v. *Ebner Gold Min. Co.*, 239 Fed. 638, 640 (9th Cir. 1917).

[34] *Id.* at 644-645.

[35] *Hoogendorn* v. *Nelson Gulch Min. Co.*, 4 Alaska 216, 219 (1910).

[36] *Kernan* v. *Andrus*, 6 Alaska, 54, 60 (1918).

[37] *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941); *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 92 (9th Cir. 1910).

rights acquired in connection with use of the water to which the right appertained.[38]

Over the years, the courts of Alaska agreed that to constitute a valid appropriation of water, three elements must always exist: (1) intent to apply the water to some beneficial use, then existing or contemplated; (2) diversion of the water from the source of supply by artificial means; and (3) application of the water within a reasonable time to some useful industry.[39] One who located a water right with intent to hold it for speculation and not for beneficial use gained no rights by simply going through the forms of locating a water right.[40]

The doctrine of relation governed the determination of priority of an appropriative right that was consummated with reasonable diligence.[41]

Some judicially declared aspects of the appropriative right.—Various court decisions developed the following briefly described aspects of the appropriative right. Some of the aspects described under this and the foregoing subtopic have been modified by the 1966 Water Use Act which is discussed later.

(1) Quantity of water. As against a subsequent appropriator, the appropriative right extended to, and only to, the quantity of water actually diverted and applied to a beneficial use.[42]

(2) Change in exercise of right. The prior appropriator could change the point of diversion or place of use of the water to which he had a right, without affecting the priority of his right, so long as such change did not prejudice the rights of later appropriators.[43]

(3) Sale of water right with land. The intent of the parties was controlling in deciding whether an appurtenant appropriative right would pass with the land on a sale thereof.[44]

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[38] *Miocene Ditch Co.* v. *Jacobson*, 2 Alaska 567, 574 (1905), overruled on the facts in *Miocene Ditch Co.* v. *Jacobsen*, 146 Fed. 680 (9th Cir. 1906).

[39] *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 333 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908); *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572 (1908); *Hoogendorn* v. *Nelson Gulch Min. Co.*, 4 Alaska 216, 220 (1910). See *Ketchikan Co.* v. *Citizens' Co.*, 2 Alaska 120, 125 (1903); *Alaska Juneau Gold Min. Co.* v. *Ebner Gold Min. Co.*, 239 Fed. 638, 641 (9th Cir. 1917).

[40] *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 586 (1908).

[41] *Miocene Ditch Co.* v. *Jacobsen*, 146 Fed. 680, 682 (9th Cir. 1906); *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 335-337 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908); *Hoogendorn* v. *Nelson Gulch Min. Co.*, 4 Alaska 216, 219 (1910); *Stinson* v. *Murray*, 8 Alaska 167, 172 (1930).

[42] *Kernan* v. *Andrus*, 6 Alaska 54, 59-60 (1918); *Ketchikan Co.* v. *Citizens' Co.*, 2 Alaska 120, 125 (1903); *Revenue Min. Co.* v. *Balderston*, 2 Alaska 363, 369 (1905); *Anderson* v. *Campbell*, 4 Alaska 660, 666 (1913).

[43] *Eglar* v. *Baker*, 4 Alaska 142, 144-145 (1910); *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 584 (1908).

[44] *Stinson* v. *Murray*, 8 Alaska 167, 174 (1930). See *Anderson* v. *Campbell*, 4 Alaska 660, 666 (1913).

(4) Loss of appropriative right. (a) Abandonment. This was a question of intent as well as of fact.[45]

(b) Forfeiture. An alleged forfeiture of an appropriative right had to be clearly proved.[46]

(c) Equitable estoppel. In one case an equitable estoppel was decreed against a party because of its conduct toward another claimant.[47]

(5) Condemnation of rights of way for conveyance of water. Some court decisons involving exercise of the power of eminent domain in water cases are cited in the accompanying footnote.[48]

The Riparian Doctrine Prior to 1966

Early uncertain status.—Although the opinions in the reported Alaska cases involving water rights evince no doubt at any time in the minds of the courts that a miner could make a valid *appropriation* of water on public lands, there was for many years considerable doubt and disagreement as to the status of the *riparian* doctrine in the Alaska jurisdiction. This was expressed in conflicting decisions rendered by courts for the four divisions of the District of Alaska before there was any occasion for the United States Court of Appeals to pass upon and settle the question. Of these conflicting decisions, certain ones favored the doctrine of riparian rights,[49] and others decried it.[50]

Summary of handling of riparian questions.—The high points of the handling of the riparian question in Alaska during the first half of the 20th century by courts and legislature may be summarized for the sake of clarity after first dividing this period into three phases.

(1) First phase. In 1903, the district court for the first division held that water rights in Alaska are common law riparian rights, which depend upon

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[45] *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 337 (1907). See *Balabanoff* v. *Kellogg*, 10 Alaska 11, 17, 118 Fed. (2d) 597, 599 (9th Cir. 140), certiorari denied, 314 U.S. 635 (1941).

[46] *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 585 (1908).

[47] *Id.* at 587-588.

[48] *Miocene Ditch Co.* v. *Jacobson*, 2 Alaska 567 (1905), overruled on the facts in *Miocene Ditch Co.* v. *Jacobsen*, 146 Fed. 680 (9th Cir. 1906); *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85 (9th Cir. 1910); *Richert* v. *Thompson*, 8 Alaska 398 (1933), affirmed, 72 Fed. (2d) 807 (9th Cir. 1934); *Miocene Ditch Co.* v. *Lyng*, 138 Fed. 544 (9th Cir. 1905); *Northern Min. & Trading Co.* v. *Alaska Gold Recovery Co.*, 20 Fed. (2d) 5 (9th Cir. 1927).

[49] *Ketchikan Co.* v. *Citizens' Co.*, 2 Alaska 120, 123-124 (1903); *Madigan* v. *Kougarok Min. Co.*, 3 Alaska 63, 70 (1906); *Anderson* v. *Campbell*, 4 Alaska 660, 665-666 (1913).

[50] *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 322-323, 330 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. (1908); *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 91 (9th Cir. 1910); *Kernan* v. *Andrus*, 6 Alaska 54, 59 (1918).

ownership of land contiguous to the water supply.[51] Some later decisions were in accord.[52]

(2) Second phase. In a 1907 decision, the court expressed positive disagreement with its previous holding as to nonapplicability of the Congressional Act of 1866 to Alaska, as noted earlier.[53] A riparian right for mining purposes was held to be inapplicable to local conditions.[54] Subsequently, the court of appeals declared that only so much of the common law as was applicable prevailed in Alaska, and that this did not include the common law doctrine of riparian rights.[55]

The decision rendered in a 1918 district court case to the effect that the common law doctrine of riparian rights did not apply to the Seward Peninsula in Alaska was controlled by the above holding of the court of appeals. The 1917 statute, discussed below, was not mentioned.[56]

(3) Third phase. (a) In 1917, the Territorial legislature entered the field by enacting a statute that to some extent tended to negate the prevailing judicial attitude respecting riparian rights.[57]

(b) The act accorded to the locator of any mining claim that included both banks of a stream, in the absence of a prior appropriation and as against all subsequent locators, the use of all stream waters needed for mining the claim.

(c) A person who subsequently used water of this stream above the aforesaid mining claim might divert all or a part of the stream water. However, on demand of the mining claim locator, the subsequent locator was required to turn back into the stream channel as much water as would be necessary for use of the mining claim locator in mining his claim.

Effect of the 1917 statute.—This statute, said the United States Court of Appeals (probably as *dictum*), enacted the law of riparian rights to a limited extent, but with no *ex post facto* force because previously the doctrine of riparian rights had not been applied in the Territory.[58] The "limited extent"

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[51] *Ketchikan Co.* v. *Citizens' Co.*, 2 Alaska 120, 123-124 (1903).

[52] *Madigan* v. *Kougarok Min. Co.*, 3 Alaska 63, 70 (1906); *Anderson* v. *Campbell*, 4 Alaska 660, 665-666 (1913). But see *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 91 (9th Cir. 1910).

[53] See the discussion at note 19 *supra.*

[54] *McFarland* v. *Alaska Perseverance Min. Co.*, 3 Alaska 308, 322-323, 330 (1907), affirmed sub nom. *Thorndyke* v. *Alaska Perseverance Min. Co.*, 164 Fed. 657 (9th Cir. 1908).

[55] *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 88, 91 (9th Cir. 1910).

[56] *Kernan* v. *Andrus*, 6 Alaska 54, 59 (1918).

[57] Alaska Laws 1917, ch. 57, Stat. §§ 27.10.080 (Supp. 1962) and 38.05.260 (Supp. 1965). See *Stinson* v. *Murray*, 8 Alaska 167, 171-172 (1930), wherein it was held that the statute was not controlling because the rights of the parties thereto had accrued before it was enacted.

[58] *Balabanoff* v. *Kellogg*, 10 Alaska 11, 16-17, 118 Fed. (2d) 597, 599 (9th Cir. 1940), certiorari denied, 314 U.S. 635 (1941).

referred (a) to the limited effectiveness of the statute as beginning at the time of its enactment, (b) to its inapplicability to rights already vested,[59] and (c) to its restriction to uses of water for operation of mining claims that embraced both banks of streams.

The Dual Systems of Water Rights

Interrelationships prior to 1966.—The history of water rights decisions in Alaska required its classification, prior to 1966, as a dual-system State.

Invariably the applicability of the appropriation doctrine to water development was recognized by the courts, with the aid of legislation expressing general principles but no details of procedure or administrative regulation. The riparian doctrine, on the other hand, had a checkered career. But eventually, as the result of legislation and acceptance by the courts, it emerged to a limited extent.

Alaska courts recognized the existence of valid rights to appropriate water according to principles that had been declared by the courts of mainland States of the West and by the United States Surpeme Court. Some Alaska cases involved controversies between appropriators only. Other decisions, rendered chiefly during the first decade of the 20th century, settled controversies between claimants of appropriative rights as against those of owners or possessors of riparian mining claims. On the whole, most matters litigated were either riparian rights as against appropriative rights, or relative rights of appropriators as among themselves, rather than relative rights of riparian owners alone.

By local custom, for more than two decades before the riparian doctrine had judicial approval, the Alaska miners applied principles of priority to their appropriations of water and thus well established the doctrine. And it is important to emphasize that even in all reported cases in which the riparian doctrine was recognized and applied, the appropriation doctrine received equal attention. The most serious questions that the courts had to resolve involved the relative superiority of rights in litigation. In determining this, time was the controlling element. Superiority of rights depended upon the respective times of their becoming effective—appropriative rights at dates of priority of appropriations, riparian rights at the dates of location of mining claims to which they attached. Thus, in a particular case, rights of either kind might be decreed to be superior for the sole reason that they were earlier than those of the other kind.

Enactment of the 1917 statute.—This statute,[60] as noted earlier, enacted the law of riparian rights to a limited extent, but with no *ex post facto* force because previously the doctrine had not been applied in the Territory.[61]

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[59] See *Stinson* v. *Murray*, 8 Alaska 167, 171-172 (1930).

[60] Alaska Laws 1917, ch. 57, Stat. §§27.10.080 (Supp. 1962) and 38.05.260 (Supp. 1965).

[61] *Balabanoff* v. *Kellogg*, 10 Alaska, 11, 16-17, 118 Fed. (2d) 597, 599 (9th Cir. 1940).

Appropriative rights that vested prior to enactment of the 1917 statute were not affected by it; they depended upon priority of appropriation alone if they were kept in good standing. Appropriations made after enactment of the statute in 1917 were affected by it to the extent that mining claims of the character designated by the statute were located on the streams in question prior to the several dates of appropriation. These later appropriations of water that postdated the enactment were therefore subject not only to prior appropriative rights, but also to the rights of riparian mining claims previously located on both banks of the streams.

The sequence summarized.—During the earlier period of water use by Alaska miners and just past the turn of the century, rights of use were acquired, exercised, and settled on a basis of prior appropriation, without complications of opposing claims based solely on ownership of land contiguous to streams. Then, for several years. the dual system philosophy prevailed in certain areas as a result of decisions of the district courts in the absence of rulings by the United States Court of Appeals. Under this dual system, relative rights of appropriators were adjudicated on a basis of priority of appropriation, as before. But riparian rights (that dated from the time the mining claims to which they attached were segregated from the public domain), were interjected into the schedule of priorities. The riparian right was superior to appropriative rights thereafter acquired, but inferior to those that antedated location of the riparian claims.

The foregoing concept was rejected by the United States Court of Appeals in 1910, in a decision that repudiated the riparian principle completely with respect to rights for mining use in Alaska.[62] This ruling had the effect of resolving the preceding judicial disagreements and of placing the jurisdiction on an exclusive appropriation basis. Although some riparian rights had been decreed in the meantime, nevertheless from a Territory-wide standpoint the troublesome riparian question appeared to be settled.

However, only a few years later, in 1917, the legislature asserted its authority by declaring that owners of mining claims on both banks of a stream were thereby entitled to use all waters necessary for working their claims, subject to appropriative rights already vested but superior to those of subsequent dates. Such later appropriators were entitled to use the stream water during such times—and only such times—as it was not needed by the riparian claimant on this particular claim.

Repeal of riparian legislation in 1966.—Without using the word "riparian" at any place in the statute, the Water Use Act of 1966 repealed all outstanding riparian legislation, effective July 1, 1966.[63]

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[62] *Van Dyke* v. *Midnight Sun Min. & Ditch Co.*, 177 Fed. 85, 91-92 (9th Cir. 1910).

[63] Alaska Stat. § § 27.10.080 (mining chapter) (Supp. 1962) and 38.05.060 (public lands chapter) (Supp. 1965), repealed, Laws 1966, ch. 50, § 2.

Rights to Use Percolating Ground Water Prior to 1966

In 1953, the United States District Court said that "percolating water, being a part of the freehold, may generally speaking, be used by the owner as he sees fit."[64]

Determination and Adjudication of Existing Water Rights Prior to 1966

Prior to 1966, Alaska had no special statutory procedure for the determination and adjudication of water rights. Controversies over rights to use water were determined judicially in the United States courts for the District of Alaska and, on appeal, in the United States Court of Appeals, 9th Circuit. When Alaska was admitted to the Union, provision was made for transfer of court jurisdiction from Federal courts to the State superior and supreme courts.[65] From January 3, 1962, jurisdiction of the State courts became exclusive other than with respect to causes under the jurisdiction of the United States. Prior to that date, the State courts had nonexclusive jurisdiction to the extent that causes of action might be commenced and determined in each judicial district at the time of appointment of one or more judges for such district.[66]

Constitutional Provisions of 1959

Among the various provisions pertaining to water resources included in the Alaska Constitution, which became operative upon Statehood in 1959, are the following provisions:

1. "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."[67]
2. "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[68]
3. "All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to State purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife."[69]
4. "Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or

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[64] *Trillingham* v. *Alaska Housing Authority*, 109 Fed. Supp. 924, 925 (D. Alaska 1953).
[65] Alaska Const. art. XV, §17.
[66] Alaska Laws 1959, ch. 50, §31.
[67] Alaska Const. art. VIII, §2.
[68] *Id.* art. VIII, §3.
[69] *Id.* art. VIII, §13.

resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes."[70]

5. "No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."[71]

The Alaska Water Use Act of 1966

Provides for appropriation of water.—This legislation provides for and regulates a system for the appropriation and use of water. The Department of Natural Resources has the responsibility for carrying out the provisions of the Water Use Act.[72]

An appropriative right can be acquired only as provided in the Act. "Appropriation" is defined to mean "the diversion, impoundment, or withdrawal of a

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[70] *Id.* art. VIII, § 14.

This and other constitutional provisions, particularly art. VIII, § 16, set out below, were construed by the Alaska Supreme Court in a recent case regarding access to navigable waters, discussed in note 84 *infra*. *Wernberg* v. *State*, 516 Pac. (2d) 1191, 1198-1199 (Alaska 1973), rehearing denied, 519 Pac. (2d) 801 (Alaska 1974).

[71] Alaska Const. art. VIII, § 16.

Some other constitutional provisions of interest include the following:

"Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." *Id.* art. VIII, § 17.

"Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights." *Id.* art. VIII, § 18.

[72] Alaska Laws 1966, ch. 50, Stat. § 46.15.010 *et seq.* (Supp. 1971).

Various functions of the Department under this Act are described below. In adopting regulations to carry out the provisions of this Act, the Commissioner of Natural Resources is to consider the responsibilities of the Department of Environmental Conservation and the Department of Fish and Game. Alaska Stat. § 46.15.020(b) (Supp. 1973). See note 87 *infra* regarding this and related provisions with respect to the Department of Environmental Conservation and the Department of Fish and Game.

In addition, the Act created a Water Resources Board, of which the Commissioner of Natural Resources is executive secretary, the duty of which is to inform and advise the Governor on all matters pertaining to the use and appropriation of water. Alaska Stat. § 46.15.190 to .240 (Supp. 1971).

The first section of the Act provides, "The Department of Natural Resources shall determine and adjudicate rights in the waters of the State, and in its appropriation and distribution." *Id.* § 46.15.010. The Act includes procedures regarding the determination of preexisting water rights which are discussed below. While the first section perhaps contemplates the determination and adjudication of other water rights in addition to such preexisting rights, the Act does not include any specific procedures for the determination and adjudication of such other rights. In this regard, see the discussion in chapter 15 at notes 79-84. Regarding the reference to "distribution" in the first section of the Act, see the discussion in chapter 16 at notes 25-28.

quantity of water from a source of water for a beneficial use."[73] "Beneficial use" means "a use of water for the benefit of the appropriator, other persons or the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, manufacturing, mining, power, public, sanitary, fish and wildlife, and recreational uses."[74]

No water right—either appropriated or unappropriated—may be acquired by adverse use or adverse possession.[75]

Waters subject to appropriation.—Waters that occur in a natural state are reserved to the people for common use, subject to appropriation.[76] This includes both surface and subsurface waters, with the exception of mineral and medicinal waters.[77]

Effect upon riparian rights.—Long before the Water Use Act went into effect, the question of riparian rights had caused dissension among the courts and between the legislature and the courts, culminating in a mining statute that "to a limited extent" enacted "the law of riparian rights," as discussed earlier.[78] This one statutory feature, restricted as it was, stood in the way of a unitary appropriation philosophy for Alaska. But the statute that originally authorized such water rights[79] and the two subsequent statutes were repealed by the Water Use Act of 1966.[80]

The Act provides that:

> *A water right acquired by law before the effective date of this chapter* or a beneficial use of water on the effective date of this chapter or made within five years before the effective date, or made in conjunction with works under construction on the effective date, *under a lawful common law or customary appropriation or use, is a lawful appropriation* under this chapter. The appropriation is *subject to applicable provisions of this chapter* and rules and regulations adopted under this chapter. [Emphasis supplied.][81]

Without expressly mentioning riparian rights, this apparently purports to convert any riparian rights to appropriative rights to use water as specified in the Act. While this language appears to be broad enough to recognize both used and unused riparian rights, the Act does not appear to include any procedure

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[73] Alaska Stat. §46.15.260(2) (Supp. 1971).

[74] *Id.* §46.15.260(3).

[75] *Id.* §46.15.040(a).

[76] *Id.* §46.15.030.

[77] *Id.* §46.15.260(5). See also Alaska Const. art VIII, § §3 and 13, set out at notes 68-69 *supra.*

[78] See "The Riparian Doctrine Prior to 1966," *supra.*

[79] Alaska Laws 1917, ch. 57, Code §47-3-35 (1949).

[80] Alaska Stat. § §27.10.080 (Supp. 1962) and 38.05.260 (Supp. 1965), repealed, Laws 1966, ch. 50, §2.

[81] Alaska Stat. §46.15.060 (Supp. 1971). See also § §46.15.260(2) and 46.15.030.

for establishing evidence of or for preserving *unused* rights.[82] At any rate, the Act apparently contemplates that any such rights may be declared forfeited if they have not been beneficially used, without sufficient cause, within 5 years after the Act's effective date.[83]

Consequently, the Act apparently purports to phase out any riparian rights to use water as specified in the Act. As mentioned earlier, the Act defines "appropriation" to mean "the diversion, impoundment, or withdrawal of a quantity of water from a source of water for a beneficial use."[84]

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[82] This is subject to the exception where works were under construction on the Act's effective date. See §46.15.135(a) and Alaska Reg. 11-1.801.01 (1967), discussed in Trelease, F. J., "Alaska's New Water Use Act," 2 Land & Water L. Rev. 1, 31-32 (1967).

[83] Alaska Stat. §46.15.140(b) (Supp. 1971), set out at note 100 *infra*. While this section refers only to appropriative rights, the Act apparently purports to convert any unused riparian rights to appropriative rights, as discussed above.

[84] *Id.* §46.15.260(2).

This definition of appropriation may leave the possibility of some used or unused riparian rights for other purposes. A recent case involved claimed riparian rights impaired by the diversion of a creek for drainage purposes. Notwithstanding that a permit to divert the creek had been obtained, apparently under this Act (and although the Department of Environmental Conservation, discussed in note 87 *infra*, had drafted plans and specifications that the diverter had agreed to implement), the Alaska Supreme Court concluded that a court action for an injunction and damages could appropriately be brought for siltation, erosion, and other damages occasioned by the diversion of the creek. The action was brought against the upstream diverters by a family corporation in control of lower land traversed by the creek. *G & A Contractors, Inc.* v. *Alaska Greenhouses, Inc.*, 517 Pac. (2d) 1379, 1381 (Alaska 1974). "[Plaintiff's] plans * * * included using Chester Creek as the focus of a garden showplace, recreation area, and arboretum." *Id.* "His intended use was to enhance the attractiveness of the stream sides, to create a showplace in connection with his nursery business." *Id.* at 1387.

In another recent case, the court concluded that damages should be awarded for the impairment of a riparian landowner's access to a tidal inlet which had been long employed for commercial fishing purposes. *Wernberg* v. *State*, 516 Pac. (2d) 1191 (Alaska 1973), mentioned in note 70 *supra*. The court, *inter alia*, made the following general statements, although largely as *dicta* and without specific reference to Alaskan water law: "To facilitate understanding of some of the issues presented, it is appropriate to briefly review some of the doctrine of riparian rights. * * *

"The particular rights delineated by the doctrine are, naturally, many and varied. Generally speaking, a riparian proprietor has the right to: (1) use the water for general purposes such as bathing and other domestic activities; (2) have access to navigable waters; (3) build wharves and piers out to deep water if this can be done without interfering with navigation; (4) take title to accretions and alluviums; and (5) make other beneficial use of the water even though the water level is lowered, so long as the use does not unreasonably interfere with similar rights of other riparians." *Id.* at 1194. The court also said, "In the arid western states the rights of riparian proprietors were made subject to those of non-riparian landowners who were prior appropriators of the waters * * *." *Id.*

The court did not mention the Alaska Water Use Act of 1966, discussed above. While that Act apparently does not generally affect the riparian landowner's right of access

(*Continued*)

Procedures regarding appropriation of water.—(1) Preexisting water rights. The section entitled "Existing Rights" provides that a water right lawfully acquired before the effective date of the Water Use Act, or a beneficial use made on such date or within 5 years previously or with the use of works then under construction, "under a lawful common law or customary appropriation or use, is a lawful appropriation under this chapter." It is subject to the Act and to rules and regulations adopted thereunder.[85]

The question of riparian rights in this and other regards is discussed earlier under "Effect upon riparian rights."

(2) Determination of preexisting rights. A claimant of a preexisting right, described above, is required to file with the Commissioner a declaration of appropriation. Priority dates from the time work began if due diligence was used, otherwise when water was first applied to beneficial use. The Commissioner is directed to determine the rights of persons owning preexisting appropriations. The procedure includes setting a time period for filing declarations, for specified areas or sources, publication and mailing of notices, investigations, hearings if requested, issuance or refusal to issue certificates of appropriation, and appeal to the superior court by aggrieved parties.[86]

(3) Permits and certificates. The first step in appropriating water consists of filing an application for a permit with the Commissioner. Procedures are provided for making applications for permits to the Commissioner, publication and mailing or service of notices, filing of objections, holding hearings, and appeal to the superior court by an aggrieved person.[87] Prescribed criteria

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(*Continued*)
to water for fishing purposes, which this case involved, it would appear that it particularly has affected the last (5th) type of riparian right listed by the court.

Riparian rights with respect to accretions to riparian land were recognized, and applicable rules discussed, in *Schafer* v. *Schnabel*, 494 Pac. (2d) 802 (Alaska 1972).

[85] Alaska Stat. §46.15.060 (Supp. 1971).

[86] The declaration shall be considered correct until a certificate of appropriation is issued or denied. *Id.* §46.15.135.

Regarding the question of determining and adjudicating other water rights, see the end of note 72 *supra.*

[87] Alaska Stat. §§46.15.070(a) and (c)-(f) (Supp. 1971) and 46.15.070(b) (Supp. 1973). By regulation, the Commissioner may designate types of appropriations which are exempt from this section (46.15.070) and provide simplified procedures for ruling on the applications. In this regard, see the simplified procedures in Alaska Reg. 11-1.803 (1967) for appropriations of unappropriated water averaging under 5,000 gallons per day.

In the act creating the Department of Environmental Conservation the legislature declared the policy of the State to be to protect natural resources and to prevent environmental pollution by improving and coordinating the plans and functions of the State affecting natural resources. Alaska Laws 1971, ch. 120, §3, Stat. §46.03.010 (Supp. 1971). To implement this policy, the Department of Environmental Conservation may review State programs and activities relating to natural resources and make recommendations regarding environmental guidelines to other State agencies. *Id.* §46.03.020(2). The Department also may appear in administrative proceedings of

for issuance of a permit are as follows:

> (a) The commissioner shall issue a permit if he finds that
>
> (1) rights of a prior appropriator will not be unduly affected;
> (2) the proposed means of diversion or construction are adequate;
> (3) the proposed use of water is beneficial; and
> (4) the proposed appropriation is in the public interest.
>
> (b) In determining the public interest, the commissioner shall consider
>
> (1) the benefit to the applicant resulting from the proposed appropriation;
> (2) the effect of the economic activity resulting from the proposed appropriation;
> (3) the effect on fish and game resources and on public recreational opportunities;
> (4) the effect on public health;
> (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
> (6) harm to other persons resulting from the proposed appropriation;
> (7) the intent and ability of the applicant to complete the appropriation; and
> (8) the effect upon access to navigable or public waters.[88]

Other controlling matters include preferences in granting permits; terms of permits, including quantity of water, plans and specifications, and other conditions; and time limits for beginning construction and perfecting approations, discussed later. If the appropriation has been properly perfected, the Commissioner shall issue a certificate of appropriation.[89] The Commissioner

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other agencies affecting natural resources. *Id.* §46.03.020(4). One aspect of the interdepartmental coordination is that notice of waste disposal permits is sent by the Commissioner of Environmental Conservation to, among others, the Commissioner of Natural Resources, and the Commissioner of Fish and Game. *Id.* §46.03.110(c). Similarily, notices regarding permits to appropriate water are sent by the Department of Natural Resources to the Department of Environmental Conservation and the Department of Fish and Game. Alaska Stat. §46.15.070(b) (Supp. 1973). In addition, the Commissioner of Natural Resources shall adopt procedures and substantive regulations to carry out the provisions of the Water Use Act, "taking into consideration the responsibilities of the Department of Environmental Conservation under AS 46.03 and the Department of Fish and Game under AS 16." *Id.* §46.15.020(b). All applications to the Commissioner for a permit to appropriate water shall be considered as having been simultaneously filed with those Departments under their respective legislation. *Id.* §46.15.040(c). Notice of such application and opportunity to object shall be given to those Departments. *Id.* §§46.15.070(b) and (c) (Supp. 1971).

[88] Alaska Stat. §46.15.080 (Supp. 1971).

[89] *Id.* §46.15.120.

shall record all permits and certificates, and amendments and orders affecting them, and index them in accordance with the source of water and name of the applicant or appropriator.[90]

(4) Exempted water uses. The Water Use Act includes a section which provides, among other things, that one who "constructs works for an appropriation, or diverts, impounds, withdraws or uses a *significant* amount of water from any source without a permit or certificate of appropriation * * * is guilty of a misdemeanor."[91] Drawing upon this section as authority, the regulations promulgated under the Act have provided for the following exemptions:

> 805. EXEMPTIONS
>
> 805.01 Water Uses Exempted from the Water Use Act
>
> A person may apply for a permit to appropriate and may receive a certificate of appropriation but he is not subject to penalty if he fails to do so, providing that he does not use a significant amount of water and that the water he uses is not otherwise appropriated. Examples of uses that do not constitute the use of a significant amount of water are:
>
> a. The use of less than 1,000 gallons of water per day for domestic purposes.
> b. The temporary use of water, during a single period not to exceed 120 days, for drilling, construction, and other activities that do not require a permanent or seasonally recurring water use.
> c. The use of water in a remote location where the use will not impinge on other uses.
> d. The use of water in an emergency.
> e. The use of sea water in and on docks, shore establishments and watercraft.
>
> 805.02 No Water Right Established
>
> No water right is established by a use of water exempt under this section and the water so used is subject to appropriation by others.
>
> Authority: AS 46.15.180

(5) Priority. The priority of an appropriation dates from the time of filing an application with the Commissioner. If it was perfected before the effective date of the Act, it is determined as explained earlier.[92]

(6) Effect of priority. Another provision of the Act states that "Priority of appropriation gives prior right."[93] Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as

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[90] Alaska Stat. §46.15.020(b)(2) (Supp. 1973).

[91] Alaska Stat. §46.15.180 (Supp. 1971). Emphasis added.

[92] *Id.* §46.15.130, referring in the latter regard to §46.15.135, discussed under "(1) Determination of preexisting rights," *supra.*

[93] Alaska Const. art. VIII, §13, set out at note 69 *supra* similarly provides, "Priority of appropriation shall give prior right."

the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire his water under the changed conditions."[94] See the following discussion, "(7) Permit terms and conditions" and "(8) Preferred use," regarding preferred use for public water supply.

(7) Permit terms and conditions. The Commissioner may not issue a permit for more water than can be beneficially used for the purposes stated in the application. He may issue a permit for less than the requested amount and may require other modifications of plans and specifications for the appropriation. He may issue a permit "subject to terms, conditions, restrictions, and limitations he considers necessary to protect the rights of others, and the public interest. However, the permit shall be subject to termination only as provided" in the Act.[95]

(8) Preferred use. When there are competing applications for permits from the same source and it is insufficient to supply all applicants, the Commissioner shall give preference first to public water supply and then "to the use which alone or in combination with other foreseeable uses will constitute the most beneficial use."[96]

One who proves a "preferred use"—that is, for a public water supply—shall be granted a permit and "preference over other appropriators." To be entitled to such preference, the applicant must show that his use will be prevented or substantially interfered with by a prior appropriation and agree to compensate the prior appropriator for any damages sustained by the preferred use.[97]

(9) Time for construction and completion. "A permit may place a time limit for beginning construction and perfecting appropriation. Reasonable extensions of time shall be permitted for good cause shown."[98]

(10) Loss of appropriative right. (a) The Commissioner apparently may wholly or partially revoke a certificate of appropriation if the holder, with intention to abandon, ceases to make beneficial use of all or part of the appropriated water. Such wholly or partially abandoned appropriation reverts to the State and the abandoned water becomes unappropriated water.[99]

(b) The Commissioner "may declare an appropriation to be wholly or partially forfeited and shall revoke the certificate of appropriation if an

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[94] Alaska Stat. §46.15.050 (Supp. 1971).

[95] *Id.* §46.15.100.

[96] *Id.* §46.15.090.

Alaska Const. art. VIII, §13, set out at note 69 *supra*, provides in part, "Except for public water supply, an appropriation of water shall be limited to state purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife."

[97] Alaska Stat. §46.15.150 (Supp. 1971).

[98] *Id.* §46.15.110.

[99] *Id.* §46.15.140(a).

appropriator voluntarily fails or neglects, without sufficient cause, to make use of all or a part of his appropriated water for a period of five successive years."[100]

(11) Transfer and change of appropriations. The appropriative right is appurtenant to the land or place of beneficial use. Water supplied by one person to another's land is not appurtenant thereto unless the parties so intend. An appurtenant right passes with the land unless specifically exempted from the conveyance. With permission of the Commissioner, an appropriative right or any part thereof may be transferred for other purposes or to other land and become appurtenant thereto.[101]

There is no express statutory authority for changes in the point of diversion of appropriative rights. But, the Alaska Supreme Court has recognized that the prior appropriator may change the point of diversion or place of use of the water to which he has a right, without affecting the priority of his right, so long as such change does not prejudice the rights of later appropriators.[102]

(12) Distribution of water. The first section of the Water Use Act provides, "The Department of Natural Resources shall determine and adjudicate rights in the waters of the State, and in its appropriation and distribution."[103] While this section of the Act may contemplate the "distribution" of water, no specific procedures for such distribution are included. However, the penalty provision of the Act,[104] quoted in the next subsection, implies authority in the Commissioner to perform at least the designated functions relating to the distribution of water.[105]

(13) Penalities. The Act provides:

> A person who constructs works for an appropriation, or diverts, impounds, withdraws or uses a significant amount of water from any source without a permit or certificate of appropriation; or a person who violates an order of the commissioner to cease and desist from preventing any water from moving to a person having a prior right to use the same; or who disobeys an order of the commissioner requiring him to take steps to cause the water to so move; or who

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[100] *Id.* §46.15.140(b).

[101] *Id.* §46.15.160. The instrument of transfer must be recorded with the Commissioner and recorder's office. *Id.* See §46.15.170 regarding effect of recording.

[102] *Eglar* v. *Baker*, 4 Alaska 142, 144-145 (1910); *Miocene Ditch Co.* v. *Campion Min. & Trading Co.*, 3 Alaska 572, 584 (1908).

[103] *Id.* §46.15.010.

[104] *Id.* §46.15.180.

[105] The Act, however, apparently does not otherwise contain provisions pertaining to the distribution of water, unlike its provisions regarding the determination of preexisting water rights, discussed earlier.

For rather similar views regarding the applicability of this Act to the distribution of water, see Trelease, F. J., "Alaska's New Water Use Act," 2 Land & Water L. Rev. 1, 36 (1967).

> fails or refuses to install meters, gauges or other measuring devices or control works; or who violates an order establishing corrective controls for an area or for a source of water, or who knowingly makes a false or misleading statement in a declaration of existing rights, is guilty of a misdemeanor.[106]

Crimes under this provision are in addition to any others provided by law.

Ground water.—As discussed earlier under "Appropriation of Water—Waters Subject to Appropriation," the Water Use Act applies to waters occurring in a natural state, both surface or subsurface, with the exception of mineral and medicinal waters. The Act does not define the term "subsurface" water. However, regulations promulgated under the Act have employed and defined the term "ground water" to mean "any water, except capillary moisture, beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water within the boundaries of the State, whatever may be the geologic formation or structure in which the water stands, flows, percolates, or otherwise moves."[107]

Appropriators who utilize ground water resources must follow all applicable requirements for appropriation of water.[108] The regulations define a "well" to mean:

> [A]n artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which ground water flows under natural pressure or is artificially withdrawn. This definition does not include holes or shafts drilled or dug for the purpose of exploration or production of oil, gas or valuable minerals unless such hole or shaft is actually used for the production of water.[109]

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[106] Alaska Stat. §46.15.180 (Supp. 1971).

[107] Alaska Reg. 11-1.800.03 (1967).

[108] The booklet entitled "Appropriation of Water Under the Alaska Water Use Act," prepared by the Department "to explain the rights, privileges and responsibilities of water users, and procedures whereby water rights may be obtained under the Alaska Water Use Act" (*Id.* at 1), includes certain "Special Requirements for Appropriation of Ground Water." These include, *inter alia*, the following requirements:

"No permit shall be granted for the development or withdrawal of ground water beyond the capacity of the aquifer in the given basin, district or locality to yield such water within reasonable drawdown or in the case of artesian conditions a reasonable reduction in artesian pressures.

* * * *

"Artesian pressure shall not be wasted by permitting the water to reach any permeable substratum before coming to the surface of the ground or into a water course or other body of water unless it is used for a beneficial purpose.

* * * *

"Whenever a well is found that is by nature of its construction, operation or otherwise causing wasteful use of ground water, is unduly interfering with other wells or is polluting ground water or surface water supplies, * * * an order [may be issued] for the discontinuance of, or [to] impose conditions upon the use of such well to such extent as may be necessary to remedy the defect." *Id.* at 8.

[109] Alaska Reg. 11-1.800.06 (1967).

Arizona

Governmental Status

The area within the present State of Arizona was once a part of the Mexican State of Sonora. After it was ceded to the United States,[1] this area was included in the Territory of New Mexico,[2] until the separate Territory of Arizona was established February 24, 1863.[3] Arizona was admitted to statehood on February 14, 1912.[4]

Pre-American Water Enterprises

Irrigation was practiced by the Indians to some extent when Spanish explorers entered the area that is now Arizona, and the Spaniards built irrigation works in connection with their agricultural settlements. Most of the development at the time the Territory was organized was in the San Pedro and Santa Cruz valleys under the "public acequias" or community ditches characteristic of Spanish-Mexican settlements,[5] the water rights of which had been established under Spanish and Mexican law and were protected during and after the Mexican War by the American military and Territorial governments.[6]

State Administrative Agency

The Water Code provides, "The state land department shall have general control and supervision of the waters of the state and of the appropriation and distribution thereof, except distribution of water reserved to special officers appointed by courts under existing judgments or decrees."[7]

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[1] Most of what is now Arizona was ceded to the United States by Mexico in 1848 by the Treaty of Guadalupe Hidalgo. 9 Stat. 922 (1848). The remainder was acquired from Mexico in 1853 by the Gadsden Purchase Treaty. 10 Stat. 1031 (1853).

[2] 9 Stat. 446 (1850).

[3] 12 Stat. 664 (1863).

[4] 37 Stat. 1728 (1912). The Joint Resolution to admit the Territories of New Mexico and Arizona as States, to take effect upon proclamation of the President, was passed in 1911. 37 Stat. 39 (1911).

[5] *Biggs* v. *Utah Irrigating Ditch Co.*, 7 Ariz. 331, 348–349, 64 Pac. 494 (1901).

[6] See Hutchins, W. A., "The Community Acequia: Its Origin and Development," 31 Southwestern Historical Quarterly 264 (1928).

[7] Ariz. Rev. Stat. Ann. §45-102 (1956).

With respect to what "waters of the state" may include, see §45-101(A), set out at note 17 *infra*, which apparently pertains to various waters on the surface and definite underground channels.

The Department's functions in regard to percolating ground waters are discussed later under that topic.

The safe construction, alteration, repair, operation, and removal of dams and reservoirs, which are not dealt with here, are under the supervision of the State Water Engineer as an employee of the Arizona Water Commission. Ariz. Rev. Stat. Ann. §§45-505(A), -506(C)(2) (Supp. 1974) and -701 *et seq.* (1956), as amended (Supp. 1974). The Commission may, *inter alia*, prosecute and defend all rights, claims, and privileges of the State respecting interstate streams. Ariz. Rev. Stat. Ann. §45-506(B)(1) (Supp. 1974).

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—The Arizona Supreme Court has declared that recognition of the right to appropriate and use water for irrigation antedates history and even tradition;[8] and that in the Mexican State of Sonora, rights of prior appropriators arose under Mexican law only as a result of grants from the government, but that appropriations likewise were permitted to some extent by local custom.[9]

The right to appropriate water was reaffirmed by the first legislature of the Territory of Arizona in 1864. This was done through the Bill of Rights in the Howell Code, wherein it was declared that all streams, lakes, and ponds of water capable of being used for navigation or irrigation were public property, and the right to appropriate them exclusively to private use except under legislative regulation was denied.[10] Another chapter in the Howell Code declared all rivers, creeks, and streams of running water in the Territory to be public and applicable to the purposes of irrigating and mining, and stated that all inhabitants of the Territory who owned or possessed arable lands should have the right to construct public or private acequias (ditches) to obtain the necessary water from any of such sources found convenient, and to have the exclusive right to as much of the water as they needed.[11] These declarations have been held by the Arizona Supreme Court to have established the appropriation doctrine with respect to the waters to which they referred.[12]

The chapter of the Howell Code relating to acequias followed closely the public or community acequia laws that had been enacted by the Legislature of New Mexico in 1850 and 1852 while Arizona was a part of New Mexico Territory, and added other provisions relating to their management and their operation and maintenance.[13] Aside from sections involving general principles of water law, these provisions have since been eliminated. The community acequia, in contrast to the situation in New Mexico,[14] has ceased to be of much importance in Arizona.

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[8] *Clough* v. *Wing*, 2 Ariz. 371, 380, 17 Pac. 453 (1888). See also *Biggs* v. *Utah Irrigating Ditch Co.*, 7 Ariz. 331, 348-349, 64 Pac. 494 (1901); *Slosser* v. *Salt River Valley Canal Co.*, 7 Ariz. 376, 385-386, 65 Pac. 332 (1901).

[9] *Maricopa County M.W.C. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 74-75, 4 Pac. (2d) 369 (1931). See also *Boquillas Land & Cattle Co.* v. *St. David Cooperative Commercial & Dev. Assn.*, 11 Ariz. 128, 129, 89 Pac. 504 (1907).

[10] Terr. Ariz. Bill of Rights, art. 22 (1864).

[11] Terr. Ariz. Howell Code, ch. LV, "Of Acequias, or Irrigating Canals" (1864).

[12] *Tattersfield* v. *Putnam*, 45 Ariz. 156, 165, 41 Pac. (2d) 228 (1935); *Maricopa County M. W. C. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 77, 4 Pac. (2d) 369 (1931); *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 102, 245 Pac. 369 (1926).

[13] The acequia and other water laws as they existed in 1887, prior to the adoption of a statutory method of appropriating water, are contained in Ariz. Rev. Stat. §§3198-3230 (1887).

[14] See, in the New Mexico State summary, *infra*, "Water Rights of Community Acequias."

Procedure for appropriating water.—In 1893 the legislature provided a method for appropriating water, the first step being the posting of a notice of appropriation at the proposed point of diversion.[15] This was replaced by the current law, first enacted in 1919, commonly known as the "Water Code."[16]

The Water Code provides, in a section partially entitled "Public nature of waters of the state,"

> The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.[17]

According to the Arizona Supreme Court, the use of the word "natural" in this section limits the sources of water subject to appropriation thereunder and excludes sources of artificial origin.[18]

Unappropriated water may be appropriated for domestic, municipal, irrigation, stockwatering, water power, recreation, wildlife (including fish), or mining. "The person or the state of Arizona or a political subdivision thereof first appropriating the water shall have the better right."[19]

The statutory procedure is the exclusive method of acquiring an appropriative right.[20] Although the statute provides that "Any person," including the United States, the State, or a municipality may appropriate water,[21] the Arizona Supreme Court has imposed a landownership qualification upon intending appropriators for irrigation purposes.[22]

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[15] Ariz. Laws 1893, No. 86.

[16] Ariz. Laws 1919, ch. 164.

[17] Ariz. Rev. Stat. Ann. §45-101(A) (1956).

[18] "[T]he test of the right of appropriation, both in quantity and quality, depends on their natural conditions, and not on what may occur after that condition is artificially changed." *Fourzan* v. *Curtis*, 43 Ariz. 140, 143, 29 Pac.(2d) 722 (1934). See also *Parker* v. *McIntyre*, 47 Ariz. 484, 491, 56 Pac. (2d) 1337 (1936); *Campbell* v. *Willard*, 45 Ariz. 221, 224–225, 42 Pac. (2d) 403 (1935).

[19] Ariz. Rev. Stat. Ann. §45-141(A) (Supp. 1974). Compare §45-175 which provides: "During years when a scarcity of water exists owners of lands shall have preference to the water for irrigation according to the dates of their appropriation or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence." This was based on Terr. Ariz. Howell Code, ch. LV, §17 (1864). With respect to this, see *Biggs* v. *Utah Irrigating Ditch Co.*, 7 Ariz. 331, 349, 64 Pac. 494 (1901). See also *Huning* v. *Porter*, 6 Ariz. 171, 54 Pac. 584 (1898).

[20] *Tattersfield* v. *Putnam*, 45 Ariz. 156, 174, 41 Pac. (2d) 228 (1935). Prior to enactment of the Water Code, an intending appropriator had the option of conforming to the then existing statute (1893 to 1919) or of disregarding it and relying solely upon mere application of the water to beneficial use. *Parker* v. *McIntyre*, 47 Ariz. 484, 489, 56 Pac. (2d) 1337 (1936). Now he has no choice. *England* v. *Ally Ong Hing*, 105 Ariz. 65, 459 Pac. (2d) 498, 504 (1969).

[21] Ariz. Rev. Stat. Ann. §§45-141 and -142 (Supp. 1974).

[22] Such an applicant must be the owner or possessor of land susceptible of irrigation; if

Application to the State Land Department for a permit to appropriate the water is the first step in the procedure;[23] the final step is the issuance of a certificate to the applicant when he has satisfied all requirements for perfecting his appropriation, including the timely application of the water to a beneficial use.[24] The priority of a right perfected in full compliance with all requirements dates from the filing of the application in the office of the Department.[25]

> The department shall approve applications made in proper form for the appropriation of water for a beneficial use, but when the application or the proposed use conflicts with vested rights, is a menance to public safety, or is against the interests and welfare of the public, the application shall be rejected.
>
> An application may be approved for less water than applied for if substantial reasons exist therefor, but shall not be approved for more water than may be put to a beneficial use. Applications for municipal uses may be approved to the exclusion of all subsequent appropriations if the estimated needs of the municipality so demand after consideration thereof and upon order of the department.[26]

An applicant or person whose rights are affected by the Department's decision may appeal to the superior court.[27] However, the Arizona Supreme Court, in a divided (3 to 2) opinion, held that the holders of alleged prior, vested, and decreed rights to all the water applied for were not "persons whose rights are affected" by the issuance of a permit to an applicant. The court indicated that the issuance of a permit under the statutory procedure "can in

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only a possessor, he must have a present intent and apparent future ability to acquire ownership. *Tattersfield* v. *Putnam*, 45 Ariz. 156, 168–174, 41 Pac. (2d) 228 (1935); *Slosser* v. *Salt River Valley Canal Co.*, 7 Ariz. 376, 385–386, 393, 65 Pac. 332 (1901), appeal dismissed, 195 U. S. 639 (1904). But ownership of the means of diverting and distributing water, however, is not essential to perfect the right of appropriation, for such means may be owned by a person other than the owner or possessor of land who seeks to appropriate the water. *Gould* v. *Maricopa Canal Co.*, 8 Ariz. 429, 447, 76 Pac. 598 (1904), appeal dismissed, 195 U.S. 639 (1904).

With respect to appropriating water rights on Federal public domain lands, see *Parker* v. *McIntyre*, 47 Ariz. 484, 56 Pac. (2d) 1337, 1340 (1936).

[23] Ariz. Rev. Stat. Ann. §45-142 (Supp. 1974).

[24] Ariz. Rev. Stat. Ann. §§45-142 to -154 (1956), as amended. Ariz. Rev. Stat. Ann. §45-150 (Supp. 1974) provides, "Actual construction, except under applications by a city or town for municipal uses, shall begin within two years after approval of the application, and shall be prosecuted with reasonable diligence and completed within a reasonable time which shall be fixed in the permit at not to exceed five years from the date of approval. The department shall, for good cause shown, extend the time beyond the five-year period if the magnitude, physical difficulties and cost of the work justify extension."

[25] Ariz. Rev. Stat. Ann. §45-152(B) (1956).

[26] *Id.* §45-143.

Regarding authorization to owners of arable and irrigable lands to condemn rights of way for public or private canals across lands of others, see §45-201.

[27] *Id.* §45-154.

no way affect the vested rights of prior appropriators."[28] Although such prior appropriators may not appeal, they may pursue other remedies. Among such remedies, they may be able to initiate a separate adjudication of their priorities or a suit for damages or an injunction. See the later discussion under "Determination of Conflicting Water Rights."[29]

Appropriations involving storage of water require: (1) applications for primary permits by parties proposing to construct the storage works; and (2) applications for secondary permits by those who propose to apply the water to beneficial use. When beneficial use has been perfected, the final certificate of appropriation refers to both the ditch described in the secondary permit and the reservoir described in the primary permit.[30]

Restrictions and preferences in appropriation of water.—As noted above, an application to appropriate water that threatens to conflict with vested rights or with the public welfare must be rejected, and an application may be approved for less water than applied for.[31] Appropriations of water to generate hydroelectric energy are subject to two restrictions: (1) those exceeding 25,000 horsepower must be approved by the legislature;[32] and (2) rights for

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[28] *Ernst* v. *Superior Ct. of Apache County*, 82 Ariz. 17, 307 Pac. (2d) 911, 911-912 (1957), citing *Beach* v. *Superior Ct. of Apache County*, 64 Ariz. 375, 173 Pac. (2d) 79 (1946).

The court went on to say, "Respondents do not contend that the commissioner's decision in granting the permits can disturb the vested rights of prior appropriators. This being so, such appropriators are in no way injured or bound by the decision * * *. Our view is that the Beach case is determinative of the question here presented * * *." 307 Pac. (2d) at 912. In the *Beach* case, the court had said that the commissioner "has authority to investigate, to determine whether in his judgment the appropriation applied for would conflict with vested rights, authority to determine whether or not he thinks the water applied for can be put to a beneficial use. He takes this up in a summary way, and if he decides to refuse the permit the applicant has a right to appeal [see the current version of §45-143, set out at note 26 *supra*]; *but as stated in the former opinion, the commissioner in this case under the procedure adopted had no jurisdiction to settle and determine the relative rights of the appellant, and the appellee to the water of the Verde river.*" 173 Pac. (2d) at 82.

A year after the *Ernst* decision, in a water rights action to quiet title and seek an injunction, the court said: "There can be no doubt as to the jurisdiction of the Superior Court of Mohave County to determine the respective interests of the parties in these waters and to order the appropriate relief for their invasion, if any. While the State Land Commissioner is authorized by statute to issue permits and certificates of water rights, his action does not adversely affect the vested rights of prior appropriators and does not affect the jurisdiction of the Superior Court to determine controversies relative thereto. Ernst v. Superior Court of Apache County, 82 Ariz. 17, 307 P.2d 911; Beach v. Superior Court of Apache County, 64 Ariz. 375, 173 P.2d 79." *Mullen* v. *Gross*, 84 Ariz. 207, 326 Pac. (2d) 33, 34-35 (1958). This was a unanimous opinion.

[29] See also the discussion of *Mullen* v. *Gross*, note 28 *supra*.

[30] Ariz. Rev. Stat. Ann. §45-151 (1956).

[31] *Id.* §45-143, set out at note 26 *supra*.

[32] *Id.* §45-146(A).

power development are limited to 40 years duration, subject to preference rights of renewal.[33]

When pending applications conflict, first preference goes to domestic (including gardens not exceeding one-half acre) and municipal uses; second to irrigation and stockwatering; third to power and mining;[34] and last to recreation and wildlife uses, including fish.[35]

Some aspects of the Arizona appropriative right.—The irrigation water right is an appurtenance to the land on which the water is used, subject to severance under conditions noted below.[36] Necessarily appurtenant, therefore, the water right passes with the land on a conveyance thereof even without mention in the instrument of conveyance.[37]

An appropriator of water of a surface stream is entitled to protection against depletion in flow of the undercurrent in both quantity and quality, which if allowed to continue would require installation of a new method of diversion.[38]

As water may be appropriated by any person, the State, or political subdivision thereof, either for personal use "or for delivery to consumers,"[39] formal title to an appropriation made under the statutory procedure may thus be held by a public service corporation. However, when actual ownership of an appropriative right has been under discussion in decisions of the Arizona Supreme Court, the land-holding water users have been held to be the true appropriators.[40]

In years of scarce water supply, landowners shall have preference to water for irrigation "according to the dates of their appropriation or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have

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[33] *Id.* §45-152(B).

[34] Ariz. Rev. Stat. Ann §45-147 (Supp. 1974).

With respect to municipal use, see also §45-143(B) (1956), set out at note 26 *supra*.

[35] Ariz. Rev. Stat. Ann. §45-141(C) (Supp. 1974).

[36] *Id.* §45-172. *Tattersfield* v. *Putnam*, 45 Ariz. 156, 170, 171, 41 Pac. (2d) 228 (1935).

[37] *Day* v. *Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 478, 237 Pac. 636 (1925).

[38] *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 106–108, 245 Pac. 369 (1926).

[39] Ariz. Rev. Stat. Ann. §45-141(A) (Supp. 1974).

[40] See, e.g., *Slosser* v. *Salt River Valley Canal Co.*, 7 Ariz. 376, 390, 65 Pac. 332 (1901); *Gould* v. *Maricopa Canal Co.*, 8 Ariz. 429, 447, 76 Pac. 598 (1904). Compare *Montezuma Canal Co.* v. *Smithfield Canal Co.*, 218 U.S. 371, 382 (1910).

In *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 112–113, 245 Pac. 369 (1926), the supreme court referred to the defendant public service corporation as doing the appropriating, but this obviously was simply a convenient way of referring to the defendant as doing the construction and operation work for, and as representing the interests of, its many consumers. The contest was between prior and subsequent appropriators; there was no issue of ownership of the appropriative right. The attitude of the supreme court on the question of water rights ownership was not changed thereby. See *Olsen* v. *Union Canal & Irr. Co.*, 58 Ariz. 306, 317–318, 119 Pac. (2d) 569 (1941); *Whiting* v. *Lyman Water Co.*, 59 Ariz. 121, 123–124, 458, 459–460, 124 Pac. (2d) 316, 129 Pac. (2d) 995 (1942).

preference."[41] This statute was based on a provision in the Howell Code, adopted early in the Territorial regime.[42] With respect to this, the State supreme court stated in 1901, "As applied to private ditches, the statute must be construed as a declaration that not mere priority or diversion, but priority of use and application of water upon particular lands, shall govern in determining conflicting rights."[43]

Water users may rotate the use of water to which they are collectively entitled, purusant to written agreement presented to the water superintendent.[44]

The right of junior appropriators to take and to make substitutions for waters to which senior appropriators are entitled, provided that in all respects all rights of the latter are properly safeguarded, has been recognized by the courts.[45]

There is no express statutory authority in Arizona for changes in point of diversion of appropriative rights. The Arizona Supreme Court has sanctioned such changes by holding that if occasioned by abandonment of the original ditch and substitution of another, they were not evidence of intent to abandon the water rights and did not affect their validity.[46] This court also stated that the means of appropriation may be changed by the appropriator from time to time if no injury results to others, or may be changed by direction of the courts in proper cases in order to enlarge the use of the waters of the stream.[47]

Changes in the place and purpose of use are subject to statutory restrictions. One section of the Water Code provides:

> A water right may be severed from the land to which it is appurtenant or from the site of its use if for other than irrigation purposes and with the consent and approval of the owner of such right may be transferred for use for irrigation of agricultural lands or for municipal, stock watering, power and mining purposes and to the state or its political subdivisions for use for recreation and wildlife purposes (including fish), without losing priority theretofore established, subject to [certain] limitations and restrictions * * *.[48]

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[41] Ariz. Rev. Stat. Ann. §45-175 (1956).

[42] Terr. Ariz. Howell Code, ch. LV, §17 (1864).

[43] *Biggs* v. *Utah Irrigating Ditch Co.*, 7 Ariz. 331, 349, 64 Pac. 494 (1901).

[44] Ariz. Rev. Stat. Ann. §45-245(B) (1956).

[45] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.*, 39 Ariz. 367, 370, 7 Pac. (2d) 254 (1932); *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 106–107, 112–113, 245 Pac. 369 (1926).

[46] *Slosser* v. *Salt River Valley Canal Co.*, 7 Ariz. 376, 394-395, 65 Pac. 332 (1901); *Gould* v. *Maricopa Canal Co.*, 8 Ariz. 429, 448, 76 Pac. 598 (1904). See *Miller* v. *Douglas*, 7 Ariz. 41, 44, 60 Pac. 722 (1900); *Salt River Valley Water Users' Assn.* v. *Norviel*, 29 Ariz. 360, 370, 374, 499, 502, 241 Pac. 503 (1925), 242 Pac. 1013 (1926).

[47] *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 105, 245 Pac. 369 (1926).

[48] Ariz. Rev. Stat. Ann. §45-172 (Supp. 1974).

The Arizona court of appeals held in 1966 that appropriators who had conserved water by improvement and concrete lining of their irrigation ditches did not have the

An application for such severance or transfer and, after notice and hearing, the approval of the State Land Department are ordinarily required.[49]

> Vested or existing rights to the use of water shall not be affected, infringed upon nor interfered with, and in no event shall the water diverted or used after the transfer of such rights exceed the vested rights existing at the time of such severance and transfer, and the state land commissioner shall by order so define and limit the amount of water to be diverted or used annually subsequent to such transfer.[50]

If water rights are to be transferred from lands within an irrigation district, agricultural improvement district, or water users association, the approval of such district or association also is required.[51]

Another section of the Water Code provides that no "change in the use of water appropriated for domestic, municipal or irrigation uses" may be made without the approval of the Department; and a change that contemplates generating hydroelectric energy of more than 25,000 horsepower requires legislative authorization.[52]

Water rights may be lost by abandonment, (in which case, intent apparently is essential[53]) or by the voluntary failure, without sufficient cause, to beneficially use all or any part of a water right for 5 successive years.[54] "The rights relinquished shall revert to the state, and the waters affected by such

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right to use the saved water on adjacent lands for which they held no appropriative rights without applying for the right to do so from the State Land Department. *Salt River Valley Water Users' Assn.* v. *Kovacovich*, 3 Ariz. App. 28, 411 Pac. (2d) 201, 202–204 (1966). This is discussed in more detail in chapter 9 at note 269.

[49] Ariz. Rev. Stat. Ann. §§45-172(1) and (7) (Supp. 1974).

This does not apply to certain transfers, approved by irrigation districts, accomplished by excluding certain lands from the district and including other lands in lieu thereof. *Id.* §45-172(6).

[50] *Id.* §45-172(2).

[51] *Id.* §45-172(4). Such requirement also applies to transfer of rights to use "water on or from any watershed or drainage area which supplies or contributes water for the irrigation of lands within" such a district or association. Failure to approve or reject such an application within 45 days shall constitute approval. *Id.* §45-172(5).

[52] Ariz. Rev. Stat. Ann. §45-146(B) (1956).

[53] This was so decided in *Gila Water Co.* v. *Green*, 27 Ariz. 318, 329, 232 Pac. 1016 (1925), 29 Ariz. 304, 306, 241 Pac. 307 (1925), prior to the 1974 legislation regarding abandonment cited in note 54 *infra*.

[54] Ariz. Rev. Stat. Ann. §45-189 (Supp. 1974), enacted by Laws 1974, ch. 122, §2. See also Ariz. Rev. Stat. Ann. §45-101(C) (1956), previously enacted and still extant, which provides, "When the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and shall again be subject to appropriation."

Regarding prior legislation with respect to statutory forfeiture, see *Gila Water Co.* v. *Green*, 29 Ariz. 304, 306, 241 Pac. 307 (1925).

rights shall become available for appropriation to the extent they are not lawfully claimed or used by existing appropriators."[55]

In certain circumstances, one may be barred by estoppel from exercising a water right.[56]

While water rights formerly could be lost by adverse use or possession for the period of the statute of limitations,[57] this was prohibited in 1974.[58]

Repudiation of the Riparian Doctrine of Water Rights

The Territorial Legislature of Arizona in 1887 specifically repudiated the riparian doctrine.[59] The State constitution, in substantially identical language, provides, "The common law doctrine of riparian rights shall not obtain or be of any force or effect in the State."[60]

In the year following the legislative repudiation, the Territorial supreme court stated that the common law doctrine had been unknown under the laws and customs of Mexico, and that it had never been suited to local conditions relating to the use of water; and emphasized its stand in other cases.[61] One such Territorial decision was affirmed by the United States Supreme Court.[62] The State supreme court has consistently taken the same position.[63] In a 1966 opinion the court said in regard to the constitutional provision quoted above:

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[55] Ariz. Rev. Stat. Ann. §45-189 (Supp. 1974). See also Ariz. Rev. Stat. Ann. §45-101(C) (1956), set out in note 54 *supra*.

If the State Land Department finds that nonuse for 5 successive years may have occurred, it shall give notice and hold a hearing to determine whether the water right has reverted to the State through nonuse. After the hearing the Department shall enter an order declaring whether the water right has been lost by nonuse. Ariz. Rev. Stat. Ann. §45-190 (Supp. 1974). The decision of the Department is subject to judicial review. *Id.* §45-191.

[56] *Wedgworth* v. *Wedgworth*, 20 Ariz. 518, 522, 181 Pac. 952 (1919); *Biggs* v. *Utah Irrigating Ditch Co.*, 7 Ariz. 331, 351–352, 64 Pac. 494 (1901).

[57] *Gould* v. *Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. 598 (1904); *George* v. *Gist*, 33 Ariz. 93, 263 Pac. 10 (1928).

[58] Ariz. Laws 1974, ch. 122, §2, pp. 461–462, Rev. Stat. Ann. §45-188 (Supp. 1974). But this shall not "diminish or enhance the validity of a claim filed under this article originating prior to the effective date of chapter 164 of the Laws of 1919." *Id.* Chapter 164 of the Laws of 1919 was the forerunner of the current Water Code.

[59] Ariz. Rev. Stat. §3198 (1887).

[60] Ariz. Const. art. XVII, §1.

[61] *Clough* v. *Wing*, 2 Ariz. 371, 381, 17 Pac. 453 (1888). See also *Hill* v. *Lenormand*, 2 Ariz. 354, 357, 16 Pac. 266 (1888); *Chandler* v. *Austin*, 4 Ariz. 346, 350, 42 Pac. 483 (1895); *Arizona Copper Co.* v. *Gillespie*, 12 Ariz. 190, 202, 100 Pac. 465 (1909).

[62] *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U.S. 339 (1909), affirming *Boquillas Land & Cattle Co.* v. *St. David Cooperative Commercial & Dev. Assn.*, 11 Ariz. 128, 135–139, 89 Pac. 504 (1907).

[63] *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 102, 245 Pac. 369 (1926); *Maricopa County M. W. C. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 77, 4 Pac. (2d) 369 (1931); *Tattersfield* v. *Putnam*, 45 Ariz. 156, 165, 41 Pac. (2d) 228 (1935).

> This does not mean that sometimes the riparian water rights doctrine has no force or effect in Arizona, nor does it mean that the courts will enforce the provisions of the constitution as is deemed expedient. It means that the doctrine shall not obtain nor shall it be of any force or effect in the state. *Ever.*[64]

Arizona, then, stands in the position of having rejected the riparian doctrine of water rights in specific terms through the media of the constitution, the legislature, and the supreme court.[65]

Subterranean Watercourse

Definite underground stream.—The Water Code specifically includes water flowing "in definite underground channels" among the sources declared to "belong to the public" and to be "subject to appropriation and beneficial use."[66]

No reference to ground water was included in the Bill of Rights, the Howell Code, or early appropriation statutes of Arizona. However, early in the 20th century, the Territorial supreme court, in *Howard* v. *Perrin*, stated that—as distinguished from waters percolating through the soil in undefined and unknown channels—subterranean streams flowing in natural channels between well-defined banks were subject to appropriation under the same rules as those relating to surface streams.[67] This principle was agreed upon by the parties in *Howard* v. *Perrin*, was accepted by the Territorial court as a correct statement of the law, and has been approved in several decisions of the State supreme court.[68]

Granted that the Arizona Supreme Court and Legislature are agreed that water of a subterranean watercourse is subject to appropriation, the supreme court has held that one who asserts the existence of such a water supply must prove his assertion affirmatively by clear and convincing evidence.[69] The court's thesis is that a watercourse, whether surface or subterranean, has essentially a channel, consisting of a well-defined bed and banks, and a current of water which need not flow continuously; that before such an underground

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[64] *Brasher* v. *Gibson*, 101 Ariz. 326, 419 Pac. (2d) 505, 509 (1966).

[65] The doctrine of riparian rights may, however, encompass more than just the right to use water. See chapter 6 at notes 154–156. In Arizona, the supreme court has recognized and applied the doctrine of riparian rights with respect to accretions. *State* v. *Jacobs*, 93 Ariz. 336, 339, 380 Pac.(2d) 998 (1963); *State* v. *Gunther & Shirley Co.*, 5 Ariz. App. 77, 423 Pac. (2d) 352, 357 (1967).

[66] Ariz. Rev. Stat. Ann. §45-101 (1956).

[67] *Howard* v. *Perrin*, 8 Ariz. 347, 353–354, 76 Pac. 460 (1904), affirmed, 200 U.S. 71 (1906).

[68] *Pima Farms Co.* v. *Proctor*, 30 Ariz. 96, 98, 102, 245 Pac. 369 (1926); *Maricopa County M.W.C. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 78, 82, 4 Pac. (2d) 369 (1931); *Campbell* v. *Willard*, 45 Ariz. 221, 224, 42 Pac. (2d) 403 (1935).

[69] *Maricopa County M.W.C. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 85-90, 4 Pac. (2d) 369 (1931).

stream is subject to appropriation, there must be certainty of its location as well as of its existence.

> But all of these, when examined, must be such as to afford clear and convincing proof to the satisfaction of a reasonable man, not only that there are subterranean waters, but that such waters have a definite bed, banks and current within the ordinary meaning of the terms as above set forth, and the evidence must establish with reasonable certainty the location of such bed and banks. It is not sufficient that geologic theory or even visible physical facts prove that a stream *may* exist in a certain place, or probably or certainly does exist *somewhere. There must be certainty of location as well as of existence of the stream before it is subject to appropriation.*[70]

Underflow of surface stream.—The Arizona Supreme Court adopted the following definition:[71]

> The underflow, subflow or undercurrent, as it is variously called, of a surface stream may be defined as those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream.

The judicial test is that if drawing off the subsurface water tends to diminish appreciably and directly the flow of the surface stream, the ground water is subflow, and is subject to the same rules of appropriation as a surface stream itself. Otherwise, although the water may have come from the waters of the stream, it is not, strictly speaking, a part of the stream and hence is not subject to appropriation.

Percolating Ground Waters

Underground waters not part of a definite underground stream or the underflow of a surface stream have been considered percolating ground waters.[72]

The Arizona Supreme Court has rejected the prior appropriation doctrine with respect to percolating ground waters and has adopted "the doctrine of reasonable use."[73] The court has held that "the American rule of reasonable use" permits percolating waters to be extracted for the beneficial use of the land from which they are withdrawn.[74] But "[p]ercolating waters may not be

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[70] 39 Ariz. at 87, modified in other respects, 39 Ariz. 367, 7 Pac. (2d) 254 (1932).

[71] 39 Ariz. at 96.

[72] *Maricopa County M.W.C. Dist. No. 1* v. *Southwest Cotton Co.*, 39 Ariz. 65, 4 Pac (2d) 369, 377-381 (1931).

[73] *Jarvis* v. *State Land Dept.*, 106 Ariz. 506, 479 Pac. (2d) 169, 171 (1970), citing *Bristor* v. *Cheatham*, 75 Ariz. 227, 255 Pac. (2d) 173 (1953).

[74] *Id.*, citing *Jarvis* v. *State Land Dept., City of Tucson*, 104 Ariz. 527, 456 Pac. (2d) 385 (1969).

In the 1969 *Jarvis* opinion, the court said that in *Bristor* v. *Cheatham* [73 Ariz. 228,

used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured."[75]

Arizona legislation provides that no one may construct an irrigation well within a designated "critical groundwater area" without a permit from the State Land Department.[76] Upon application, the Department shall issue such a permit, but not for the irrigation of lands which were not irrigated when the area was declared critical or which had not been cultivated within 5 years prior thereto.[77] Such critical ground water areas shall be designated by the Department from time to time when adequate data is available to justify such

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240 Pac. (2d) 185 (1952)], after first deciding that the prior appropriation doctrine applied to ground water, on rehearing [74 Ariz. 227, 255 Pac. (2d) 173 (1953)] the *Bristor* court, "in deciding that the owners of land had a vested property right in the [underlying water,] unequivocally committed this State to the doctrine of reasonable use rather than prior appropriation. * * * The rule that the owner of land owns the water beneath the soil has been the continuous holding of this court for seventy-five years. [Citing cases.]" *Jarvis* v. *State Land Dept., City of Tucson*, 104 Ariz. 527, 456 Pac. (2d) 385, 387 (1969).

[75] 479 Pac. (2d) at 171–172.

In *Bristor* v. *Cheatham*, 75 Ariz. 227, 237–238, 255 Pac. (2d) 173, 180 (1953), the court said: "This rule does not prevent the extraction of ground water subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage. As stated in Canada v. City of Shawnee [179 Okla. 53, 64 Pac. (2d) 694 (1937)]:

" ' * * * *the rule of reasonable use* as applied to percolating waters "does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses. " ' " (Emphasis added.)

The court also said: "Some courts have extended the doctrine by limiting the taking of water, when there is a scarcity thereof, to only the landowner's proportionate share thereof. * * * [This] is the doctrine of correlative rights. * * * We think the better rule is that of reasonable use as distinguished from the doctrine of correlative rights." 75 Ariz. at 236, 255 Pac. (2d) at 178.

[76] Ariz. Rev. Stat. Ann. §45-301 *et seq.* (1956), as amended.

An "irrigation well" is defined as a well primarily used for irrigation, with a capacity in excess of 100 gallons per minute. Ariz. Rev. Stat. Ann. §45-301(8) (Supp. 1974). But this does not include wells used solely for irrigation of no more than 320 acres by certain schools having a course in agriculture. Wells used for "domestic, stockwatering, domestic water utility, industrial or transportation purposes" also are specifically exempt. *Id.* §45-301(3).

[77] Ariz. Rev. Stat. Ann. §45-314 (Supp. 1974). (*Continued*)

action.[78] This may be done either upon petition or its own initiative, after required notice and hearing.[79]

A critical ground water area means any ground water basin, as defined in the statute, "not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal."[80]

(*Continued*)

Section 45-313(C) provides that no permit shall be required to complete a well on which construction had substantially commenced "to the extent that a bona fide drilling rig was set up over the well site and drilling was in progress" at the time of the owner's receipt of the order prohibiting commencement of construction without a permit, required by §45-308 (see note 79 *infra*), but such well shall be completed within 1 year from the designation of the critical ground water area.

Ariz. Rev. Stat. Ann. §45-322 (1956), first enacted in 1948, provides, "Nothing in this article shall be construed to affect the right of any person to construct and operate an exempted well as defined in §45-301 [see note 76 *supra*], nor to affect the right of any person to continue the use of water from existing irrigation wells."

A permit may be issued to replace or deepen an existing well if the well intended to be replaced or deepened "will no longer yield sufficient water to irrigate the land normally supplied by it within the five years immediately prior to filing application" and the Department determines that "the proposed deepening is necessary" or that the replacement well is a "bona fide replacement of an existing well." *Id.* §45-316.

"Except as provided in this article, no permit shall be issued to any person other than the owner of the land on which the proposed well is to be located, or to an irrigation or agricultural improvement district or other organized irrigation project for use upon lands within the district or project." Ariz. Rev. Stat. Ann. §45-314 (Supp. 1974).

The Department may allow a change in the location of a permitted well if the new location will be used to irrigate the same lands as the original well and will be within the same critical ground water area. Ariz. Rev. Stat. Ann. §45-315 (1956).

Persons aggrieved by a determination or order of the Department may appeal to the superior court which shall hear the matter *de novo*. *Id.* §45-321.

Section 45-323 provides that violators of the provisions of the article on ground waters may be found guilty of a misdemeanor and subject to fine. And §45-324 provides, "The department shall enjoin or restrain any person irrigating, pumping, or drilling in violation of this article."

[78] Ariz. Rev. Stat. Ann. §45-308 (Supp. 1974).

The boundaries of the area may be subsequently changed or the critical designation may be later abolished. *Id.* § §45-308 (Supp. 1974) and -311 (1956).

[79] Ariz. Rev. Stat. Ann. § §45-308 (Supp. 1974), -309 and -310 (1956).

Section 45-308(C) (Supp. 1974) provides that as soon as practicable after initiation of the designation of a critical area the Department shall issue an order prohibiting starting construction of a well without a permit unless and until such order is lifted by another order after the hearing. But see note 77 *supra* regarding wells already commenced.

[80] Ariz. Rev. State. Ann. §45-301 (Supp. 1974).

" 'Ground water' means water under the surface of the earth regardless of the geologic structure in which it is standing or moving. It does not include water flowing in underground streams with ascertainable beds and banks.

" 'Groundwater basin' means land overlying, as nearly as may be determined by

In view of the statutory definition of a critical ground water area, the Arizona Supreme Court has held that in such an area "additional users would necessarily deplete the supply of existing users. Consequently, the conveyance of groundwaters off the lands on which wells * * * [in such an area] are located impairs the supply of the other land owners within the critical area."[81]

In this 1970 opinion, the Arizona Supreme Court indicated that—under the American rule of reasonable use—the City of Tucson may not "pump water from its wells [located in the Marana Critical Ground Water Area] and transport the water so pumped through its pipelines to lands which lie within the watershed but outside the Marana Critical Ground Water Area."[82] In this regard, the court, among other things, made the statement regarding critical ground water areas quoted above and also said: "Tucson argues that since by statute A.R.S. §45-301 et seq. only new irrigation * * * wells in critical areas having a capacity of more than 100 gallons per minute are prohibited,[83] the Legislature must have intended to permit pumping for municipal purposes without restriction. But the illegality of the use of ground water is not dependent upon whether the Legislature has not forbidden the sinking of wells as a source of supply to be used for municipalities."[84] The court also said:

> Tucson questions whether on equitable principles it should be prohibited from delivering water to Ryan Field. Ryan Field is an airfield which we understand has existed at least as long as petitioners have engaged in agriculture. Its lands overlie the Avra-Altar water basin and geographically it lies within the Marana Critical Ground Water Area so as to entitle it to withdraw water from the common supply for all purposes except agriculture. Tucson should not be prohibited from delivering water to Ryan Field for lawful purposes since the Ryan Field supply is from the common basin over which it lies and from which it could legally withdraw water by sinking its own wells for domestic purposes.
>
> Tucson's delivery of water to purchasers within the Avra-Altar drainage area but outside the Marana Critical Ground Water Area is, however, without equitable sanction. There is no indication in the record that these customers of Tucson overlie the water basin so as to come within the principle applicable to Ryan Field. Until Tucson can

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known facts, a distinct body of ground water, but the exterior limits of a groundwater basin shall not be deemed to extend upstream or downstream beyond a defile, gorge or canyon of a surface stream or wash." *Id.* § § 45-301(4) and (5).

The validity of this legislation was upheld in regard to issues in dispute in *Southwest Engineering Co.* v. *Ernst*, 79 Ariz. 403, 291 Pac. (2d) 764 (1955), cited and discussed in *Jarvis* v. *State Land Dept., City of Tucson*, 104 Ariz. 527, 456 Pac. (2d) 385 (1969).

[81] *Jarvis* v. *State Land Dept.*, 106 Ariz. 506, 479 Pac. (2d) 169, 172 (1970), citing *Jarvis* v. *State Land Dept., City of Tucson*, 104 Ariz. 527, 456 Pac. (2d) 385 (1969), and cited in *Farmers Inv. Co.* v. *Pima Mining Co.*, 111 Ariz. 56, 523 Pac. (2d) 487, 488 (1974), which raised certain questions about State lands.

[82] 479 Pac. (2d) at 172.

[83] In this regard, see the discussion at notes 76-77 *supra.*

[84] 479 Pac. (2d) at 172.

> establish that its customers outside the Marana Critical Ground Water Area but within the Avra-Altar Valleys' drainage areas overlie the water basin so as to be entitled to withdraw water from it, there are no equities which will relieve it of the injunction heretofore issued.
>
> Finally, petitioners request this Court to determine whether Tucson by acquiring lands in cultivation in the Avra-Altar Valleys may remove the ground water used upon those lands to other areas contrary to the doctrine of reasonable use.[85]

In the latter regard, the court said:

> By A.R.S. §45-147 the relative value of uses in appropriable waters has been fixed by the Legislature as first, domestic and municipal uses, and second, irrigation and stock watering. The creation of such a priority clearly evidences a legislative policy that the needs of agriculture give way to the needs of municipalities. Hence, we hold that the decree in this case will be modified if Tucson purchases or acquires the title to lands within the Avra-Altar Valleys which are now cultivated and uses the water which would have been used in cultivating such lands as a source of supply for its municipal customers. Tucson may withdraw an amount equal to the annual historical maximum use upon the lands so acquired.
>
> The record in this case compels the conclusion that underlying the Avra-Altar Valley floor is a basin of gently percolating waters. It is our decision, therefore, that if Tucson acquires lands within the Avra-Altar Valleys overlying the Marana Critical Ground Water Area it may withdraw water from the basin for municipal uses to the same extent as water previously withdrawn for use on those lands. The water withdrawn may be either from wells on the lands so acquired or from Tucson's presently existing wells, but in no event may water be withdrawn both for use on the lands and transported off the lands for municipal purposes.[86]

Section 45-147 of the Arizona statutes, referred to by the court, pertains to preferences as between competing applicants for the appropriation of water in watercourses, discussed earlier.[87] In Arizona, percolating ground waters are not subject to appropriation.[88] Nonetheless, it would appear from the court's quoted language that it may have concluded that section 45-147 evidences *a more general* legislative policy that "the needs of agriculture give way to the needs of municipalities."

The State Land Department shall require all flowing wells to be capped or equipped with valves to stop wastage when not in use, and it may otherwise require flowing or nonflowing wells to be so constructed and maintained as to prevent waste through leaky casings or lack of casings, pipes, fittings, valves or pumps.[89]

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[85] 479 Pac. (2d) at 173.

[86] 479 Pac. (2d) at 174.

[87] See the discussion at note 34 *supra.*

[88] See the discussion at notes 17 and 73 *supra.*

[89] Ariz. Rev. Stat. Ann. §45-319 (1956).

Determination of Conflicting Water Rights

Special statutory procedure.—Procedures to determine relative rights to use waters of streams or other water supplies, and to reconcile determinations in different proceedings, are provided in the Water Code.[90] The constitutionality of the procedure has been upheld, under attack.[91]

The State Land Department, on its own initiative, may determine the rights of the various claimants in the water of "a stream or water supply," and is required to do so when petitioned by one or more of the water users if the circumstances justify it.[92] The Department is authorized to make investigations, take testimony, and make findings of fact and an order of determination of the relative rights. Thereupon the Department files the record in the appropriate superior court for a court adjudication of such rights. The court proceedings are comparable to those of a civil action, culminating in a judgment of adjudication affirming or modifying the order made by the Department.[93] If no exceptions are filed, the court shall affirm the order of the Department, but if there are exceptions it may modify it.[94] The statute provides, "The determination of the department as confirmed or modified by the judgment of the court shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or body of water embraced in the determination."[95] On conclusion of the proceeding, the Department issues to each person represented thereby a certificate of his adjudicated water right.[96]

Procedure is also provided for reconciling rights in a water supply that have been determined in more than one separate proceeding. Contests over claims or rights of another may be maintained in such reconciliation proceeding only between claimants who were not parties to the same adjudication in the original hearings.[97]

Court transfer procedure.—Any State court in which an action is brought to determine relative rights to use waters of streams or other water supplies may transfer the action to the State Land Department for determination under the statutory adjudication procedure, but no proceedings may be taken in such action by the Department until such transfer is made.[98]

Water rights registration.—In 1974, the legislature created a statutory system for registration of various water rights[99] with respect to "waters of all sources flowing in streams, canyons, ravines or other natural channels or in definite

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[90] Ariz. Rev. Stat. Ann. § §45-231 to -245 (1956).
[91] *Stuart* v. *Norviel*, 26 Ariz. 493, 501-502, 226 Pac. 908 (1924).
[92] Ariz. Rev. Stat. Ann. §45-231(A) (1956).
[93] *Id.* § §45-233 to -240.
[94] *Id.* §45-239.
[95] *Id.* §45-240.
[96] *Id.* §45-241.
[97] *Id.* §45-244.
[98] *Id.* §45-231(A).
[99] Ariz. Laws 1974, ch. 122, Rev. Stat. Ann. § §45-180 to -193 (Supp. 1974).

underground channels, whether perennial or intermittent, flood, waste or surplus water, and of all lakes, ponds and springs on the surface."[100] The statute requires all persons claiming a water right to file a statement of claim with the State Land Department, by June 30, 1977,[101] except for "any water rights issued pursuant to a permit or certificate issued by the department or its predecessors [,] to rights acquired to the use of the mainstream waters of the Colorado River or to rights acquired or validated by contract with the United States of America, court decree or other adjudication."[102] The statute provides that failure to file a claim constitutes a waiver and relinquishment of the water right,[103] but that the filing of a statement of claim with the Department is not an adjudication of a water right and the date of filing the statement of claim has no effect on the priority of such rights.[104]

Administration of Water Rights and Distribution of Water

As noted earlier, the Water Code provides, "The state land department shall have general control and supervision of the waters of the state and of the appropriation and distribution thereof, except distribution of water reserved to special officers appointed by courts under existing judgments or decrees."[105]

The State Land Department is directed by statute to divide the State into water districts with reference to drainage watersheds. Districts are to be created from time to time as claims on the streams are determined, but not until necessary.[106]

For each district a superintendent may be appointed and assistants employed.[107] Their duties are to divide the waters among the storage and diversion facilities according to the rights that pertain severally thereto; and to regulate control works in accordance with decreed rights and for the purpose of preventing waste.[108] Any injured party may apply to the superior court for an injunction against the superintendent; but injunction shall not issue unless it

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[100] *Id.* §45-180(3).

[101] *Id.* §45-181(A).

[102] *Id.* §45-181(B).

The inserted comma in the above quotation was apparently inadvertently omitted inasmuch as a comma was thus inserted in otherwise identical language in §45-186 regarding the notice requirements.

[103] *Id.* §45-183.

[104] *Id.* §45-184.

[105] Ariz. Rev. Stat. Ann. §45-102 (1956).

With respect to what "waters of the state" may include, see §45-101(A), set out at note 17 *supra*, which apparently pertains to various waters on the surface and definite underground channels.

The Department's functions in regard to percolating ground waters are discussed earlier under that topic.

[106] *Id.* §45-105(A).

[107] *Id.* §45-105(B).

[108] *Id.* §45-106(A).

appears that the superintendent has failed to effectuate a departmental order or a court judgment or decree determining existing rights to the use of the water.[109]

California

Governmental Status

California was ceded to the United States by Mexico in 1848, under the Treaty of Guadalupe Hidalgo,[1] and was admitted to the Union by Act of Congress[2] on September 9, 1850, without having had a Territorial government.

Spanish-Mexican Water Enterprises

Colonization agencies and organizations.—The colonization of California by the Spanish government followed the usual pattern of being conducted through religious, military, and civil agencies. In the course of establishing missions extending from San Diego to Sonomas, the ecclesiastics built works to provide the lands at the missions and subsidiary stations with irrigation water. Many private acequias or ditches were also constructed by individual owners of ranchos or small tracts or by groups of water users. In addition, agricultural pueblos or civil communities were founded by the Spaniards at San Jose and Los Angeles and by the Mexicans at San Diego.[3]

The era of Spanish-Mexican water enterprises in California ended in 1848. In that same year, less than 6 months before the Treaty of Guadalupe Hidalgo was proclaimed, gold was discovered in the Sierra foothills and the era of water development under American auspices began. The contrast between these two eras—the leisurely installation of irrigation and domestic water enterprises begun by the Franciscan fathers in 1769, and the bustling and feverish mining water activity that erupted three-quarters of a century later—is indeed striking. During the Gold Rush and for years thereafter, uses of water for mining and for enterprises connected with mining prevailed, to be followed, as in other Western States and Territories, by irrigation for agriculture, manufacturing, and municipal purposes.

Water rights.—Water rights of lands that had been granted by the successive governments of Spain and Mexico were recognized under California State law by reason of their previous use on nonriparian lands or their riparian status. Water rights were claimed by and adjudicated to the cities of Los Angeles and San Diego because of their municipal succession to the original agricultural pueblos, as discussed in chapter 11.

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[109] *Id.* § 45-106(C).

[1] Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

[2] 9 Stat. 452 (1850).

[3] See Hutchins, W. A., "The Community Acequia: Its Origin and Development," 31 Southwestern Historical Quarterly 264, 282-284 (1928).

Influence of Spanish-Mexican water rights on State water law.—As noted in chapter 6 (see "Establishment of the Appropriation Doctrine in the West—Origins of the Appropriation Doctrine"), although the Arizona and New Mexico courts agree that the doctrine of appropriation existed in those jurisdictions prior to American sovereignty, there appears to be nothing in the water laws of either California or Texas to suggest that a principle of prior appropriation of water prevailed under Spanish or Mexican sovereignty. Whatever may have been the early situation elsewhere in the Southwest, California's water appropriation philosophy stemmed directly from the customs of the gold miners in the Sierra Nevada. See, in chapter 6, "Establishment of the Appropriation Doctrine in the West—Origins of the Appropriation Doctrine—California Gold Rush."

As to the riparian doctrine, the California courts have not traced the water rights of pre-American land grants solely to Mexican law. They based their riparian concepts on the common law, which was adopted by the legislature in the year of admission to the Union; and to lands held under Spanish and Mexican grants contiguous to streams they accorded riparian rights in the waters thereof, but neither greater nor less than those of lands acquired from the United States Government. The California Supreme Court discussed Spanish and Mexican water law at some length in *Lux* v. *Haggin*,[4] and noted Mexican law in a few other cases as well, but concentrated uniformly on the common law. Some important features of present California riparian doctrine have been decided in controversies arising on lands originally granted by Spain or Mexico—not because the lands were so granted, but solely because these privately owned lands, regardless of the source of private title, were contiguous to flowing streams or were traversed by them.[5]

Samuel C. Wiel, writing in 1911, says that although the Mexican Government held a large power of making grants and concessions on the public domain, little had been done under this power in California, and that "the writer knows of no California water-rights traced back to any special private grant or concession of waters from the Mexican Government."[6] He states further that there had been in fact no law in force to interfere with the California miners helping themselves to the waters they needed, for the region as a whole was uninhabited.

On the whole, Spanish-Mexican water law made little if any impression on the water law of the State of California other than with respect to water rights of American cities that succeeded Spanish and Mexican pueblos.

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[4] *Lux* v. *Haggin*, 69 Cal. 255, 317-334, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[5] See, e.g., *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331-332, 88 Pac. 978 (1907); *Frazee* v. *Railroad Comm'n*, 185 Cal. 690, 693-694, 201 Pac. 921 (1921); *Holmes* v. *Nay* 186 Cal. 231, 235, 199 Pac. 325 (1921); *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 526, 81 Pac. (2d) 533 (1938).

[6] Wiel, S. C., "Water Rights in the Western States," 3d ed., vol. 1, §68 (1911).

State Administrative Agencies

The State Water Resources Control Board is vested with jurisdiction over the appropriation of water and the determination of water rights, as well as certain other functions.[7] Supervision over the distribution of water in watermaster service areas, however, is not under the Board but is one of the many duties delegated to the State Department of Water Resources.[8]

Both the Board and the Department are units of the California Resources Agency, established in 1961.[9]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—There is a paucity of published historical material bearing upon possible recognition of customs of appropriating water by priority of diversion and use in California during the Spanish and Mexican regimes. Further, no reported decision of the State supreme court that has come to the author's attention expressly adjudicated prior appropriative rights as such on the basis of Spanish-Mexican laws and customs. In view of all this, the inescapable conclusion is that the first specific, unqualified recognition of the doctrine of prior appropriation in California applied to mining practices in the goldfields. This feature is discussed in chapter 6 under "Establishment of the Appropriation Doctrine in the West—Origins of the Appropriation Doctrine—California Gold Rush." Briefly, in 1851 the State legislature took note of the miners' practices, legislated concerning them, and made them the subject of revenue. In 1872 a statute was passed which essentially codified appropriative principles and practices that had been developed in the mining camps. Many water cases decided in the early years involved rights to the use of water for mining purposes or for milling connected with mining.[10]

In the early California water cases, priority of appropriation—a fundamental feature of the appropriation doctrine—was specifically recognized repeatedly.[11] The first appropriator of water to be conveyed from natural streams to other

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[7] Cal. Water Code §§ 1000-2900 and 4999-5008 (West 1971).

[8] *Id.*, §§ 4000-4407.

Other functions of the Department include supervision of the safe construction, enlargement, alteration, repair, maintenance, and operation of dams over a certain height or storage capacity, which is not dealt with here. See § 6000 *et seq.*

[9] Cal. Stat. 1961, ch. 2037, p. 4246.

[10] Of 52 decisions in controversies over the use of water rendered by the California Supreme Court to the end of 1872—in which year the first appropriation statute was enacted—45 involved claims of appropriative rights for mining purposes, 10 for milling, nine for irrigation, four for domestic or municipal, and one for stockwatering. In 16 of these cases more than one use of water was involved. Eight cases included both mining and milling, and four involved both mining and irrigation.

[11] See *Stiles* v. *Laird*, 5 Cal. 120, 122, 63 Am. Dec. 110 (1855); *Hill* v. *Newman*, 5 Cal. 445, 446, 63 Am. Dec. 140 (1855); *Hill* v. *King*, 8 Cal. 336, 337, 338 (1857).

localities for mining or other beneficial purposes was recognized in the local communities as having, to the extent of actual use, the better right; and these and other regulations and customs regarding the diversion of the waters received the sanction of the State courts.[12] In its first decision respecting conflicting claims of right to use water, the supreme court held that the foundation of plaintiff's right was their first possession, which applied to all the waters running into Shady Creek.[13] The principle of priority was applied in the first cases as between appropriators of water for mining purposes,[14] and in ensuing years it was accorded to other purposes as well.[15] Less than 10 years after gold was discovered the supreme court said, "The right to appropriate the waters of the streams of this State, for mining and other purposes, has been too long settled to admit of any doubt or discussion at this time."[16]

Noteworthy in various early decisions was the supreme court's consciousness of the importance of mining and of hydraulic water rights in the State, and of the newness of the problems presented.[17] "Courts are bound to take notice of the political and social condition of the country, which they judicially rule."[18] And so, in acknowledging the right of appropriation—the acquisition and exercise of which was prescribed entirely by local community rules—the courts based their decisions on community wants "and the peculiar condition of things" in California, for which there was no precedent.[19]

Contemporaneous with the supreme court's recognition of the appropriation doctrine was its recognition of riparian mining water rights. See "The Riparian Doctrine," discussed later.

Thus the customs of recognizing rights to water by prior appropriation established in the mining camps became valid local law even in the absence of any specific State or Federal legislation authorizing appropriation of water. After passage by Congress of the Act of 1866, persons who appropriated water on the public domain for beneficial purposes were no longer even technical trespassers.[20]

The first California legislation defining principles of appropriative rights, specifically authorizing appropriation of water, and providing a procedure for

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[12] *Jennison* v. *Kirk*, 98 U.S. 453, 458 (1879).

[13] *Eddy* v. *Simpson*, 3 Cal. 249, 252, 58 Am. Dec. 408 (1853).

[14] *Id.*

[15] *Tartar* v. *Spring Creek Water & Min. Co.*, 5 Cal. 395, 397-399 (1855); *McKinney* v. *Smith*, 21 Cal. 374, 381-382 (1863); *Rupley* v. *Welch*, 23 Cal. 452, 455-457 (1863).

[16] *Hill* v. *King*, 8 Cal. 336, 338 (1857).

[17] See *Conger* v. *Weaver*, 6 Cal. 548, 555-556, 65 Am. Dec. 528 (1856); *Hoffman* v. *Stone*, 7 Cal. 46, 48, 49 (1857); *Crandall* v. *Woods*, 8 Cal. 136, 141 (1857); *Bear River & Auburn Water & Min. Co.* v. *New York Min. Co.*, 8 Cal. 327, 332-333, 68 Am. Dec. 325 (1857).

[18] *Irwin* v. *Phillips*, 5 Cal. 140, 146, 63 Am. Dec. 113 (1855).

[19] *Hoffman* v. *Stone*, 7 Cal. 46, 48 (1857).

[20] See, in chapter 6, "Establishment of the Appropriation Doctrine—Development of the Appropriation Doctrine—Congressional Legislation."

making and recording appropriations was enacted as a part of the Civil Code in 1872, nearly a quarter century after the discovery of gold.[21] This was an important historical event. The legislature's indirect or implied recognition of the doctrine of prior appropriation[22] had prevailed for more than two decades during which judicial recognition was repeatedly accorded. Finally, in the Civil Code enactment of 1872, legislative recognition was formalized in explicit terms.

The Civil Code appropriative procedure (optional with the appropriator) remained in effect until 1914. See the immediately following subtopic.

As noted in chapter 6, under "Establishment of the Appropriation Doctrine in the West—Origins of the Appropriation Doctrine—California Gold Rush," the combined features of posting and recording notice of appropriation, and of thereafter diverting and putting the water to beneficial use, which were first "spelled out" at the legislative level in this brief statute of 1872, were thereafter incorporated in the early appropriation acts of a considerable number of western jurisdictions.

Procedure for appropriating water: Former nonstatutory and Civil Code—(1) Prior to the effective date of the Civil Code, the only procedures for appropriating water in California were *nonstatutory*. The rules of the various mining camps differed in detail but the fundamental principles were substantially uniform.[23] The right to appropriate water was customarily initiated by posting a notice at the place of intended diversion. However, in the mining areas and elsewhere, rights could be initiated by other acts that manifested the intention of the appropriator in such manner as to put a prudent man on inquiry.[24] Title to the right vested when the appropriation was completed.[25]

(2) The first statutory procedure for appropriating water in California, contained in the Civil Code of 1872, was the early posting and recording method which in the ensuing decades became so well known throughout the West. The importance of this statute in the development of western appropriation legislation merits attention to its contents.[26]

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[21] Cal. Civ. Code §§1410-1422 (1872).

[22] In 1855 the supreme court acknowledged this legislative attitude by saying that the rights of miners and of prior appropriators of water for gold mining had been so fully recognized that, without specific legislation conferring or confirming them, they were alluded to in various acts of the legislature as though they had been. *Irwin* v. *Phillips,* 5 Cal. 140, 146-147, 63 Am. Dec. 113 (1855). The court cited examples of taxation and assessment of dams, canals, and water races for mining purposes.

[23] See the account in Wiel, *supra* note 6, §§ 66-73. See also Harding, S. T., "Water in California," 32-35 (1960); and Shinn, C. H., "Mining Camps, A Study in American Frontier Government" (1948).

[24] *Kimball* v. *Gearhart*, 12 Cal. 27, 29-31 (1859); *Conger* v. *Weaver*, 6 Cal. 548, 558-559 (1856); *Parke* v. *Kilham*, 8 Cal. 77, 79, 68 Am. Dec. 310 (1857).

[25] *Inyo Consol. Water Co.* v. *Jess*, 161 Cal. 516, 520, 119 Pac. 934 (1912).

[26] See Harding, S. T., "Water Rights for Irrigation—Principles and Procedure for Engineers," 22-25 (1936), and "Water in California," *supra* note 23, at 36-37.

Before prescribing the requisite procedural steps, the 1872 statute provided that the right to use water flowing in a river or stream or down a canyon or ravine might be acquired by appropriation, which must be for some useful or beneficial purpose, the right ceasing upon cessation of use therefor by the appropriator or his successor in interest. Changes in place of diversion or of use were authorized if no injury to others resulted. The water might be commingled with water of another stream and then reclaimed if this did not injure prior appropriators. As between appropriators, the one first in time is first in right. And after prescribing the procedure, the legislature declared that the rights of riparian proprietors were not affected by the statute.

The Civil Code procedure was as follows: The intending appropriator was required to post a notice at a conspicuous place at the point of intended diversion, stating the claimed number of inches of water measured under a 4-inch pressure, purpose and place of use, and means of diversion, and within 10 days thereafter to record the notice with the county recorder. Construction work was to start within 60 days after posting and to continue diligently and uninterruptedly to completion—which meant conducting the waters to the place of use—unless temporarily interrupted by snow or rain. By complying with these rules, the claimant's right related back to the time of posting notice; failure to comply deprived him of the prior right of use as against a subsequent claimant who complied therewith.

Enactment of the Civil Code sections did not terminate one's right to make a valid nonstatutory appropriation, for the method they prescribed was not an exclusive one.[27] An advantage of conforming to the statutory procedure was that as between conflicting nonstatutory and Civil Code appropriations, only the latter had the benefit of the statutory doctrine of relation back.[28]

Both the statutory and Civil Code procedures were supplanted by that provided in the Water Commission Act, discussed immediately below.

Procedure for appropriating water: Present Water Code.—The current statutory procedure for appropriating water first became law in the Water Commission Act, which was enacted in 1913 and went into effect in December 1914.[29] As amended from time to time, the Water Commission Act was codified in 1943 as a part of the Water Code.[30]

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[27] *Lower Tule River Ditch Co.* v. *Angiola Water Co.*, 149 Cal. 496, 499, 86 Pac. 1081 (1906).

[28] For some aspects of this relationship, see *De Necochea* v. *Curtis*, 80 Cal. 397, 402, 20 Pac. 563, 22 Pac. 198 (1889); *Wells* v. *Mantes*, 99 Cal. 583, 584, 587, 34 Pac. 324 (1893); *Duckworth* v. *Watsonville Water & Light Co.*, 158 Cal. 206, 211, 110 Pac. 927 (1910), 170 Cal. 425, 431, 150 Pac. 58 (1915); *Haight* v. *Costanich*, 184 Cal. 426, 432, 194 Pac. 26 (1920).

This subject is discussed in Hutchins, W. A., "The California Law of Water Rights" 115-116 (1956).

[29] Cal. Stat. 1913, ch. 586.

[30] Cal. Stat. 1943, ch. 368.

The first State administrative agency to which these statutory functions were delegated was the State Water Commission, composed of three members. From 1914 to 1956, when the State Water Rights Board and the State Department of Water Resources were created, several changes took place in the composition of these agencies.[31] In 1967 the State Water Rights Board was replaced by the State Water Resources Control Board.[32]

The Water Code provides:[33]

> Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels.
>
> All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

The appropriation must be for some useful or beneficial purpose.[34]

The procedure in the Water Commission Act and Water Code, having superseded both the Civil Code and contemporaneous nonstatutory procedures for appropriating stream waters, is the exclusive method by which an appropriation of water of a watercourse can now be made.[35]

The extant procedure in the Water Code for appropriating water of watercourses in California embodies the essential steps prescribed in the Water Commission Act. But through the years, it has developed into a type of proceeding different from the original.[36]

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[31] Harding, *supra* note 23, at 53-55.

[32] Cal. Stat. 1967, ch. 284, § 7.

The State Water Resources Control Board is a unit under the California Resources Agency, established in 1961. Cal. Stat. 1961, ch. 2037, p. 4246.

[33] Cal. Water Code §§ 1200 and 1201 (West 1971).

[34] *Id.* § 1240. Storing of water underground, including diversion of stream water therefor, constitutes a beneficial use thereof if the stored water is thereafter applied to the beneficial purposes for which the storage appropriation was made. *Id.* § 1242.

[35] Cal. Water Code § 1225 (West Supp. 1975) provides, "Except as provided in Article 2.5 (commencing with Section 1226) of this chapter [regarding stockponds, discussed below under "Certain stockponds: Rights clarified"], no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division." Diversion or use of water subject to the provisions of the division other than as authorized therein is a trespass which the Board may seek to have enjoined. Cal. Water Code § 1052 (West 1971). See *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 398, 54 Pac. (2d) 1100 (1936); *Meridian* v. *San Francisco*, 13 Cal. (2d) 424, 450, 90 Pac. (2d) 537 (1939).

[36] *Temescal Water Co.* v. *Department of Pub. Works*, 44 Cal. (2d) 90, 99-100, 280 Pac. (2d) 1 (1955).

Any person, or the United States, the State, or any entity or organization capable of holding an interest in real property in the State, may apply for and obtain a permit for any unappropriated water in conformity with the statute and with reasonable rules and regulations of the Board.[37]

An appropriation under the Water Code is initiated by filing with the State Water Resources Control Board an application to appropriate water.[38] The Board shall give notice of the application's receipt to the applicant and the district attorney and board of supervisors of each county in which the water is to be diverted.[39] "If the application is for more than three cubic feet per second or for more than 200 acre-feet per annum of storage" the notice shall be published by the applicant as required,[40] otherwise, it shall be posted and mailed as required.[41] The Board may approve the application,[42] in which event a permit must be issued to the applicant.[43] If the application is protested by any interested person, a permit cannot be issued without a hearing.[44] No hearing is necessary in order to issue a permit upon an unprotested application, or in order to reject a defective application after notice; but the Board may elect to hold a hearing.[45] Validity of the Board's action on an application is subject to judicial review,[46] as noted below. The permit may be revoked (subject to a hearing if requested and to judicial review) if the permitted work is not commenced and completed or the water applied to beneficial use as contemplated in the permit, the applicable division of the Water Code, and the rules and regulations of the Board.[47]

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[37] Cal. Water Code § § 1252 and 1252.5 (West 1971).

[38] *Id.* § § 1250-1252.5.

[39] *Id.* § § 1300 and 1301.

[40] *Id.* § § 1310-1317.

[41] *Id.* § § 1320-1324.

[42] *Id.* § 1350.

[43] *Id.* § 1380.

[44] *Id.* § § 1330-1341.

See *Temescal Water Co.* v. *Department of Pub. Works*, 44 Cal. (2d) 90, 100, 280 Pac. (2d) 1 (1955).

[45] Cal. Water Code § 1351 (West 1971).

[46] *Id.* § 1360. See *Temescal Water Co.* v. *Department of Pub. Works*, 44 Cal. (2d) 90, 99-100, 106, 280 Pac. (2d) 1 (1955).

[47] Cal. Water Code § § 1410-1410.2 (West Supp. 1975) and 1411-1415 (West 1971).

Legislation in 1973, as amended in 1974, provides for the issuance of a conditional, temporary permit to use unappropriated water (for a period not to exceed 6 months and with no more than one renewal) if it is urgently but temporarily needed and would not injure lawful water users, could not adversely affect rights of downstream users, and would not unreasonably affect fish, wildlife, or other instream beneficial uses, and after consultation with the Department of Fish and Game. Special provisions relate to notices, objections, hearings, etc. No such temporary permit shall constitute a vested right, even of a temporary nature, and it shall at all times remain subject to modification or revocation in the Board's discretion. *Id.* § § 1425-1430 (West Supp. 1975).

On completion of the project, the Board examines the works and use of water authorized by the permit and determines whether they conform to the law and administrative requirements.[48] If the determination is favorable, the Board issues to the permittee a license, which evidences his right to divert and use the water to the extent that it is determined to have been applied to beneficial use.[49] The license may be revoked, subject to a hearing if requested, if the water granted under the license has not been put to a useful or beneficial purpose in conformity with the applicable division of the Water Code or the licensee has ceased to put it to such use or has failed to observe the terms and conditions of the license.[50]

Priorities of an application properly made and of a permit issued thereon relate back to the date of the application.[51]

Judicial review of actions of the Board on applications is provided for in the Water Code.[52]

> Any person interested in any application may, within 30 days after final action by the board, file a petition for a writ of mandate in the superior court in and for the county in which the applicant seeks to divert water under the application to inquire into the validity of the action of the board. If the applicant seeks to divert water in more than one county, the petition may be filed in any one of the counties. The right to petition shall not be affected by the failure to seek reconsideration before the board.

The same recourse is accorded to the holder of a permit which is revoked;[53] to the holder of a permit to whom the Board has issued a license for an amount of water or season of use less than specified in the permit;[54] and to a licensee whose license has been revoked.[55]

Restrictions and preferences in appropriation of water.—The Water Code directs the State Water Resources Control Board to allow appropriations of unappropriated water for beneficial purposes "under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated," otherwise to reject the proposal.[56] In

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[48] Cal. Water Code § § 1600 and 1605 (West 1971).

[49] *Id.* § 1610.

[50] Cal. Water Code § § 1675-1675.2 (West Supp. 1975) and 1676 (West 1971).

[51] Cal. Water Code § § 1450 and 1455 (West 1971).

[52] *Id.* § 1360.

[53] *Id.* § § 1412-1415.

[54] *Id.* § § 1615-1618.

[55] *Id.* § § 1676 and 1677.

[56] *Id.* § § 1253 and 1255-1257.

Section 1394 provides, "The board may reserve jurisdiction in whole or in part to amend, revise, supplement, or delete terms and conditions in a permit" either (a) if it finds that insufficient information is available to finally determine the terms and conditions which "will reasonably protect vested rights without resulting in waste of

(*Continued*)

determining public interest, general water resources plans must be considered.[57] Under its statutory authority, as construed by the California Supreme Court, the Board exercises a broad discretion in determining whether the issuance of a permit will best serve the public interest.[58] This determination requires an administrative adjudication which, in any case in which the issuance of a permit is protested, may be made only after a hearing, and which is subject to judicial review by way of writ of mandate.

Another section of the Water Code directs the State Water Resources Control Board, in acting on applications for permits, to:

> consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.[59]

(*Continued*)
water or which will best develop, conserve, and utilize in the public interest the water sought to be appropriated," and that a period of actual operation will be necessary to ascertain this, or (b) if the application represents only part of a coordinated project for which there are other pending applications and "the board finds that the co-ordinated project requires co-ordinated terms and conditions which cannot reasonably be decided upon until decision is reached on said other pending applications." Such jurisdiction shall thus be reserved only after notice to the parties and a hearing, and subject to reconsideration and judicial review. Jurisdiction shall be reserved no longer than reasonably necessary and in no event after issuance of a license.

[57] *Id.* §1256. This includes the California Water Plan for which appropriations may be made by the Department of Water Resources. See chapter 7 at notes 137-138.

[58] *Temescal Water Co.* v. *Department of Pub. Works*, 44 Cal. (2d) 90, 99-101, 280 Pac. (2d) 1 (1955). For the development of this principle, see also the previous cases of *Tulare Water Co.* v. *State Water Comm'n*, 187 Cal. 533, 536-537, 202 Pac. 874 (1921), and *Yuba River Power Co.* v. *Nevada Irr. Dist.*, 207 Cal. 521, 522-523, 279 Pac. 128 (1929). In *East Bay Municipal Util. Dist.* v. *State Dept. of Pub. Works*, 1 Cal. (2d) 476, 477-481, 35 Pac. (2d) 1027 (1934), the supreme court sustained the administrative agency in its action of inserting in a permit for utilization of water for power purposes the following condition: "The right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes."

[59] Cal. Water Code §1257 (West 1971).

As used in the division of the Water Code pertaining to water rights, the term "reasonable or beneficial purposes" is not to be construed to mean the use in any 1 year of more than 2½ acre-feet of water per acre in the irrigation of land not devoted to cultivated crops. *Id.* §1004.

The first section of the Board's regulations for implementation of the Environmental Quality Act of 1970 [Cal. Pub. Res. Code §21000 *et seq.* (Supp. 1975)] states: "The regulations contained herein are prescribed by the state board pursuant to Public

The established policy of the State is that use of water for domestic purposes is the highest use and irrigation the next highest,[60] and the Water Resources Control Board is expressly directed to be guided thereby in acting upon applications to appropriate water.[61] Protection of water rights of municipalities for existing and future uses, without waste, is also established policy,[62] implemented by a direction that an application by a municipality for a permit for proper municipal and domestic purposes shall be considered first in right, irrespective of whether it is first in time.[63] Procedure is provided for temporary uses of excess municipal waters by others pending the time the municipality needs the excess.[64]

The Water Code also provides:

> The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.[65]

As amended in 1972, it is also provided:

> The board shall notify the Department of Fish and Game of any application for a permit to appropriate water. The Department of Fish and Game shall recommend the amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources and shall report its findings to the board.[66]

Resources Code Section 21082. The purpose of these regulations is to specify the objectives, criteria and procedures to be followed by the state board and the regional [water quality control] boards in implementing the Environmental Quality Act of 1970. Implementation of this act includes the orderly evaluation of projects and the preparation of environmental impact reports where required or where appropriate. These regulations are intended to be used in conjunction with the state guidelines as defined in Section 2701(x)." Cal. Admin. Code, tit. 23, §2700 (1974). Section 2701(r)(3) provides that a "project" may involve "the issuance to a person of a lease, permit, license or other entitlement for use by one or more public agencies."

[60] *Id.* §106.

[61] *Id.* §1254.

[62] *Id.* §106.5.

[63] *Id.* §1460.

[64] *Id.* §§1203, and 1460-1464.

When a municipality is ready to use waters in excess of existing needs, to which it has claim, the holders of temporary permits are entitled to compensation for the loss of use of their facilities thus rendered valueless. Or in lieu of temporary permits, the municipality may be authorized to become as to the surplus a public utility, subject to the jurisdiction of the State Public Utilities Commission.

Definitions of domestic and municipal use contained in the regulations of the Board pertaining to appropriation of water are described in chapter 7 at note 949.

Cal. Water Code § 10500 (West Supp. 1975) contains special provisions regarding appropriations by the Department of Water Resources for the California Water Plan.

[65] Cal. Water Code §1243 (West Supp. 1975).

[66] *Id.*

By virtue of 1972 legislation, no water diversion facility shall be constructed on any river designated as a wild and scenic river under this legislation unless and until the Secretary of the Resources Agency (of which the Board is a unit) determines (1) that such facility is needed to supply domestic water to the residents of the county or counties through which the river flows, and (2) that it will not adversely affect its free flowing condition or natural character. New dams, reservoirs, or other impoundment facilities—except for certain temporary flood storage—are prohibited.[67]

The Water Code imposes certain restrictions upon the taking of water, pursuant to State and Federal plans, away from the localities in which it originates, aimed at protecting these localities from being deprived of water reasonably required for their beneficial needs and development. Statewide restrictions relate to counties of origin;[68] Central Valley Project restrictions, to watersheds or areas of origin.[69]

Certain stockponds: Rights clarified.—Legislation enacted in 1974 added Article 2.5 entitled "Stockponds".[70] Section 1226 thereof declares, among other things, that many dams and other water impoundment structures for livestock watering use and incidental domestic and recreational use have been built without clearly defined water rights due to "uncertainty of the state law and the lack of information by the owners as to proper procedures by which to obtain a water right" and that it is in the State's interest to clarify such rights. The legislation provides:

> The owner of any dam or other water impoundment structure constructed prior to January 1, 1969, the capacity of which is not in excess of 10 acre-feet on January 1, 1975, and concerning which water rights litigation between private parties was not a matter of record prior to January 1, 1974, is declared to have a valid water right with a priority as of the date of construction of the dam and to be eligible for such evidence of validity as the board may provide, for the use of such water for purposes as specified in Section 1226. All permits or licenses issued by the board prior to the effective date of this article shall have priority over any water right claimed pursuant to this article.[71]

Other sections provide: "Any person claiming a water right pursuant to this article who fails to file a claim of water right on or before December 31, 1977, shall have a water right priority as of the date of filing."[72] "The board may,

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[67] Cal. Pub. Resources Code § 5093.55 (West Supp. 1975).

[68] Cal. Water Code § 10500-10507 (West 1971).

[69] *Id.* § § 11128 and 11460-11463. See chapter 8 at notes 400-403.

Early in the 20th century, the State supreme court recognized the right of the appropriator to divert, from one watershed to another, water in excess of the quantity necessary to satisfy the requirements of prior rights, provided no injury is inflicted upon prior rights. In this regard, see chapter 8 at notes 395-396.

[70] Cal. Water Code, div. 2, pt. 2, ch. 1, art. 2.5, § § 1226-1226.4 (West Supp. 1975).

[71] *Id.* § 1226.1.

[72] *Id.* § 1226.2.

after notice and hearing, revoke any evidence of a water right granted pursuant to the provisions of this article upon a finding that the water has ceased to be used for the purposes specified in Section 1226."[73]

Some aspects of the California appropriative right.—The appropriative right is appurtenant to the land on or in connection with which the water is used; it is real property; and it passes with the deed to the property without specific mention of such appurtenances.[74] It is separable and alienable from the land to which it became initially appurtenant;[75] and the landowner may convey the land with a reservation of the water right from the conveyance.[76]

It has long been settled in California that an appropriator may change the point of diversion, place of use, or character of use of water in the exercise of his right without affecting his right to divert and use the water or his priority, provided that the rights of others are not thereby impaired.[77] In case of appropriations made under the Water Code for the earlier Water Commission Act, this may be done only with the permission of the State Water Resources Control Board, which must first find that the change will not injure any legal user of the water involved and must hold a hearing in case a protest is filed.[78] With respect to appropriations otherwise made, the Water Code merely authorizes such changes if others are not injured.[79]

The use of water for sale, rental, and distribution to the public generally is a public use, subject to public regulation.[80]

The prior appropriator must use reasonable diligence, reasonable care, and reasonably efficient appliances in making his diversion and transporting the water to the place of intended use in order that the surplus water may not be rendered unavailable to those who are entitled to it.[81]

Providing prior appropriators are adequately protected, in a controversy between appropriators, the court may fix in its decree the times when, by rotation, the quantity of water to which they are collectively entitled may be

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[73] *Id.* §1226.4.

[74] *Witherill* v. *Brehm*, 47 Cal. App. 286, 295, 240 Pac. 529 (1925).

[75] *Wright* v. *Best*, 19 Cal. (2d) 368, 382, 121 Pac. (2d) 702 (1942).

[76] See *Locke* v. *Yorba Irr. Co.*, 35 Cal. (2d) 205, 209-211, 217 Pac. (2d) 425 (1950).

[77] *San Bernardino* v. *Riverside*, 186 Cal. 7, 28-29, 198 Pac. 784 (1921).

[78] Cal. Water Code §§1700-1705.5 (West Supp. 1971).

[79] *Id.* §1706.

[80] Cal. Const. art. XIV, §1; *San Joaquin & Kings River Canal & Irr. Co.* v. *James J. Stevenson*, 164 Cal. 221, 226, 128 Pac. 924 (1912).

In this regard, see, in chapter 8, "Elements of the Appropriation Right—Sale, Rental, or Distribution of Water." For related matters, see also such subtopics thereunder as "The Real Appropriator—Mutual Enterprise" in which California cases are cited.

[81] *Natoma Water & Min. Co.* v. *Hancock*, 101 Cal. 42, 51-52, 31 Pac. 112 (1892), 35 Pac. 334 (1894). See also other California cases cited in chapter 9 under "Efficiency of Practices," and *Erickson* v. *Queen Valley Ranch Co.*, 22 Cal. App. (3d) 578, 99 Cal. Rptr. 446 (1971), discussed in note 88 *infra.*

used by each exclusively at different times in proportion to their respective rights.[82]

The process of turning water from a stream or other source into another stream channel in which water is already flowing, and of diverting an equivalent quantity from the combined flow at a lower point—known as "commingling"—has been recognized as legitimate from early mining days in California.[83] Legislative authorization was included in the Civil Code in 1872,[84] and is contained in the Water Code as follows: "Water which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another shall not be diminished."[85]

Appropriative rights are subject to loss by reason of (1) abandonment, as to which there must be a concurrence of act and intent to abandon,[86] and (2) statutory forfeiture, for failure to use the appropriated water for a useful or beneficial purpose.[87] It is provided that when the holder of a vested right to water fails to beneficially use all or any part of the claimed water for the purpose for which it was appropriated or adjudicated, for 3 successive years, the right to such water is forfeited.[88] Exceptions are provided if nonuse of

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[82] *Hufford* v. *Dye*, 162 Cal. 147, 160-161, 121 Pac. 400 (1912), discussed in more detail in chapter 9 at note 131.

[83] See *Hoffman* v. *Stone*, 7 Cal. 46, 49 (1857). The rule extends to the use of natural subterranean reservoirs. *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 76-77, 142 Pac. (2d) 289 (1943).

[84] Cal. Civ. Code § 1413 (1872).

[85] Cal. Water Code § 7075 (West 1971). See also § § 7043 and 7044.

[86] *Utt* v. *Frey*, 106 Cal. 392, 397-398, 39 Pac. 807 (1895); *Wood* v. *Etiwanda Water Co.*, 147 Cal. 228, 234, 81 Pac. 512 (1905).

Abandonment "depends upon proof of an intent to permanently relinquish the possession and enjoyment of a property right." *Lindblom* v. *Round Valley Water Co.*, 178 Cal. 450, 455, 173 Pac. 994 (1918).

Mere nonuse of the water to which an appropriator is entitled, without some proof of intent to abandon, is not conclusive evidence of abandonment of the right. *Land* v. *Johnston*, 156 Cal. 253, 256, 104 Pac. 449 (1909).

The use of any part of the water to which an appropriative right attaches may be abandoned. *Smith* v. *Green*, 109 Cal. 228, 235, 41 Pac. 1022 (1895).

[87] Cal. Water Code § 1240 (West 1971).

See also Cal. Water Code § 1675 (West Supp. 1975), described at note 50 *supra*, and § 1226.4, regarding certain stockponds, set out at note 73 *supra*.

[88] Cal. Water Code § 1241 (West 1971). See *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 398, 54 Pac. (2d) 1100 (1936).

As discussed in chapter 14 at notes 201-204, prior to the adoption of California's first State administrative water rights statute in 1913, there was no statutory period resulting in forfeiture for nonuse. However, the State supreme court held, by analogy to the prescriptive period, discussed below, that a 5-year period for forfeiture applied. *Smith* v. *Hawkins*, 110 Cal. 122, 126-127, 42 Pac. 453 (1895). This 5-year period was replaced by the statutory 3-year period with respect to water of surface and subterranean watercourses appropriated under a State license or permit, but it is still in effect with respect to ground water not flowing in a known and definite channel.

appropriative irrigation water rights results from compliance with crop control or soil conservation contracts with the United States or in other cases of hardships as the Water Resources Control Board may by rule prescribe.[89] Special provisions also apply to nonuse of water rights appurtenant to lands held by the United States in trust for Indians.[90]

A prescriptive right may be acquired against one by another, through adverse possession and use for the 5-year period of the statute of limitations.[91] It has been said, "The facts or elements which are necessary to the existence of a prescriptive water right have been set forth in a veritable forest of cases."[92]

The holder of a water right also may be barred by estoppel, because of circumstances for which he is held responsible, from asserting his title against another in a court of equity.[93] This defense rests upon the doctrine "that a right conceded for the purpose of such defense to exist in a party, he shall not be permitted to assert against another to the latter's injury because of the existence and proof of certain facts and conditions which would render its assertion inequitable;" and the question of its application depends upon the facts of each particular case.[94]

Private ways for an irrigation, drainage, or seepage canal may be opened, laid out, or altered by orders of the county boards of supervisors for the convenience of one or more residents or freeholders of road districts under the

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Pasadena v. *Alhambra*, 33 Cal. (2d) 908, 933-934, 207 Pac. (2d) 17 (1949). In these regards, see also Hutchins, W. A., "The California Law of Water Rights" 293-296 (1956).

In a recent case, a California court of appeal said that "Since John Pedro's appropriative right had been established before 1914, forfeiture required nonuse for five rather than three years." The court concluded there was no actual nonuse of water but that transmission losses of 5/6 of the diverted water would not be a reasonable beneficial use within the meaning of the 1928 constitutional amendment, discussed later, and hence could result in a partial abandonment. *Erickson* v. *Queen Valley Ranch Co.*, 22 Cal. App. (3d) 578, 99 Cal. Rptr. 446 (1971).

[89] In such cases, the forfeiture period shall be extended no more than 10 years or for the duration of any such contract if less than 10 years. Cal. Water Code § 1241.6 (West 1971).

Special provisions apply to nonuse of water rights appurtenant to lands held by the United States in trust for the Indians. *Id.* § 1241.5.

[90] *Id.* § 1241.5.

[91] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 927, 207 Pac. (2d) 17 (1949).

[92] *Peck* v. *Howard*, 73 Cal. App. (2d) 308, 325, 167 Pac. (2d) 753 (1946).

The necessary elements and related factors are discussed in chapter 14 in which several California cases are cited. See especially "Prescription—Elements of the Prescriptive Right." With respect to statutory prohibitions on prescription as against the State or public entities, see chapter 14 at notes 691-692 and 700, citing Cal. Civ. Code § 1007 (West Supp. 1975).

[93] *Stepp* v. *Williams*, 52 Cal. App. 237, 254-255, 198 Pac. 661 (1921).

[94] *San Diego* v. *Cuyamaca Water Co.*, 209 Cal. 105, 137, 287 Pac. 475 (1930).

The elements of estoppel and related factors are discussed in chapter 14 under "Estoppel," in which a number of California cases are cited.

procedure applicable to public roads, except that only one petitioner is necessary. The person for whose benefit the private way is required shall pay damages awarded to landowners and shall keep the canal in repair.[95]

The Riparian Doctrine

Recognition of the riparian doctrine.—In the year in which California was admitted to the Union, the legislature passed an act adopting the common law of England, so far as not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of the State, as the rule of decision in all State courts.[96] As a part thereof, said the California Supreme Court in 1886 in the leading case of *Lux* v. *Haggin*, the legislature adopted the riparian doctrine.[97] In making this assertion, as well as others pertaining to the riparian issues, the court was unequivocal and detailed.

The opinions in a number of cases that preceded *Lux* v. *Haggin* exhibited consciousness of the riparian doctrine. In some of these cases, riparian rights were not actually adjudicated.[98] The first decision that rested wholly upon the common law rights of riparian proprietors as against each other, with no consideration of nonriparian uses, was rendered in 1865.[99] During the ensuing 20-year period antedating *Lux* v. *Haggin*, there were several cases in the supreme court in which rights of riparian proprietors were recognized and various matters respecting them actually litigated.[100]

The decision in *Lux* v. *Haggin* firmly established the riparian doctrine as a fundamental aspect of the water law of California. Included later under "Interrelationships of the Dual Systems" there is a brief account of the development of the long conflict between riparians and appropriators, its culmination in a constitutional amendment, and the courts' acceptance of its basic mandate.

Accrual and character of the riparian right.—The riparian right is "not gained by use or lost by disuse."[101] The right of a proprietor of privately owned land accrues when title to that land passes to private ownership.[102] Each succeeding owner of the land takes title to the water right as a part of the transaction by which he acquires title to the land, unless the right is divested by certain circumstances noted below. (See "Severance of riparian right from land.") This is because the riparian proprietor's right to the flow of water is annexed to the

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[95] Cal. Water Code § § 7020-7026 (West 1971).

[96] Cal. Stat. 1850, p. 219.

[97] *Lux* v. *Haggin*, 69 Cal. 255, 384, 387, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

[98] See *Irwin* v. *Phillips*, 5 Cal. 140, 145-146 (1855); *Hill* v. *Newman*, 5 Cal. 445, 446 (1855); *Kelly* v. *Natoma Water Co.*, 6 Cal. 105, 108 (1856); *Hill* v. *King*, 8 Cal. 336, 338 (1857); *Kidd* v. *Laird*, 15 Cal. 161, 180 (1860).

[99] *Ferrea* v. *Knipe*, 28 Cal. 340, 343-345 (1865).

[100] See Hutchins, *supra* note 88, at 53 n. 7.

[101] *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 Pac. 444 (1927).

[102] *McKinley Bros.* v. *McCauley*, 215 Cal. 229, 231, 9 Pac. (2d) 298 (1932).

soil, not as a mere easement or appurtenance, but as part and parcel of the land itself.[103] Identified with the realty as parcel thereof, the riparian right necessarily is real property.[104]

The riparian right is limited to reasonable beneficial use of the water under reasonable methods of diversion and use.[105] As against upstream riparians, the riparian proprietor is entitled "to a substantially unpolluted stream,"[106] particularly where the downstream use is for domestic purposes.[107] But his right of possession and use of the water does not begin until the water actually reaches the riparian land;[108] and he generally has no concern with any diversion or use of the water after it has passed his land nor any right to object thereto.[109]

As the riparian right is in its nature a tenancy in common, not a separate or severable estate, it does not entitle the holder to the use of "a constant, invariable, specific quantity of water."[110] As against other like owners (except with respect to preferred natural or domestic uses, discussed below under "Purpose of use of water") he has only a right in common with them "to take a proportional share from the stream—a correlative right which he shares reciprocally" with the others.[111] When a controversy arises between riparians over their respective uses of water, the remedy is a division or apportionment of the water in accordance with principles of equity, taking into consideration the reasonable needs of each;[112] and a suit in equity may be brought for this purpose.[113] Necessarily, many considerations must enter into the solution of such a problem including, as stated in one case, length of stream, volume of water, extent of each ownership, character of soil owned by each claimant, and area sought to be irrigated by each;[114] and in another, "location, aridity, rainfall, soil porosity, responsiveness, adaptability to particular forms of production, and many other elements."[115] Economic considerations may be important, such as relative values of possible uses of riparian tracts,[116] and determination of standards of profitable irrigation.[117]

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[103] *San Francisco* v. *Alameda County*, 5 Cal. (2d) 243, 246, 54 Pac. (2d) 462 (1936).
[104] *Palmer* v. *Railroad Comm'n*, 167 Cal. 163, 173, 138 Pac. 997 (1914).
[105] Cal. Const. art. XIV, § 3.
[106] *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 312, 30 Pac. (2d) 30 (1934).
[107] *Joerger* v. *Pacific Gas & Elec. Co.*, 207 Cal. 8, 25-26, 276 Pac. 1017 (1929).
[108] *Miller & Lux* v. *Enterprise Canal & Land Co.*, 169 Cal. 415, 441, 147 Pac. 567 (1915).
[109] *Holmes* v. *Nay*, 186 Cal. 231, 234, 235-237, 242, 199 Pac. 325 (1921).
[110] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 219-221, 287 Pac. 93 (1930).
[111] *Prather* v. *Hoberg*, 24 Cal. (2d) 549, 559-560, 150 Pac. (2d) 405 (1944).
[112] *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 636, 7 Pac. (2d) 706 (1932).
[113] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947).
[114] *Harris* v. *Harrison*, 93 Cal. 676, 681, 29 Pac. 325 (1892). See also *Wiggins* v. *Muscupiabe Land & Water Co.*, 113 Cal. 182, 195, 45 Pac. 160 (1896).
[115] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 117-118, 252 Pac. 607 (1926).
[116] *Southern Cal. Inv. Co.* v. *Wilshire*, 144 Cal. 68, 71, 77 Pac. 767 (1904).
[117] *Half Moon Bay Land Co.* v. *Cowell*, 173 Cal. 543, 549-550, 160 Pac. 675 (1916).

In *Prather* v. *Hoberg*, the supreme court said:[118]

> As between riparian owners it is preferable, whenever possible, to have an apportionment decreed in terms of a percentage or proportional allotment. * * * No mathematical rule has been formulated to determine such a right, for what is a reasonable amount varies not only with the circumstances of each case but also varies from year to year and season to season.

Despite this inevitable variability, the decree of apportionment is based on the conditions that obtain at the time of the trial, and it is binding upon the parties so long as it remains in effect, which continues so long as the conditions upon which it is based remain substantially unchanged. But the decree may be modified in a subsequent proceeding if the conditions have changed sufficiently to warrant a new or modified apportionment.[119]

Severance of riparian right from land.—The grantor of land through which a stream of water flows may reserve the riparian water right from the conveyance.[120]

It is also competent for the riparian proprietor to grant the use of water in whole or in part, leaving the fee of the land vested in himself.[121] However, "the severed right, apart from and distinct from any claim of ownership in or to the land, cannot be classed as a riparian right, a part and parcel of the soil."[122] The legal effect of such a grant is that the grantor is estopped from asserting the riparian right in antagonism to the grantee; that the estoppel runs likewise against the riparian lands; that it is binding not only as between the original parties but as against their successors as well; but that it does not affect other parties.[123]

Other ways in which the California riparian right may be severed from the land include (1) condemnation;[124] (2) prescription, through adverse use for the period of the statute of limitations;[125] (3) loss of contact of land with stream

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[118] *Prather* v. *Hoberg*, 24 Cal. (2d) 549, 559-560, 150 Pac. (2d) 405 (1944).

[119] See *Los Angeles* v. *Baldwin*, 53 Cal. 469, 470 (1879), including the specially concurring opinion at 474-475.

[120] *Walker* v. *Lillingston*, 137 Cal. 401, 402-404, 70 Pac. 282 (1902); *Forest Lakes Mut. Water Co.* v. *Santa Cruz Land Title Co.*, 98 Cal. App. 489, 495-496, 277 Pac. 172 (1929).

[121] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 223, 24 Pac. 645 (1890); *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 913, 178 Pac. (2d) 844 (1947).

[122] *Spring Valley Water Co.* v. *Alameda County*, 88 Cal. App. 157, 167-168, 263 Pac. 318 (1927).

[123] See *Duckworth* v. *Watsonville Water & Light Co.*, 150 Cal. 520, 526, 89 Pac. 338 (1907), 170 Cal. 425, 429-430, 150 Pac. 58 (1915). See also *Wright* v. *Best*, 19 Cal. (2d) 368, 382, 121 Pac. (2d) 702 (1942); *Mt. Shasta Power Corp.* v. *McArthur*, 109 Cal. App. 171, 192-193, 292 Pac. 549 (1930).

[124] *Los Angeles* v. *Aitken*, 10 Cal. App. (2d) 460, 474-475, 52 Pac. (2d) 585 (1935).

[125] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 374, 40 Pac. (2d) 486 (1935).

by conveyance, where the deed is silent as to riparian rights,[126] unless the circumstances showed that the parties intended the water right to be preserved or were such as to raise an estoppel;[127] and (4) loss of contact of land with stream by avulsion,[128] where the owner does not restore the water to its original channel within a reasonable time and without disturbing the rights of others.[129]

Riparian lands.—It is well settled in California that the extent of lands having riparian status is generally determined by three criteria: (1) The land in question must be contiguous to or abut upon a stream, except in those cases in which the right is preserved in parcels that have become noncontiguous by reason of subdivision of the land, as discussed above. (2) The riparian right generally extends only to the smallest tract held under one title in the chain of title leading to the present owner. (3) The land, in order to be riparian, must be within the watershed of the stream.[130]

"In determining the riparian status of land the same rules of law apply regardless of the size of the tract, the extent of the watershed or the amount of the runoff."[131]

Riparian waters.—Riparian rights attach to watercourses, both surface and subterranean, and to other definite natural sources of water supply on the surface of the earth. The State constitution now speaks of riparian rights "in a stream or water course."[132]

The riparian right applies to a *natural* water source.[133] Foreign waters are not subject to the rights of riparian owners on streams into which they are artificially drained.[134] However, a watercourse originally constructed artifically may, under certain circumstances, become in legal contemplation a natural watercourse so that riparian owners may become possessed of rights therein.[135]

Since the adoption of the constitutional amendment of 1928, discussed earlier, the courts recognize no distinction between ordinary and extraordinary floodflows in a stream, and the right of the riparian owner now extends to

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[126] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 538, 81 Pac. (2d) 533 (1938).

[127] *Hudson* v. *Dailey*, 156 Cal. 617, 624-625, 105 Pac. 748 (1909).

[128] Avulsion is a *sudden* natural change in the course of a stream that results in separating the new channel from contact with the former riparian land.

The riparian right generally is not lost by *accretion*, which is a *gradual* change in the course of a stream.

[129] *McKissick Cattle Co.* v. *Alsaga*, 41 Cal. App. 380, 388-389, 182 Pac. 793 (1919).

[130] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 528-529, 81 Pac. (2d) 533 (1938).

[131] 11 Cal. (2d) at 534.

[132] Cal. Const. art. XIV, § 3.

[133] *Turner* v. *James Canal Co.*, 155 Cal. 82, 87, 99 Pac. 520 (1909); *Chowchilla Farms Co.* v. *Martin*, 219 Cal. 1, 19, 25 Pac. (2d) 435 (1933).

[134] *Crane* v. *Stevinson*, 5 Cal. (2d) 387, 392-395, 399-400, 54 Pac. (2d) 1100 (1936).

[135] *Chowchilla Farms Co.* v. *Martin*, 219 Cal. 1, 18-26, 25 Pac. (2d) 435 (1933). See, in chapter 3, "Collateral Questions Respecting Watercourses—Watercourses Originally Made Artificially."

whatever water is naturally available in the stream but only to the extent of his own reasonable and beneficial use, present and prospective.[136]

Other riparian water sources may include a lake;[137] pond;[138] spring discharging into a watercourse;[139] tributary stream;[140] and slough connected with a river.[141]

Purpose of use of water.—The distinction between so-called "natural" or "ordinary" uses of water and "artificial" or "extraordinary" uses is recognized in California.[142]

Natural uses include only the use of water for domestic purposes and for the watering of domestic animals. Artificial uses include the watering of large herds of stock, irrigation, development of hydroelectric power, and certain other riparian uses noted below.

The upper riparian owner is entitled to take from the stream as much water as he actually needs for natural purposes,[143] but he has no right to obstruct the flow unreasonably to the injury of the lower owner.[144]

Where natural and artificial uses conflict, natural uses have the preference. This means that it is only after natural wants are supplied that any of the water may be used for artificial purposes.[145]

Among artificial uses of water—such, for example, as irrigation, watering of large herds of stock, or manufacturing—there is no preference. All riparian owners have relative rights of reasonable use depending upon all the facts and circumstances.[146]

Commercialization of domestic use of water by serving the needs of paying guests on riparian land does not necessarily make it an artificial use; but *extensive* commercialization to the prejudice of a lower riparian owner is not a natural use entitling it to preference.[147]

The preference accorded to stockwatering applies only to the number of domestic animals required for ordinary farm domestic uses. Watering of commercial herds, although a proper riparian use, is not a natural use of

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[136] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 368, 374-375, 40 Pac. (2d) 486 (1935); *Meridian* v. *San Francisco*, 13 Cal. (2d) 424, 445-447, 90 Pac. (2d) 537 (1939).

[137] *Elsinore* v. *Temescal Water Co.*, 36 Cal. App. (2d) 116, 129-130, 97 Pac. (2d) 274 (1939).

[138] *Turner* v. *James Canal Co.*, 155 Cal. 82, 87, 99 Pac. 520 (1909).

[139] *San Francisco Bank* v. *Langer*, 43 Cal. App. (2d) 263, 268, 110 Pac. (2d) 687 (1941).

[140] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 532, 81 Pac. (2d) 533 (1938).

[141] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 92, 252 Pac. 607 (1926).

[142] *Cowell* v. *Armstrong*, 210 Cal. 218, 224-225, 290 Pac. 1036 (1930).

[143] *Drake* v. *Tucker*, 43 Cal. App. 53, 58, 184 Pac. 502 (1919).

[144] *Barneich* v. *Mercy*, 136 Cal. 205, 206, 68 Pac. 589 (1902); *Ferrea* v. *Knipe*, 28 Cal. 340, 343-345 (1865).

[145] *Smith* v. *Corbit*, 116 Cal. 587, 592, 48 Pac. 725 (1897).

[146] *Drake* v. *Tucker*, 43 Cal. App. 53, 58, 184 Pac. 502 (1919); *Cowell* v. *Armstrong*, 210 Cal. 218, 224-225, 290 Pac. 1036 (1930).

[147] *Prather* v. *Hoberg*, 24 Cal. (2d) 549, 560-562, 150 Pac. (2d) 405 (1944).

water entitled to a preference over irrigation or other recognized artificial uses.[148]

Late in the 19th century the California Supreme Court remarked that irrigation, "though not perhaps the least important" of all riparian rights, "must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast."[149] Despite this early judicial downgrading of the importance of irrigation, the right to make reasonable use of water for crop production on riparian land has been recognized throughout the history of water rights litigation in California.[150] The riparian right is not limited to irrigation of cultivated land producing tilled crops, but is also effective with respect to uncultivated lands, including areas that benefit from natural stream overflow.[151]

Other recognized riparian uses of water have included generation of hydroelectric power;[152] propulsion of mill machinery;[153] transporting logs;[154] mining;[155] and attractive surroundings and recreation.[156]

A municipality in California may have riparian rights in a stream by reason of its ownership of riparian land, but it has no greater right to the use of the water than a private owner of the same tract would have.[157]

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[148] *Cowell* v. *Armstrong*, 210 Cal. 218, 224-226, 290 Pac. 1036 (1930).

[149] *Alta Land & Water Co.* v. *Hancock*, 85 Cal. 219, 230, 24 Pac. 645 (1890).

[150] See *Ferrea* v. *Knipe*, 28 Cal. 340, 341-345 (1865); *Lux* v. *Haggin*, 69 Cal. 255, 408-409, 4 Pac. 919 (1884), 10 Pac. 674 (1886). In 1892 the supreme court observed that the common law right of a riparian owner to the flow of water, substantially unimpaired in quality or undiminished in quantity, had been changed in some western American jurisdictions, including California, to include the reasonable use of water for irrigating the riparian land. *Harris* v. *Harrison*, 93 Cal. 676, 681, 29 Pac. 325 (1892).

[151] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 116-118, 252 Pac. 607 (1926); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 729-730, 752, 755 (1950).

As a result of the 1928 constitutional amendment, discussed later, the riparian owner is now limited in the exercise of his right to reasonableness as against appropriators as well as against other riparian owners. But there appears to be no basis in present California law for asserting that the diversion of water by natural overflow, without the use of artificial applicances, is, itself, an unreasonable means of diversion. Whether, in a particular case, the diversion of water by natural overflow is reasonable or unreasonable will undoubtedly depend upon all the circumstances of that case.

[152] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 215, 219, 287 Pac. 93 (1930); *Moore* v. *California Oreg. Power Co.*, 22 Cal. (2d) 725, 731, 140 Pac. (2d) 798 (1943).

[153] *Mentone Irr. Co.* v. *Redlands Elec. Light & Power Co.*, 155 Cal. 323, 327, 100 Pac. 1082 (1909).

[154] *San Joaquin & Kings River Canal & Irr. Co.* v. *Fresno Flume & Irr. Co.*, 158 Cal. 626, 631-632, 112 Pac. 182 (1910).

[155] *Leigh Co.* v. *Independent Ditch Co.*, 8 Cal. 323 (1857).

[156] *Elsinore* v. *Temescal Water Co.*, 36 Cal. App. (2d) 116, 129-130, 97 Pac. (2d) 274 (1939); *Prather* v. *Hoberg*, 24 Cal. (2d) 549, 560-562, 150 Pac. (2d) 405 (1944).

[157] *Antioch* v. *Williams Irr. Dist.*, 188 Cal. 451, 456, 205 Pac. 688 (1922).

Place of use of water.—The riparian right includes "the right to a reasonable use of the water of the stream on any portion of the tract which is riparian to it, but not elsewhere."[158] The water may be used at any place on the tract.[159]

The use of his water by a riparian owner on nonriparian land is a nonriparian use and a trespass on the rights of downstream proprietors.[160] As the riparian proprietor himself has no right to divert the water to nonriparian land, he cannot as against a lower owner confer the right upon another,[161] but he may do so as against himself and his grantees only. (Regarding the effect of granting one's riparian right, see the earlier discussion under "Severance of Riparian Right From Land.")

The riparian owner cannot rightfully divert his riparian water to lands beyond the watershed of the stream.[162]

The 1928 California constitutional amendment deprived a riparian owner of the right to enjoin an act that caused him no substantial injury, while assuring him protection in his rights of both present and prospective reasonable beneficial use.[163]

As mentioned above under "Purpose of use of water," the California Supreme Court has indicated that a municipality that owns riparian land has no greater right to use the water than a private owner of the tract would have. In this regard, the court has said that the riparian rights "extend only to the use of the water upon the abutting land and none other."[164]

Storage of water.—To insure the uninterrupted operation of mills, water wheels, or power plants, the riparian owner may make temporary detention of the water in forebays or reservoirs.[165] But seasonal storage of water is not a proper riparian use. A lower riparian is entitled to an injunction or damages for any substantial interference with his right.[166]

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[158] *Holmes* v. *Nay*, 186 Cal. 231, 235, 199 Pac. 325 (1921).

[159] *Parker* v. *Swett*, 188 Cal. 474, 485-486, 205 Pac. 1065 (1922).

[160] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 334-335, 88 Pac. 978, 981-982 (1907). See *Moore* v. *California Oreg. Power Co.*, 22 Cal. (2d) 725, 734, 140 Pac. (2d) 798 (1943).

[161] *Gould* v. *Eaton*, 117 Cal. 539, 543, 49 Pac. 577 (1897).

[162] *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 330, 88 Pac. 978 (1907); *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 529, 81 Pac. (2d) 533 (1938); *Mt. Shasta Power Corp.* v. *McArthur*, 109 Cal. App. 171, 191, 292 Pac. 549 (1930).

[163] See "Interrelationships of the Dual Systems—The constitutional amendment of 1928," *infra.*

[164] *Antioch* v. *Williams Irr. Dist.*, 188 Cal. 451, 456, 205 Pac. 688 (1922).

[165] *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.*, 209 Cal. 206, 215-216, 219, 287 Pac. 93 (1930).

[166] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.*, 218 Cal. 559, 564-565, 24 Pac. (2d) 495 (1933).

The court added that seasonal carryover by a riparian owner who dams the entire streamflow is not authorized in exercising the riparian right. *Id.* The court also said it was unnecessary to decide whether an upper riparian owner may appropriate water

Diversion and return of water.—The riparian owner may divert the water at any suitable point on his riparian land, provided he returns it to the stream above the lower boundary,[167] or at least above the upper boundary of the next lower riparian tract. Under some circumstances, the water may be diverted above the riparian tract.[168]

The method of diverting the water is not material so long as the rights of others are not impaired.[169] In the *Herminghaus* case, the use of artificial appliances for diversion of water by a riparian owner was held to be unnecessary, and the natural overflow of the stream was held to be serving a useful and beneficial purpose in contributing to the productivity of the riparian lands.[170] The court decided in this case that use of the floodflow for natural irrigation of riparian lands by overflow was reasonable, even though the entire flow of the stream was required to lift the waters over the banks. This decision led to adoption of the constitutional amendment of 1928 limiting the right of the riparian owner, among other things, to a reasonable method of diverting the water.[171]

There appears to be no basis in present California law for asserting that the diversion of water by natural overflow without the use of artificial appliances is, of itself, an unreasonable means of diversion. Whether in a particular case the method is reasonable or unreasonable will depend on all the circumstances of the case.

Rotation may be imposed upon riparian diverters by court order in making an apportionment of the water.[172]

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when such water is in excess of all the reasonable present or prospective needs of lower riparians. *Id.* at 565-566.

In *Moore* v. *California Oreg. Power Co.*, 22 Cal. (2d) 725, 738-739, 140 Pac. (2d) 798 (1943), regarding "periodic storage," said to be similar in effect to seasonal storage, the court said, *inter alia,* "our attention has not been called to any authority holding that damages may be awarded a riparian owner of lands for an interference with his riparian rights without proof on his part that he has actually been damaged by reason of such interference."

These and other earlier cases are discussed in more detail in chapter 10 at notes 667-671.

[167] See *Joerger* v. *Mt. Shasta Power Corp.*, 214 Cal. 630, 638, 7 Pac. (2d) 706 (1932).

[168] See *Pabst* v. *Finmand*, 190 Cal. 124, 137, 138, 211 Pac. 11 (1922); *Holmes* v. *Nay*, 186 Cal. 231, 240, 199 Pac. 325 (1921); *Turner* v. *Eastside Canal & Irr. Co.*, 168 Cal. 103, 108, 142 Pac. 69 (1914).

See the discussion in chapter 10 at notes 647-654.

[169] *Charnock* v. *Higuerra*, 111 Cal. 473, 480-481, 44 Pac. 171 (1896).

[170] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 107-108, 252 Pac. 607 (1926).

[171] Cal. Const. art. XIV, §3. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 749-756 (1950).

[172] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947).

But see chapter 10 at notes 558-559 regarding domestic use.

Interrelationships of the Dual Systems

Relative superiority of conflicting rights.—The relative superiority of conflicting appropriative and riparian rights on the same stream in California largely depends upon (1) the respective times of accrual of the rights and (2) the public or private ownership of the land on which the appropriative diversion is made and of the land for which the riparian right is claimed at the times the respective rights accrued.

The time of accrual of an appropriative right is the date of priority. For rights completed pursuant to the Civil Code, Water Commission Act, or Water Code, and in some instances for early nonstatutory appropriations, this was the time of taking the first step in acquiring the right. But as against competing statutory appropriations, for the nonstatutory appropriations, it was the time of completion.[173]

Grants by the United States of public lands within California have carried with them such water rights incident thereto as may be recognized and conferred by the State law—in other words, riparian rights in the waters of streams to which the lands are contiguous.[174] Such riparian rights generally accrued when the lands were transmitted to private ownership.[175]

Appropriations made on *private* lands are *inferior* to the riparian rights that attach to tracts of land *above* the appropriator's point of diversion, even though the upstream tracts were part of the Federal public domain at the time the appropriation accrued and *subsequently* passed into private ownership.[176] The status of such appropriations with respect to riparian rights attached to such tracts of land *below* the appropriator's point of diversion apparently has not been specifically decided by the California appellate courts. Appropriations made on *Federal public domain* and *State* lands *after* riparian lands on the same stream passed into private ownership are *inferior* to the riparian rights attached to such lands.[177] However, appropriations

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[173] See the discussion at note 28 *supra*.

[174] *Williams* v. *San Francisco*, 56 Cal. App. (2d) 374, 378-381, 133 Pac. (2d) 70 (1942), hearing denied by supreme court (1943), certiorari denied, 319 U.S. 771 (1943).

See also the discussion in chapter 10 at note 313 regarding *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935).

[175] *McKinley Bros.* v. *McCauley*, 215 Cal. 229, 231, 9 Pac. (2d) 298 (1932).

[176] *Cave* v. *Tyler*, 133 Cal. 556, 570, 65 Pac. 1089 (1901); *Holmes* v. *Nay*, 186 Cal. 231, 234-235, 199 Pac. 325 (1921); *San Joaquin & Kings River Canal & Irr. Co.* v. *Worswick*, 187 Cal. 674, 683-685, 203 Pac. 999 (1922); *Cory* v. *Smith*, 206 Cal. 508, 510, 274 Pac. 969 (1929); *Thorne* v. *McKinley Bros.*, 5 Cal. (2d) 704, 710-711, 56 Pac. (2d) 204 (1936).

[177] Federal public domain: *Barrows* v. *Fox*, 98 Cal. 63, 64-67, 32 Pac. 811 (1893); *Witherill* v. *Brehm*, 74 Cal. App. 286, 298-299, 240 Pac. 529 (1925). See *Alhambra Addition Water Co.* v. *Mayberry*, 88 Cal. 68, 74-75, 25 Pac. 1101 (1891). See also *Wood* v. *Etiwanda Water Co.*, 122 Cal. 152, 158-159, 54 Pac. 726 (1898). State lands: *Lux* v. *Haggin*, 69 Cal. 255, 368, 374, 4 Pac. 919 (1884). See also *Shenandoah Min. & Mill Co.* v. *Morgan*, 106 Cal. 409, 416, 39 Pac. 802 (1895).

made on such lands *before* riparian lands on the same stream passed into private ownership are *superior* to the riparian rights attached to such lands,[178] provided that, at least in the case of an appropriation on Federal public domain lands, the appropriation was made *before* the riparian's *settlement* on the land. If the appropriation was made *before* the time title to the riparian land *passed into* private ownership, but *after* the riparian's *settlement* occurred, the appropriation (by anyone other than the United States) is *inferior* to the riparian right. For the California Supreme Court has said:[179]

> While it is true that as against the United States the inception of the right of a [riparian] settler relates only to the date of filing application, actual settlement gives to such settler a preference as to such filing, so that, as to subsequent parties other than the United States, the inception of the right is the date of settlement. In view of the fact that the rights of both the appropriator and the settler are based upon priority in time of taking the initial step, actual settlement upon the land with the intention of subsequently acquiring a completed title by patent is sufficient, we think, to create an equitable right in the land so settled upon by a bona fide settler as to cut off all intervening rights, including those of a subsequent appropriator. The right acquired by a prior appropriator relates back to the first step taken, and we are of the opinion that the right of a settler should likewise date back to the first step taken, which in this case was actual settlement, rather than to the intermediate step of filing a formal application in the land office.

Superior appropriative rights.—In the foregoing situations in which an appropriative right proves to be superior to a subsequently acquired riparian right on the same stream, the appropriator is entitled as against the riparian to have his water right fully satisfied when he needs the water. It is a matter of priority in time of accrual, just as is the case between senior and junior appropriations.

Superior riparian rights.—Most California law with respect to conflicting riparian-appropriation interrelationships has been made in controversies in which the riparian right was adjudged superior. It is implicit that the following statements are premised on this riparian superiority, which resulted chiefly or wholly from priority in time of accrual of rights.

A 40-year period elapsed between the decision in *Lux* v. *Haggin*, in which the riparian doctrine was firmly established in the jurisprudence of the State, and that in the *Herminghaus* case, in which prevailing riparian principles

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[178] Federal public domain: *Cave* v. *Crafts*, 53 Cal. 135, 138 (1878); *Osgood* v. *El Dorado Water & Deep Gravel Min. Co.*, 56 Cal. 571, 578-581 (1880); *Haight* v. *Costanich*, 184 Cal. 426, 430, 194 Pac. 26 (1920). See *Farley* v. *Spring Valley Min. & Irr. Co.*, 58 Cal. 142, 143-144 (1881). State lands: *Lux* v. *Haggin*, 69 Cal. 255, 373-374, 4 Pac. 919 (1884).

[179] *Pabst* v. *Finmand*, 190 Cal. 124, 131, 211 Pac. 11 (1922).

were so interpreted and applied as to result in segregating a large quantity of water to accomplish a comparatively small benefit.[180] The cumulative result of litigation during this period was such that the position of the riparian owner in California in relation to that of an appropriator, regardless of whether the riparian owner had or had not used water, became so fortified that the voters of the State were constrained to take action in order to make possible the beneficial utilization of the State's water resources "to the fullest extent of which they are capable."[181]

An effect of the successive court decisions was that the appropriator in the first instance was always deemed a trespasser with respect to riparian owners on the same stream;[182] and he could not acquire a right in such waters to the prejudice of riparians by any use of water except by prescription or by grant from the latter.[183] As a result of the riparian's paramount right, he was under no duty to share the waters with a nonriparian owner,[184] nor to limit by artificial appliances or otherwise his natural use and enjoyment of the waters;[185] and as against an appropriator, said the supreme court, "He is not limited by any measure of reasonableness."[186]

During the 40-year period preceding the 1928 amendment, there were two lines of water rights decisions relating to character of streamflow to which riparian rights might attach. In one line, the riparian right extended as against appropriators to the entire stream, a floodflow not being considered extraordinary when it occurred regularly. In the other, riparians were not allowed to restrain appropriative diversions of freshet or extraordinary stream waters where enough water was left for riparian needs.[187]

The constitutional amendment of 1928.[188]—The decision of the California Supreme Court in the *Herminghaus* case[189] in 1926 precipitated a movement

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[180] *Lux* v. *Haggin*, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 252 Pac. 607 (1926).

[181] Cal. Const. art. XIV, §3, adopted November 26, 1928.

[182] *Antioch* v. *Williams Irr. Dist.*, 188 Cal. 451, 463, 205 Pac. 688 (1922).

[183] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 103, 252 Pac. 607 (1926).

[184] *Pabst* v. *Finmand*, 190 Cal. 124, 132, 211 Pac. 11 (1922).

[185] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 107-108, 252 Pac. 607 (1926).

[186] *Miller & Lux* v. *Madera Canal & Irr. Co.*, 155 Cal. 59, 64, 99 Pac. 502 (1907).

[187] See citations in Hutchins, W. A., "The California Law Of Water Rights" 64-65 (1956). See also the discussion in chapter 10 at notes 342-344.

Incidentally, a court of appeals said, "It is established in California that a person may be possessed of rights to the use of the waters of a stream both because of the riparian character of the land owned by him and also as an appropriator." *Rindge* v. *Crags Land Co.*, 56 Cal. App. 247, 252-253, 205 Pac. 36 (1922). But, this was said to be subject to the condition "that the total water claimed under the combined rights does not amount to more than is reasonably necessary to satisfy the necessary uses to which it is designed to be put." Such an appropriation was inferior to an already existing upstream riparian right. *McKissick Cattle Co.* v. *Anderson*, 62 Cal. App. 558, 567, 217 Pac. 779 (1923).

[188] Cal. Const. art. XIV, §3.

[189] *Herminghaus* v. *Southern Cal. Edison Co.*, 200 Cal. 81, 252 Pac. 607 (1926).

for and adoption of an amendment of the State constitution which, as the United States Supreme Court phrased it, attempted to serve the general welfare of the State by preserving and limiting both riparian and appropriative rights while curbing either from being exercised unreasonably or wastefully.[190] The amendment forbids waste or unreasonable use or unreasonable method of use or diversion of water and commands conservation of waters with a view to their reasonable and beneficial use in the interest of the public welfare. It declares that "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable * * *." Specific definitions and declarations of water rights are:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled.

The amendment is declared to be self-executing, while authorizing the legislature to implement the declared policy.

The amendment has been construed in several key decisions of the California Supreme Court.[191] As noted earlier, most California law with respect to conflicting riparian-appropriation interrelationships has been made in controversies in which the riparian right was adjudged superior.[192]

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[190] *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 750-751 (1950). In a number of paragraphs the Court summarized the development of water law in California from its beginning to the adoption of the amendment and rendering of State supreme court decisions respecting it. *Id.* at 744-751.

[191] In addition to the cases cited in this subtopic, see *Gin S. Chow* v. *Santa Barbara*, 217 Cal. 673, 700, 703-704, 22 Pac. (2d) 5 (1933); *Lodi* v. *East Bay Municipal Util. Dist.*, 7 Cal. (2d) 316, 339-340, 60 Pac. (2d) 439 (1936); *Hillside Water Co.* v. *Los Angeles*, 10 Cal. (2d) 677, 685, 76 Pac. (2d) 681 (1938); *Los Angeles* v. *Glendale*, 23 Cal. (2d) 68, 74-75, 142 Pac. (2d) 289 (1943); *Natural Soda Products Co.* v. *Los Angeles*, 23 Cal. (2d) 193, 199, 143 Pac. (2d) 12 (1943); *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 483, 176 Pac. (2d) 8 (1946); *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 934-935, 207 Pac. (2d) 17 (1949).

The history of cases construing this constitutional amendment is discussed in *Joslin* v. *Marin Municipal Water Dist.*, 67 Cal. (2d) 132, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967).

[192] See "Superior riparian rights" *supra*. Regarding differences, as against appropriative rights, that may arise due to the time that riparian lands passed into private ownership, and related factors, see "Relative superiority of conflicting rights," *supra*.

In its first major construction of the mandate, in *Peabody* v. *Vallejo* the court held that former distinctions with regard to ordinary and extraordinary floodflows are no longer applicable in the State.[193] The right of the holder of a paramount riparian right to use water as against an appropriator is now limited to reasonable beneficial use, present and prospective.[194] In many streams of the State, the supreme court has said that great volumes of water, in addition to quantities necessary to satisfy paramount riparian rights and other rights, pass on unused to the sea, such excess waters constituting "public waters of the state to be used, regulated and controlled by the state or under its direction."[195] The court further said:[196]

> Under the amendment of 1928 the rights of the riparian attach to, but to no more than so much of the flow as may be required or used consistently with the amendment. That is, the riparian is entitled to all of the water of the stream, both in the quantity and quality of its natural state, which he is able to put to a reasonable beneficial use, and to be protected in that right by the injunctive processes of the court. But the riparian owner is not entitled to an injunction to control the use of water by an appropriator in the exercise of a right admittedly subordinate but in no way injurious to the riparian right.

A riparian owner is no longer entitled to damages, even as against an inferior appropriator, simply because his usufructuary title to the water has been interfered with.[197] In *Peabody* v. *Vallejo*, the court held that since the adoption of the amendment, technical infringement of a paramount riparian right by the exercise of an appropriative right has not been actionable except to establish and protect the paramount right.[198] But an appropriative use that causes substantial damage to a paramount riparian right, including all present and reasonably prospective recognized uses, is an impairment of the right

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[193] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 368, 40 Pac. (2d) 486 (1935). See also 2 Cal. (2d) at 365-367, 372, 374-375. Regarding the former distinctions, see the discussion at note 187 *supra*.

[194] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 524-525, 45 Pac. (2d) 972 (1935). See also 3 Cal. (2d) at 525-526, 529-530.

In *Joslin* v. *Marin Municipal Water Dist.*, 67 Cal. (2d) 132, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967), discussed in more detail in chapter 6, note 239, the court held that a riparian landowner could not require an upstream appropriator to pass along the streamflow so as to enable the lower riparian landowner to utilize the streamflow as an agent to expose or carry and deposit sand, gravel and rocks. The court concluded that such use was not a reasonable use within the meaning of the constitutional amendment. The court distinguished *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), referred to at note 151 *supra*, as a case involving the use of the natural overflow for irrigation, a recognized reasonable use.

[195] *Meridian* v. *San Francisco* 13 Cal. (2d) 424, 445-447, 90 Pac. (2d) 537 (1939). See also 13 Cal. (2d) at 449-450.

[196] 13 Cal. (2d) at 447.

[197] *Crum* v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 307, 30 Pac. (2d) 30 (1934).

[198] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 374, 40 Pac. (2d) 486 (1935).

entitling the injured party to compensation and, under some circumstances, to injunctive relief.[199]

In summary, the old doctrine that the holder of a paramount riparian right, as against an appropriator, is not limited by any measure of reasonableness and that he can enjoin an appropriative right that interferes with his use of the water under any kind of diversion process is no longer the law in California. Such riparian owner as well as the appropriator is now limited to reasonable beneficial use of water under reasonable methods of diversion and use. The amendment did not destroy the riparian right but restricted the exercise of the right.[200]

The Pueblo Water Right

Outside the dual systems of water rights in California is the pueblo water right. This is the paramount right of an American city as successor of a Spanish or Mexican pueblo to the use of water naturally occurring within the old pueblo limits to supply the needs of the city and its inhabitants. The pueblo water rights doctrine in American water law originated in California. In 1958 it was adopted by the New Mexico Supreme Court.[201]

The origin, character, and extent of the pueblo right are discussed in chapter 11. Briefly, the American successor city has the prior and paramount right to the use of waters that flowed naturally through or by the pueblo to the extent of the needs of the city's inhabitants; the right grows not only with the number of inhabitants to whatever extent this increases, but also with the extension of the city limits by annexation of land not within the limits of the original pueblo; and the right extends to so much of the waters of the stream as the expanding needs of the city require, but to the use of water only within the city limits. It attaches to the use of all surface and ground waters of the stream that naturally flowed through the original pueblo, including its tributaries, from its source to its mouth. It relates to

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[199] 2 Cal. (2d) at 374-375. See also the discussion in chapter 15 at notes 402-413, regarding physical solutions.

The court has indicated that it is necessary that the trial court especially find the quantity of water required for the reasonable beneficial uses of the riparian owner and so used by him, after which a determination may be made as to whether there is surplus water subject to appropriation. As to future or prospective beneficial uses of the riparian owner, the court does not attempt to fix in advance the quantity needed, but declares such prospective uses paramount to any right of the appropriator, by which the rights of the riparian owner will be fully protected against any ripening of the adverse appropriative use into a prescriptive right. In the meantime, pending the time the riparian is himself ready to use the water, the appropriator may make an interim use of it. *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 524-525, 45 Pac. (2d) 972 (1935).

[200] The 1928 constitutional amendment is discussed in more detail in chapter 13 at notes 236-251. Less detailed discussions are in chapter 6 at notes 237-239 and in chapter 10 at notes 501-504.

[201] See the later discussion of the "The Pueblo Water Right" under "New Mexico."

the use of water needed by the city and its inhabitants for all beneficial purposes. The pueblo right generally is superior to riparian rights of other proprietors and to rights of appropriators on the stream. Regardless of how extensive existing uses of the water by others may be, the pueblo right is available for the use of the city whenever and to whatever extent the city is ready to exercise it. No method by which it can be lost to the city has yet been declared by the California Supreme Court.

Pueblo water rights have been adjudicated to Los Angeles, which succeeded a Spanish pueblo, and to San Diego as successor of a Mexican pueblo. San Jose was also an early agricultural pueblo of the Spaniards,[202] but whatever water rights the pueblo and city may have possessed have not yet been adjudicated.

Subterranean Watercourse

The Water Code specifies subterranean streams as the only ground water supplies, in addition to underflows of surface streams, that are subject to statutory appropriation.[203] Riparian rights also apply to such waters.

Definite underground stream.—In order to be a definite underground stream, the stream in question must be flowing through a known and defined channel. For the purpose of determining the classification, "defined" means a contracted and bounded channel though the course of the stream may be undefined by human knowledge, and "known" refers to knowledge of the course of the stream by reasonable inference.[204]

"There is no dispute between the parties and no conflict in the authorities as to the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams."[205] Such water "flowing through known and definite channels" may be appropriated, subject to vested rights and appropriative rights.[206] And a definite underground stream is subject to the riparian rights of contiguous lands.[207]

The burden of proving that waters moving in the ground are flowing in a natural watercourse or in a defined channel is on the party who asserts it.[208]

Underflow of surface stream.—The underflow or subflow of a surface stream is the subsurface portion of a watercourse the whole of which comprises waters flowing in close association both on and beneath the surface.[209] The underflow may include water moving not only directly

[202] See the discussion at note 3 *supra.*

[203] Cal. Water Code § 1200 (West 1971).

[204] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 633-634, 57 Pac. 585 (1899).

[205] 124 Cal. at 632.

[206] Cal. Water Code § § 1200 and 1201 (West 1971).

[207] *Prather* v. *Hoberg*, 24 Cal. (2d) 549, 557-562, 150 Pac. (2d) 405 (1944).

[208] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 628, 633-634, 57 Pac. 585 (1899).

[209] *Verdugo Canyon Water Co.* v. *Verdugo*, 152 Cal. 655, 663, 93 Pac. 1021 (1908); *San Bernardino* v. *Riverside*, 186 Cal. 7, 14, 198 Pac. 784 (1921).

beneath the surface channel. but also lateral extensions on each side.[210] The flow and the limits within which the waters that constitute the underflow are confined must be reasonably well defined.[211]

It is "well established that the underground and surface portions of the stream constitute one common supply."[212] Rights in the underflow are governed by the law of watercourses—just as are rights in the surface flow—both appropriative[213] and riparian,[214] subject to the limitations in the 1928 constitutional amendment discussed earlier.[215]

Percolating Waters

Percolating waters are ground waters that do not form part of the body or flow of any definite surface or subsurface stream.[216]

The California Water Code does not use the term "percolating water" in its provisions relating to the appropriation of water, but confines the operation of such provisions to surface waters and to "subterranean streams flowing through known and definite channels."[217] This effectively excludes all other ground waters; and owing to the judicial distinctions between percolating waters and waters of definite underground streams, it necessarily excludes percolating waters.

The California Supreme Court formerly adhered to the English rule of absolute ownership of percolating waters by the overlying landowner,[218] although he could not maliciously deprive others of the use of such water.[219] But in *Katz* v. *Walkinshaw*, the court departed from the English doctrine and adopted what was referred to therein both as "the doctrine of reasonable use" and "this rule of correlative rights."[220] The new California rule was an outgrowth of the American rule of reasonable use developed in several Eastern court decisions, but with some new and important features. The "rule of correlative rights" became the chosen designation of this new doctrine in subsequent California court decisions.

Under the California doctrine of correlative rights, owners of lands overlying the same supply of percolating ground waters have equal rights

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[210] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 375-376, 40 Pac. (2d) 486 (1935); *Larsen* v. *Apollonio*, 5 Cal. (2d) 440, 444, 55 Pac. (2d) 196 (1936).

[211] *Los Angeles* v. *Pomeroy*, 124 Cal. 597, 617, 623-624, 636-637, 57 Pac. 585 (1899).

[212] *Rancho Santa Margarita* v. *Vail*, 11 Cal. (2d) 501, 555, 81 Pac. (2d) 533 (1938).

[213] Cal. Water Code § § 1200 and 1201 (West 1971); *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 495, 58 Pac. 1057 (1899).

[214] *Carlsbad Mut. Water Co.* v. *San Luis Rey Dev. Co.*, 78 Cal. App. (2d) 900, 911, 178 Pac. (2d) 844 (1947).

[215] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 526, 531, 45 Pac. (2d) 972 (1935).

[216] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 494, 58 Pac. 1057 (1899).

[217] Cal. Water Code § § 1200 and 1201 (West 1971).

[218] *Vineland Irr. Dist.* v. *Azusa Irrigating Co.*, 126 Cal. 486, 494, 58 Pac. 1057 (1899).

[219] *Bartlett* v. *O'Conner*, 102 Cal. XVII, 4 Cal. U. 610, 613, 36 Pac. 513 (1894).

[220] *Katz* v. *Walkinshaw*, 141 Cal. 116, 136-137, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

therein—correlative rights—for use on their overlying lands.[221] Each such right extends only to the reasonable use of the water for the benefit of the overlying land, in such quantity as is reasonably necessary, provided the supply is sufficient therefor. If it is not sufficient for all, each is entitled to a reasonable share.[222]

Under this doctrine, the correlative rights of the overlying landowners are paramount to appropriations of water for distant use.[223] No overlying owner can, to the injury of the others, take the water and conduct it to distant nonoverlying lands. The overlying correlative rights are paramount but extend only to needed water. Surplus water may be taken for distant use until and unless the overlying owners are ready to use it.[224] But an overlying owner not presently injured by such a taking may apply to the court for a judgment declaring his right to be paramount and protecting it against future impairment.[225] If and when there is no surplus, exportation of the water from the area is subject to injunction,[226] unless such a right has been acquired as against particular overlying owners by such means as purchase, condemnation, or prescription.[227]

Surplus water is "any water not needed for the reasonable beneficial uses of those having prior rights," the prior rights consisting of both overlying and prior appropriative rights.[228] Priorities govern the respective rights of appropriators of percolating water.[229] Since there is no statutory procedure for appropriating such water, the only way it can be appropriated is by taking the water and applying it to beneficial use.

The constitutional amendment of 1928 provides, among other things, that water rights are to be limited to such quantity as is reasonably required and are not to extend to the waste or unreasonable use, method of use, or method of diversion of water.[230] This applies to percolating ground waters as well as to other water sources.[231]

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[221] 141 Cal. at 135-136.

[222] *Cohen* v. *LaCanada Land & Water Co.*, 142 Cal. 437, 439-440, 76 Pac. 47 (1904).

[223] The correlative rights and their interrelationships with appropriative rights are discussed in more detail in chapter 20.

[224] *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428, 435-437, 98 Pac. 260 (1908).

[225] *San Bernardino* v. *Riverside*, 186 Cal. 7, 15-16, 198 Pac. 784 (1921).

[226] *Corona Foothill Lemon Co.* v. *Lillibridge*, 8 Cal. (2d) 522, 529, 532, 66 Pac. (2d) 443 (1937).

[227] Regarding the question of mutual prescription, see, in chapter 20, "California—Percolating Waters—The California Doctrine of Correlative Rights—Mutual prescription: A troublesome, controversial concept."

[228] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 925, 207 Pac. (2d) 17 (1949).

[229] *San Bernardino* v. *Riverside*, 186 Cal. 7, 20, 30-31, 198 Pac. 784 (1921).
Public use of percolating water ordinarily is treated as a nonoverlying and therefore appropriative use of the water. 186 Cal. at 10-11, 24-26.

[230] Cal. Const. art. XIV, § 3.

[231] *Peabody* v. *Vallejo*, 2 Cal. (2d) 351, 371, 40 Pac. (2d) 486 (1935).

Other Considerations Regarding Ground Waters

The artesian or nonartesian character of ground waters makes no difference in determining relative rights of individual owners of wells.[232] Statutory regulation of artesian wells has no bearing on such rights except to prevent each one from wasting or making unreasonable use of artesian waters.[233]

Various considerations regarding the exercise of ground water rights, some miscellaneous statutory provisions, and the coordination of rights in ground waters and surface watercourses[234] are discussed in chapter 20.

Determination of Conflicting Water Rights

Court reference procedure.—The Water Code authorizes trial courts of the State, in any suit brought for "determination of rights to water," to order a reference to the State Water Resources Control Board, as referee, of any or all issues involved.[235] Or the court may refer the suit to the Board for investigation of and report upon any or all of the physical facts involved.[236]

The Board may make investigations and may hold hearings and take testimony. After considering objections of the parties, the Board's report is filed with the court, where it is subject to the court's review on exceptions taken by parties and where evidence may be heard in rebuttal.[237]

Ordering the reference is discretionary with the trial court;[238] and it may make the reference either with or without a request from the parties.[239] The California Supreme Court has repeatedly commended this statutory plan for expediting the determination of conflicting water rights by reference to the State agency;[240] and its constitutionality was sustained under attack in cases dealing with surface watercourses and percolating ground waters.[241]

The Board is also authorized by the Water Code to accept a reference, as master or referee, from a Federal court in case suit is brought therein for determination of rights to water within or partially within the State.[242]

Statutory adjudication procedure.—The State Water Resources Control Board may determine all rights to water of a stream system whether based

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[232] See *Katz* v. *Walkinshaw*, 141 Cal. 116, 138-140, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

[233] This legislation [Cal. Water Code §§ 300-311 (West 1971)] is discussed in chapter 20 under "California—Artesian Waters—Public Regulation of Artesian Wells."

[234] This includes an exceptional situation regarding pueblo rights discussed in chapter 20 at note 165. Pueblo rights are discussed briefly above.

[235] Cal. Water Code § 2000 (West 1971).

[236] *Id.* § 2001.

[237] *Id.* §§ 2010-2021.

[238] *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 489, 176 Pac. (2d) 8 (1946).

[239] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 575, 45 Pac. (2d) 972 (1935).

[240] See the discussion in chapter 15 at note 144.

[241] *Fleming* v. *Bennett*, 18 Cal. (2d) 518, 523-528, 116 Pac. (2d) 442 (1941); *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 917-918, 207 Pac. (2d) 17 (1949).

[242] Cal. Water Code §§ 2075-2076 (West 1971).

upon appropriation, riparian right, or other basis of right.[243] For this purpose, "stream system" includes stream, lake, or other body of water with tributary sources, but *not* a ground water supply other than a subterranean stream flowing through known and definite channels.[244]

On petition of one or more claimants requesting such a determination, the Board grants the petition if it finds that the public interest will be served thereby. All claimants having rights must appear and submit proof of their claims. The Board makes a hydrographic survey, takes proofs of claims, and hears and determines contests.[245] Thereafter the Board makes an order determining and establishing the several rights to water of the stream system.[246]

The order of determination of the Board, with the original evidence and transcripts of testimony taken before the Board, is filed in the appropriate superior court. After required notice[247] and hearing, any exceptions are heard and disposed of.[248] Any claimant who, prior to entry of the order of determination by the Board, had no actual notice or knowledge of the proceedings is permitted to intervene in the proceedings.[249] If no exceptions are filed, on motion of the Board the court shall enter a decree affirming the order of determination.[250] If there are exceptions, the proceedings are conducted as nearly as possible in accordance with the rules governing civil actions.[251] At the conclusion, the court enters a decree determining the rights of all persons involved in the proceedings.[252] A certified copy is recorded in the Board's office and in the county recorder's office of each county in which any part of the adjudicated stream system is situated.[253] The decree, subject to appeal,[254] is "conclusive as to the rights of all existing claimants upon the stream system lawfully embraced in the determination."[255] The statutes also contain

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[243] *Id.* § 2501.

If the Board finds that minor uses of water (defined as the diversion or extraction of no more than 10 acre-feet annually) would have no material effect on the rights of other claimants, the Board may exempt such minor users from the proceedings. However, any person so exempt may elect to be subject to the proceedings by giving prompt notice to the Board. Cal. Water Code § § 2502 and 2503 (West Supp. 1975).

[244] Cal. Water Code § 2500 (West 1971).

[245] *Id.* § § 2525-2659.

[246] *Id.* § § 2700-2703.

[247] *Id.* § § 2756-2759.

[248] *Id.* § 2763.

[249] *Id.* § 2780.

[250] *Id.* § 2762.

[251] *Id.* § 2764.

[252] *Id.* § 2768. This shall include the priority, amount, purpose, place, and season of use and point of diversion. If for irrigation, it shall also include the appurtenant tracts of land and such other factors as may be needed to define the right. *Id.* § 2769.

[253] *Id.* § 2772.

[254] *Id.* § 2771.

[255] *Id.* § 2773.

Section 2774 provides, "When a decree has been entered, any claimant who has failed

provisions with respect to the completion and eventual determination of incomplete appropriations.[256]

Attempts to have certain Water Code sections governing adjudication procedures declared unconstitutional have been unsuccessful.[257] This procedure was modeled closely after the comparable Oregon procedure, the validity of which was sustained by the United States Supreme Court against attacks on the ground that it was repugnant to the due process clause of the 14th Amendment.[258]

Modification of decree.—The Water Code authorizes the trial court, in rendering a decree under either the court reference procedure or the statutory adjudication procedure, to provide for modification of the decree with respect only to the determination of quantities of water, on application of the Board or any affected party within 3 years from its entry.[259]

In its decree in a ground water reference proceeding, the trial court reserved jurisdiction to review its determination of safe yield and rights of all parties as affected by losses of any rights, the review of safe yield to be had "not more frequently than at five (5) year intervals." The California Supreme Court disapproved the trial court's 5-year-intervals limitation and held that "the judgment should be modified to preserve a broad retention of jurisdiction in the trial court to change its decree and orders, after notice and hearing, as the occasion may require."[260] The court did not refer to the above 3-year statutory provision.

Administration of Water Rights and Distribution of Water

The Department of Water Resources shall create watermaster service areas as water rights are ascertained and determined.[261]

On written request of owners or governing bodies of at least 15 percent "of the conduits lawfully entitled to directly divert water from the streams or other sources of water supply" in any service area, the Department at its discretion may appoint a watermaster and deputies.[262] Their duties include dividing the "water of the streams or other sources of supply among the several conduits and reservoirs" according to their respective rights,[263] under

to appear and submit proof of his claim as provided in this chapter shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream system embraced in the proceedings, and shall be held to have forfeited all rights to water theretofore claimed by him on the stream system, other than as provided in the decree, unless entitled to relief under the laws of this State."

[256] *Id.* § 2800 *et seq.*

[257] *Bray* v. *Superior Court*, 92 Cal. App. 428, 436-440, 268 Pac. 374 (1928); *Wood* v. *Pendola*, 1 Cal. (2d) 435, 439, 442, 35 Pac. (2d) 526 (1934).

[258] *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 451-455 (1916).

[259] Cal. Water Code § 2900 (West 1971).

[260] *Pasadena* v. *Alhambra*, 33 Cal. (2d) 908, 936-938, 207 Pac. (2d) 17 (1949).

[261] Cal. Water Code § § 4025-4032 (West 1971).

[262] *Id.* § 4050.

[263] *Id.* § 4151.

reasonable regulations promulgated by the Department.[264] Provision is made for the construction and maintenance of diversion and storage works, headgates, and measuring devices satisfactory to the Department;[265] for court injunctions on behalf of persons injured by improper distribution;[266] for the punishment of offenses;[267] and for the handling of expenses of distribution.[268] Whenever it appears that any of the statutory provisions are inconsistent with the provisions of a court decree of adjudication, the Department instead may conform to the requirements of the decree.[269]

The California Supreme Court has held that a trial court which had made a court reference had power, by supplementary order following judgment, to appoint the Department to supervise through the agency of a watermaster the distribution of waters in accordance with the final decree. This holding was in answer to a contention that the trial court, having entered a final decree, was without jurisdiction to make any further order.[270]

Colorado

Governmental Status

The Territory of Colorado was established February 28, 1861.[1] Colorado was admitted to the Union August 1, 1876.[2]

Early Water Enterprises

The colonizing efforts of the Spaniards extended over important stream valleys of the Great Plains region of Colorado, including the Arkansas Valley, but did not result in permanent settlements very far beyond the New Mexico State line. Most of the settlements that endured were in San Luis Valley, where many small community acequias were constructed by Spanish-Americans in the period 1850-70. With the arrival of Anglo-Saxons, beginning with the founding of Mormon settlements in the 1870's and 1880's and subsequent construction of large canals, the early Spanish and Mexican influence became appreciably lessened.[3]

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[264] *Id.* §4150. The rights may be ascertained and determined under the statutory adjudication procedure discussed above, under other procedure provided by law, by written agreement between respective claimants (which shall be recorded), by permits and licenses issued subsequent to any such adjudication or agreement, or any combination of such methods. *Id.* §4027.

[265] *Id.* §§4180-4126.

[266] *Id.* §§4160 and 4161.

[267] *Id.* §§4175-4178.

[268] *Id.* §§4200-4335.

[269] *Id.* §4401.

[270] *Fleming* v. *Bennett*, 18 Cal. (2d) 518, 529, 116 Pac. (2d) 442 (1941).

[1] 12 Stat. 172 (1861).

[2] 19 Stat. 665 (1876).

[3] Hutchins, W. A., "The Community Acequia: Its Origin and Development," 31 Southwestern Historical Quarterly 261, 281-282 (1928).

The most extensive early Colorado irrigation development was in the northern part of the State along the South Platte and the Cache la Poudre rivers. Small ditches were constructed there as early as 1860, to be followed a decade later by the famous Greeley Colony and other colony enterprises.[4]

State Administrative Agencies

In Colorado there is no State administrative supervision over the acquisition of appropriative rights in water of watercourses. The State Engineer is responsible for the administration and distribution of the waters of the State[5] through seven water divisions,[6] each headed by a division engineer.[7] Under the general supervision of the State Engineer,[8] each division engineer is responsible for the administration and distribution of water in his division,[9] and has certain functions in regard to tabulations of water rights[10] and the regulation of certain ground water usage.[11]

The Ground Water Commission has a number of regulatory functions regarding designated ground water basins.[12]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—The constitution of Colorado declares:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.
>
> The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water

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[4] Mead, E., "Irrigation Institutions" 143-144 (1903); Davis, C. F., "The Law of Irrigation" 31 (1915).

[5] Colo. Rev. Stat. Ann. §37-92-301(1) (1973), formerly §148-21-17(1). See also §37-80-102, formerly §148-11-3, regarding the general duties of the State Engineer.

[6] *Id.* §37-92-201, formerly §148-21-8.

[7] *Id.* §37-92-202, formerly §148-21-9.

[8] *Id.* §37-80-105, formerly §148-11-5.

[9] *Id.* §37-92-301(1), formerly §148-21-17(1).

[10] *Id.* §§37-92-401(1)(a) and (4) and 37-92-402(1) and (2)(c), formerly §§148-21-27(1)(a) and (4) and 148-21-28(1) and (2)(d).

[11] See particularly the discussion at notes 109 and 123-130 *infra.*

[12] Colo. Rev. Stat. Ann. §37-90-101 *et seq.* (1973), formerly §148-18-1 *et seq.*

for agricultural purposes shall have preference over those using the same for manufacturing purposes.[13]

The first Territorial legislature enacted a statute declaring that persons holding rights in lands contiguous to or in the neighborhood of any stream should be entitled to use its water for irrigation to make the lands "available to the full extent of the soil for agricultural purposes." This statute provided also that any such person who by reason of topography could not feasibly divert the water on his own contiguous land, or one whose agricultural land did not border the stream, was entitled to a right of way for a ditch across intervening lands.[14] The object of this enactment, according to the Colorado Supreme Court, was to secure to such landowners the right to divert water for irrigation and not to vest title to any given quantity of water flowing in the stream.[15]

The first reported decision of the Colorado Supreme Court with respect to conflicting claims of rights to use water held that the nonriparian's right of way arose not only by virtue of the 1861 statute, but from the necessity of successful irrigation in Colorado.[16] Several years later the supreme court gave explicit recognition to the doctrine of prior appropriation in declaring: "That the first appropriator of the water of a natural stream has a prior right to such water, to the extent of his appropriation, is a doctrine that we must hold applicable, in all cases, respecting the diversion of water for the purpose of irrigation."[17] This right in Colorado, said the court, was not only statutory but arose out of climatic necessity.

Subsequently, in answer to a contention of counsel that the doctrine of prior appropriation was first recognized and adopted in Colorado in the State constitution, the supreme court held that this doctrine had existed from the time of the earliest appropriations of water within the State. Further, said the court:[18]

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[13] Colo. Const. art. XVI, § § 5 and 6.

The Water Right Determination and Administration Act of 1969 includes, *inter alia*, the following declaration of policy: "It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state." Colo. Rev. Stat. Ann. § 37-92-102(1) (1973), formerly § 148-21-2(1).

[14] Colo. Laws 1861, p. 67.

[15] *Crippen* v. *White*, 28 Colo. 298, 302-303, 64 Pac. 184 (1901).

[16] *Yunker* v. *Nichols*, 1 Colo. 551, 555, 570 (1872).

[17] *Schilling* v. *Rominger*, 4 Colo. 100, 103-104 (1878).

[18] *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 446-447 (1882).

> The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. * * *
>
> The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant.

It is axiomatic that in Colorado "priority of appropriation for a beneficial use has always been recognized as the foundation upon which water rights depend."[19]

Procedure for appropriating water.—As noted earlier, the constitution of Colorado states, "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."[20] In this State, the intending appropriator is not required to apply for a permit to appropriate water of watercourses.

For two decades following establishment of the Territory of Colorado, no formalities for making appropriations of water were prescribed by the legislature. An appropriative right was initiated by taking the first essential step and was completed by applying the water to the intended use.[21] This is still the method of acquiring a right to use unappropriated water. However, until 1969 there was a statutory requirement for filing, but which the claimant need not have complied with to insure the soundness of his appropriation.[22] In 1969, the Colorado Legislature repealed this filing requirement[23] and enacted legislation providing that any appropriator who desires a determination of his water right and the amount and priority thereof, shall file an application for such determination with the water clerk.[24] Jurisdiction to hear and adjudicate such questions is vested exclusively in the water judges and their designated referees.[25]

A basic principle applicable to all appropriations of water is that he who is

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[19] *Greeley & Loveland Irr. Co.* v. *Farmers Pawnee Ditch Co.*, 58 Colo. 462, 464, 146 Pac. 247 (1915).

[20] Colo. Const. art. XVI, §6.

[21] A diversion which is not applied to some beneficial use does not constitute an appropriation. *Sterling* v. *Pawnee Ditch Extension Co.*, 42 Colo. 421, 428, 94 Pac. 339 (1908).

[22] This is discussed in chapter 7 at notes 583-585.

[23] Colo. Laws 1969, ch. 373, §20.

[24] Colo. Rev. Stat. Ann. §37-92-302(1) (1973), formerly §148-21-18(1).

[25] *Id.* §§37-92-203(1) and (2), formerly §§148-21-10(1) and (2). This is discussed under "Determination of Conflicting Water Rights" *infra.*

first in time is first in right.[26] But, mere intention is not enough to start an appropriation.[27] A first essential step is required.[28]

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[26] *Reagle* v. *Square S. Land & Cattle Co.*, 133 Colo. 392, 394, 296 Pac. (2d) 235 (1956). By contract one can make his priority inferior to another. *Perdue* v. *Fort Lyon Canal Co.*, 184 Colo. 219, 519 Pac. (2d) 954, 956 (1974).

[27] *Holbrook Irr. Dist.* v. *Fort Lyon Canal Co.*, 84 Colo. 174, 187-188, 269 Pac. 574 (1928). See also the *Elk Rifle* and *Oak Creek* cases in note 32 *infra*.

[28] In 1954 the Colorado Supreme Court stated that "the rule is elementary that the first essential of an appropriation is the actual diversion of the water with intent to apply to a beneficial use." *Denver* v. *Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 386, 276 Pac. (2d) 992 (1954). But in 1960 the court declared the general principal that: "It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use." *Genoa* v. *Westfall*, 141 Colo. 533, 349 Pac. (2d) 370, 378 (1960).

The latter and other Colorado cases and statutes are discussed in chapter 9 at notes 10-34. Chapter 9 at notes 33-34 discusses Colorado legislation regarding appropriations by river conservancy districts [Colo. Rev. Stat. Ann. § 37-46-107(1)(j)(1973), formerly § 150-7-5(10)] as construed in *Colorado River Water Conservation Dist.* v. *Rocky Mt. Power Co.*, 158 Colo. 331, 406 Pac. (2d) 798, 800 (1965). In that case, the court said in part, "There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream." *Id.* The court quoted its former statement in the *Denver* case quoted above. It did not mention the *Genoa* case quoted above.

A subsequent 1972 case involved, *inter alia*, an alleged appropriation by the plaintiffs based on their beneficial use of reservoir seepage water for subirrigation of pasture land. In this regard, the supreme court said: "The plaintiffs here concede the trial courts' finding that they have made no diversions. Nevertheless, they argue that the nature of the diversion is unimportant so long as the water has been put to beneficial use, citing Genoa v. Westfall, *supra*. It is true that some of the court's language—and a Nevada case cited with approval in the *Genoa* opinion—suggests that something so simple as stock watering may constitute diversion and appropriation. However, the facts of that case clearly show that the plaintiff there had made diversions of measurable amounts of water by means of wells and pumps. Other cases, both before and after *Genoa*, have held that the first essential of an appropriation of water is the actual diversion of water with intent to apply it to a beneficial use. Colorado River Water Conservation District v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 [1965]; Safranek v. Limon, 123 Colo. 330, 228 P.2d 975 [1951]. Further, the injunction requested by the Lamonts could not be granted even if there were an appropriation, since plaintiffs require the entire flow in order to put a minuscule amount to a beneficial use." *Lamont* v. *Riverside Irr. Dist.*, 179 Colo. 134, 498 Pac.(2d) 1150, 1153 (1972).

In 1973, the Colorado Legislature changed the definition of "appropriation" employed in the Water Right Determination and Administration Act of 1969 (discussed later under "Determination of Conflicting Water Rights"), from " 'Appropriation' means the diversion of a certain portion of the waters of the state and the application of the same to a beneficial use" to " 'Appropriation' means the application of a certain portion of the waters of the state to a beneficial use." The word "diversion" was deleted. The word "diversion" or "divert" also was deleted from definitions of "beneficial use" and "priority," and the definition of "beneficial use" was expanded as

Beneficial use of the water must be made before the appropriation is complete;[29] but the right may relate back to the time when the first open step was taken giving notice of the intent to obtain the right. To obtain the benefit of the doctrine of relation, construction must have been prosecuted with reasonable diligence, with a fixed purpose to carry through the project. But the appropriator has a reasonable time within which to effect his originally intended use as well as to complete his intended means of diversion.[30] Once the decision to commence the project has been made, continuing studies and changes in the plans are not necessarily evidence of a lack of due diligence.[31] What constitutes diligence depends upon the facts of each particular case.[32]

Adjudications and tabulations of conditional and other water rights are discussed later under "Determination of Conflicting Water Rights."[33]

Of the three uses of water mentioned in the appropriation statute—domestic, irrigation, and power—irrigation is the one with which the early

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follows: "For the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." The 1973 act also included the following declaration of policy: "Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution [set out at note 13 *supra*], or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree. Prior to the initiation of any such appropriation, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact." Colo. Laws 1973, ch. 442, amending Colo. Rev. Stat. Ann. §§148-21-3(6), (7), and (10) and 148-21-2(3)(Supp. 1969), now §§37-92-103(3), (4), and (10) and 37-92-102(3) (1973). In the 1969 Act, "beneficial use" did and still does include "impoundment of water for recreational purposes, including fishery or wildlife." Colo. Laws 1969, ch. 373, Colo. Rev. Stat. Ann. § 37-92-103(4)(1973).

[29] Application of water to a beneficial use is essential to a completed appropriation. All acts preceding this—even diversion from the natural stream—constitute but an inchoate right or interest, which terminates if beneficial use does not follow. *Denver* v. *Sheriff*, 105 Colo. 193, 199, 96 Pac. (2d) 836 (1939).

[30] *Denver* v. *Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 384, 388, 276 Pac. (2d) 992 (1954).

[31] *Four Counties Water Users Assn.* v. *Colorado River Water Conservation Dist.*, 159 Colo. 499, 514-516, 414 Pac. (2d) 469 (1966).

[32] *Klug* v. *Ireland*, 99 Colo. 542, 543, 64 Pac. (2d) 131 (1936).

See also *Elk-Rifle Water Co.* v. *Templeton*, 173 Colo. 438, 484 Pac. (2d) 1211 (1971); *Oak Creek Power Co.* v. *Colorado River Water Conservation Dist.*, 182 Colo. 389, 514 Pac. (2d) 323 (1973).

[33] Conditional water rights are discussed at notes 146-147 *infra*.

legislatures were chiefly concerned.[34] Early litigants in cases in which important principles of water rights law were established in Colorado included some of the mutual irrigation companies that were so prominent in the extension of irrigation.[35] An early statute, still extant, authorizes persons who have received the benefits of natural overflow from streams in irrigation of meadowland, in event of diminution of the streamflow, to construct ditches for such purpose with priorities as of the time of the first use of the meadows.[36]

Other early uses of water included mining,[37] municipal and domestic,[38] and milling uses.[39] An early statute provided that water appropriated for domestic purposes could not be used for irrigation in any form, except that water could be supplied to municipal inhabitants for sprinkling streets, extinguishing fires, or household purposes.[40]

In 1939, the Colorado Supreme Court held (in a case involving the Denver water supply) that a city has the right not only to appropriate enough water for immediate use, but also to acquire an adequate supply to satisfy its needs resulting from a normal increase in population within a reasonable time in the future; and that it may lease water in excess of immediate requirements pending the times at which it will be needed.[41]

Still other uses of water recognized as beneficial in making appropriations thereof include power,[42] fish culture,[43] and stockwatering.[44]

In a 1969 act, "beneficial use" (defined in part as a reasonable and appro-

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[34] For example, Colo. Laws 1861, p. 67, related to irrigation and to making the lands available for agriculture to the full extent of the soil. Laws 1879, p. 94, provided for irrigation districts and for adjudication of appropriative rights for irrigation purposes. Law 1879, p. 106, provided for protecting priorities of ditches when substituted for natural overflow in irrigation of meadowland. Laws 1881, p. 119, created the office of State Hydraulic Engineer, one of the duties being to measure streamflow from which water is taken for irrigation. Laws 1881, p. 161, required filings of claims relating to canals diverting water for irrigation purposes. Laws 1887, p. 295, provided for a superintendent of irrigation for each water division.

[35] See, e.g., *Combs* v. *Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. 966 (1892).

[36] Colo. Rev. Stat. Ann. §37-86-113 (1973), formerly §148-3-14, first enacted, Laws 1879, p. 106. See *Humphreys Tunnel & Min. Co.* v. *Frank*, 46 Colo. 524, 528-529, 105 Pac. 1093 (1909); *Broad Run Inv. Co.* v. *Deuel & Snyder Improvement Co.*, 47 Colo. 573, 577-583, 108 Pac. 755 (1910); *San Luis Valley Land & Cattle Co.* v. *Hazard*, 114 Colo. 233, 234-235, 157 Pac. (2d) 144 (1945).

[37] *Fuller* v. *Swan River Placer Min. Co.*, 12 Colo. 12, 19 Pac. 836 (1888).

[38] *Strickler* v. *Colorado Springs*, 16 Colo. 61, 69, 26 Pac. 313 (1891).

[39] *Cache la Poudre Res. Co.* v. *Water Supply & Storage Co.*, 25 Colo. 161, 168-169, 53 Pac. 331 (1898).

[40] Colo. Laws 1891, p. 402, Rev. Stat. Ann. §148-2-6 (1963), repealed, Laws 1969, ch. 373, §21.

[41] *Denver* v. *Sheriff*, 105 Colo. 193, 202-204, 209, 96 Pac. (2d) 836 (1939). To the court's knowledge, the term "municipal uses" had never before been used in water adjudication proceedings in the State. It was held that this term necessarily includes agricultural purposes within the city area.

[42] *Denver* v. *Colorado Land & Live Stock Co.*, 86 Colo. 191, 279 Pac. 46 (1929).

[43] *Faden* v. *Hubbell*, 93 Colo. 358, 28 Pac. (2d) 247 (1933).

[44] *Hehl Engineering Co.* v. *Hubbell*, 132 Colo. 96, 285 Pac. (2d) 593 (1955).

priate amount under reasonably efficient practices, without waste) includes impoundment for recreational purposes. A 1973 act provides for the appropriation by the State of minimum flows to preserve the natural environment.[45]

Colorado water law has recognized two classes of appropriations—one for diversion of water for immediate application to the particular use, the other for storage of the water to be used subsequently;[46] and an appropriation of water for one of these functions is not an appropriation for the other.[47] The Colorado Supreme Court has held that an appropriator could not claim storage rights for even temporary periods under an appropriation for direct irrigation.[48] A reservoir appropriation is limited to one filling on any one priority in each year.[49]

Preferences in appropriation of water.—Under "Recognition of the doctrine of appropriation," above, important Colorado constitutional provisions are set out.[50] The second sentence of the second paragraph of the quoted provisions declares priority of appropriation to be the criterion of better right as between users of water for the same purpose, but it declares preferences as between different purposes. In time of water shortage, domestic purposes have preference over all others, and agriculture has preference over manufacturing.[51] Nothing is said about compensation in the event that a junior appropriator of domestic water should assert the constitutional preference over a senior appropriator for irrigation at a time when there is not enough water for both. However, the Colorado Supreme Court, while recognizing the constitutional preference, held that it does not entitle one who desires to use water for domestic purposes to take it from another who has previously appropriated it for some other purpose, without just compensation.[52]

In Colorado prior to 1935, there was a serious question—and considerable contention—as to the relative preferences of direct flow and storage rights on

[45] Colo. Laws 1973, ch. 442, discussed in note 28 *supra.*

[46] *Handy Ditch Co.* v. *Greeley & Loveland Irr. Co.*, 86 Colo. 197, 199, 280 Pac. 481 (1929).

[47] *Holbrook Irr. Dist.* v. *Fort Lyon Canal Co.*, 84 Colo. 174, 191, 269 Pac. 574 (1928).

[48] *Handy Ditch Co.* v. *Greeley & Loveland Irr. Co.*, 86 Colo. 197, 199-200, 280 Pac. 481 (1929).

However, in another case the court indicated that water passing through reservoirs on its way to irrigated lands does not, by reason of that fact alone, become storage water. *Nepesta Ditch & Res. Co.* v. *Espinosa*, 73 Colo. 302, 303, 215 Pac. 141 (1923). "It is a matter of common knowledge, of which we must take notice, that a vast amount of water applied to direct irrigation comes through reservoirs and we can see no objection."

[49] *Windsor Res. & Canal Co.* v. *Lake Supply Ditch Co.*, 44 Colo. 214, 223-225, 98 Pac. 729 (1908).

[50] Colo. Const. art. XVI, §§5 and 6.

[51] *Id.* §6.

[52] *Sterling* v. *Pawnee Ditch Extension Co.*, 42 Colo. 421, 426-427, 94 Pac. 339 (1908), cited and quoted with approval in *Black* v. *Taylor*, 128 Colo. 449, 457, 264 Pac. (2d) 502 (1953). See *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.*, 23 Colo. 233, 236-238, 48 Pac. 532 (1896); *Strickler* v. *Colorado Springs*, 16 Colo. 61, 72-75, 26 Pac. 313 (1891).

the same stream. In *People ex rel. Park Reservoir Company* v. *Hinderlider*, a case finally decided in 1936, this question came to a head.[53] An opinion of the Colorado Supreme Court originally handed down April 15, 1935, sustained a judgment of the trial court, the result of which would have been to deny a reservoir with *senior* priority the right to store water at a time when ditches with direct-flow priorities *junior* in time to the reservoir priority needed the water for direct irrigation.

Three days later, the legislature amended the statute providing that persons might store "any of the unappropriated waters of the State not thereafter needed for immediate use for domestic or irrigating purposes * * *." This was done by adding a proviso which, as codified, reads: "* * * that after April 18, 1935, the appropriation of water for any reservoirs hereafter constructed, when decreed, shall be superior to an appropriation of water for direct application claiming a date of priority subsequent in time to that of such reservoirs."[54]

The entire cause in the *Park Reservoir* case was represented to the supreme court in September 1935. In February 1936, the supreme court withdrew its earlier opinion and reversed the trial court decision without referring to this statute, which in any event was not controlling in this litigation. The effect of the reversal was to deny preference to either appropriation group other than on a basis of priority. Whether direct flow or storage, therefore, the individual priority now governs.

Some aspects of the Colorado appropriative right.—"It is recognized in this state that water may or may not be appurtenant to land."[55] Irrigation water rights, even if appurtenant to the lands in connection with which the rights were acquired, cannot be held to be inseparably annexed thereto.[56]

The appropriative right of beneficial use of water is a property right[57]—a right in real estate.[58] This property right extends not only to the quantity of water to which the appropriation relates, but also to the priority, often its chief value.[59] While a right of real property, the appropriative right is separate

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[53] *People ex rel. Park Res. Co.* v. *Hinderlider*, 98 Colo. 505, 507-511, 57 Pac. (2d) 894 (1936). Plaintiff had a decree for storage with priority as of October 1, 1888. When spring floods had subsided, the stream did not furnish sufficient water for direct irrigation from ditches diverting from it. Priorities of some direct-use ditches were senior to that of plaintiff and some were junior.

[54] Colo. Rev. Stat. Ann. § 37-87-101 (1973), formerly § 148-5-1.

The Colorado Adjudication Act of 1943 distinguishing "direct water rights" and "storage water rights," Colo. Rev. Stat. Ann. § § 148-9-1(6) and (7) (1963), was repealed by Laws 1969, ch. 373, § 20.

[55] *Hastings & Heyden Realty Co.* v. *Gest*, 70 Colo. 278, 283, 201 Pac. 37 (1921).

[56] *Oppenlander* v. *Left Hand Ditch Co.*, 18 Colo. 142, 151, 31 Pac. 854 (1892).

[57] *Denver* v. *Sheriff*, 105 Colo. 193, 199, 96 Pac. (2d) 836 (1939).

[58] *Knapp* v. *Colorado River Conservation Dist.*, 131 Colo. 42, 52-53, 279 Pac. (2d) 420 (1955); *Davis* v. *Randall*, 44 Colo. 488, 492, 99 Pac. 322 (1908).

[59] *Nichols* v. *McIntosh*, 19 Colo. 22, 26-27, 34 Pac. 278 (1893). See *Strickler* v. *Colorado Springs*, 16 Colo. 61, 70, 26 Pac. 313 (1891).

and apart from the land on which the water is used.[60] And it is a distinct subject of grant. The land for which the water was appropriated, or on which the water has been used, may be conveyed or held without the water; the water may be conveyed or held without the land; or any part of the land may be conveyed together with any part of the water right and the remainder be retained. Where, in conveyance of land a part only of the appurtenant water right is described and specified as being conveyed therewith, such specific designation destroys any presumption of intention to convey the remainder.[61]

In an early case, the Colorado Supreme Court stated that the State constitution unquestionably contemplates and sanctions the business of transporting water from natural streams for hire to distant consumers. "Certain peculiar rights" acquired in connection with the water diverted "are dependent, for their birth and continued existence, upon the use made by the consumer."[62] Subsequent opinions of the court in regard to the nature of such rights and how they are held, as between carrier and consumer, are discussed in chapter 8.[63]

In a case in which the issue was the right of certain appropriators to construct a channel in the streambed to conduct water to their headgate, the Colorado Supreme Court held that their right to divert and use water from the stream at that headgate "included the right to make and change the necessary dams, channels or other diversion works within the stream bed which might be necessary to enable them to continue the diversion of water at their headgate, provided no additional burden were made upon defendants' lands thereby."[64] Also, appropriators have the right to repair and improve their physical works in order to divert their full decreed supply of water. As against junior appropriators, this is not an enlarged use of the water appropriated.[65]

"Commingling" of waters—the privilege of diverting water from one public stream and turning it into another, from which the same quantity may be taken less a reasonable deduction for seepage and evaporation losses—is authorized by statute.[66] Losses in transit are determined by the State Engineer

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[60] *Nielson* v. *Newmyer*, 123 Colo. 189, 192, 228 Pac. (2d) 456 (1951).

[61] *Nielson* v. *Newmyer*, 123 Colo. 189, 192-193, 228 Pac. (2d) 456 (1951). See *Wanamaker Ditch Co.* v. *Crane*, 132 Colo. 366, 373-374, 288 Pac. (2d) 339 (1955); *King* v. *Ackroyd*, 28 Colo. 488, 494, 66 Pac. 906 (1901).

[62] *Wheeler* v. *Northern Colo. Irr. Co.*, 10 Colo. 582, 588, 17 Pac. 487 (1888).

[63] See especially the discussion in chapter 8 at notes 602-606.

[64] *Downing* v. *Copeland*, 126 Colo. 373, 375-376, 249 Pac. (2d) 539 (1952).

[65] *Flasche* v. *Westcolo Co.*, 112 Colo. 387, 393, 149 Pac. (2d) 817 (1944). "The rule of law that gives junior appropriators a vested right to a continuance of conditions on the stream does not include the right to a continuance of the senior appropriators' misfortunes with their ditch."

[66] Colo. Rev. Stat. Ann. §§37-83-101 to 37-83-103 (1973), formerly §§148-6-1 to 148-6-3.

Such commingling was approved in *Sorenson* v. *Norell*, 24 Colo. App. 470, 471-472, 135 Pac. 119 (1913). (*Continued*)

(who is responsible for the administration and distribution of water as discussed later under that topic), and measuring devices must be constructed and maintained under his direction. Records are kept by the division engineers of the waters turned into their divisions. Authority is granted also for the use of natural streams, up to the ordinary high watermark, for the transportation of reservoir waters to specific points, under the supervision of the State water administration officials, with due allowance for evaporation and other losses to be determined by the State Engineer.[67]

When the rights of others are not injured, reservoir water may be delivered into a ditch entitled to water, or into a stream to supply appropriations therefrom, and an equal quantity of water may be taken from the stream at a higher point in exchange. Reasonable deductions for losses are determined by the State Engineer, necessary works are constructed and maintained under his direction, and exchanges of water are supervised by the division engineers.[68]

Another statute provides that for the purpose of saving crops or using the water more economically, appropriators on the same stream may exchange with and loan to each other, *for a limited time*, the water to which they are entitled upon giving notice in writing.[69] In *Fort Lyon Canal Company* v. *Chew*, the supreme court cautioned, however, that as a general rule an appropriator who has no present need for water should let it remain in the stream for the use of other claimants; that he may not loan it to others in time of shortage when it is needed by an appropriator who is junior to the lender and senior to the borrower; and that any such loan of water, if it can be made at all, must be done with due regard to the rights of other appropriators, and upon a clear showing that the vested rights of others are not injured.[70] Two years later, the

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(*Continued*)

See also Colo. Rev. Stat. Ann. §37-82-106 (1973), formerly §148-2-6, set out in chapter 18 at note 17. That statute is discussed in *Denver* v. *Fulton Irrigating Ditch Co.*, 179 Colo. 47, 506 Pac. (2d) 144, 147 (1972).

[67] Colo. Rev. Stat. Ann. §§37-87-102 and 37-87-103 (1973), formerly §§148-5-2 and 148-5-3.

[68] *Id.* §37-83-105, formerly §148-6-5.

See also the discussion at notes 149-151 *infra* regarding plans for augmentation which may include water exchange projects. Applications for such plans shall be approved if such exchange projects and other components of the plan for augmentation will not injuriously affect vested rights or decreed conditional water rights. *Id.* §37-92-305(3), formerly §148-21-21(3). Regarding conditions that may be imposed in granting such approvals, see note 151 *infra*.

An exchange system that was practiced for many years by mutual irrigation companies in the Cache la Poudre Valley is discussed in chapter 9 at note 78.

In a case decided in 1908, the Colorado Supreme Court held that no exchange of water between the same or different owners of ditches or reservoirs that necessarily converts a junior into a senior right can be sanctioned by a court of equity. *Windsor Res. & Canal Co.* v. *Lake Supply Ditch Co.*, 44 Colo. 214, 226, 98 Pac. 729 (1908).

[69] Colo. Rev. Stat. Ann. §37-83-104 (1973), formerly §148-6-4.

[70] *Fort Lyon Canal Co.* v. *Chew*, 33 Colo. 392, 400-405, 81 Pac. 37 (1905).

court appeared to relent a little. In answer to a contention that the act was unconstitutional, it was held that the *Fort Lyon* decision had disposed of the difficulty "by placing a construction upon the statute in question, which permits an exchange or loan of water under circumstances and conditions which do not injuriously affect the vested rights of other appropriators."[71]

Prior to 1969, Colorado had legislation which applied specifically only to changes in points of diversion.[72] But in many cases, the supreme court has sanctioned changes in place of use if no injury results to vested rights of other appropriators.[73] This is an inherent property right, long existing as an incident of ownership and always enforceable so long as the vested rights of others are not infringed.[74]

In a 1968 case, *Westminster* v. *Church*, the Colorado Supreme Court said:

> Plaintiffs' action against the City of Westminster is but one of several cases in this jurisdiction involving a municipality's purchase of agricultural water rights with the intention of devoting such rights to municipal and domestic purposes. The municipality, of course, has the legal right to devote its acquired water rights to municipal uses, provided that no injury accrues to the vested rights of other appropriators. * * * The principal dangers attending the municipality's altered use are that the city will attempt to use a continuous flow, where the city's grantor only used the water for intermittent irrigation * * * and that the municipality will enlarge its use of the water to the full extent of the decreed rights, regardless of historical usage. * * * To protect against the possibility of such extended use of the water rights, the courts will impose conditions upon the change of use and point of diversion sufficient to protect the rights of other appropriators. We have reviewed and upheld such restrictive conditions in numerous cases.[75]

In 1969, the above legislation was repealed and new provisions were enacted permitting a "change of water right," which is defined as a change in type, place, or time of use, type or place of diversion, or place or time of storage (including changes from direct application to storage and subsequent application or changes from storage and subsequent application to direct application). The phrase "change of water right" also includes changes of conditional water rights.[76] Procedures are provides for filing and acting upon applications for

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[71] *Bowman* v. *Virdin*, 40 Colo. 247, 249-251, 90 Pac. 506 (1907).

[72] Colo. Rev. Stat. Ann. § § 148-9-22 to 148-9-25 (1963).

[73] *Hassler* v. *Fountain Mut. Irr. Co.*, 93 Colo. 246, 249, 26 Pac. (2d) 102 (1933).

[74] *Brighton Ditch Co.* v. *Englewood*, 124 Colo. 366, 372-373, 237 Pac. (2d) 116 (1951).

[75] *Westminster* v. *Church*, 167 Colo. 1, 445 Pac. (2d) 52, 58 (1968), discussed in more detail in chapter 9 at notes 234-236.

[76] Colo. Laws 1969, ch. 373, § § 1 and 20(1), repealing Rev. Stat. Ann. § § 148-9-22 to 148-9-25 (1963) and enacting Rev. Stat. Ann. § 148-21-3(11) (Supp. 1969), now 37-92-103(5) (1973).

Regarding conditions that may be imposed in granting such approvals, see note 151 *infra*.

such changes by water judges and their designated referees,[77] whose functions are generally described later under "Determination of Conflicting Water Rights." Such applications shall be approved "if such change * * * will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."[78]

Colorado differs from many Western States in having no statutory provision for forfeiture of an appropriative right by reason of failure to use the water for a specified number of years.[79] However, many cases have been decided by the Colorado Supreme Court with respect to abandonment of water rights.[80] A Colorado statute defines abandonment of a water right as the whole or partial termination of the water right as a result of the owner's intent to permanently discontinue the use of all or part of the water available under his right.[81] For purposes of the procedures for tabulating water rights by the State Engineer and the division engineers,[82] when the person entitled to use water fails, for 10 years or more, to beneficially apply the water available under a water right, this creates a rebuttable presumption of abandonment of a water right with respect to so much of the available water as has not been used.[83]

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[77] See, *inter alia*, Colo. Rev. Stat. Ann. §§ 37-92-301 to 37-92-305 (1973), formerly §§ 148-21-17 to 148-21-21.

See also the discussion at notes 149-151 *infra*, regarding plans for augmentation.

[78] Colo. Rev. Stat. Ann. § 37-92-305(3) (1973), formerly § 148-21-21(3).

In a divided opinion in 1972, the Colorado Supreme Court, without reference to any existing legislation, dealt with the question of a 1966 change in the point of discharge of effluent from Denver's sewage treatment facility. The court said, *inter alia*, that changes of points of return of waste water are not governed by the same rules as changes in points of diversion. The court also said "there is no vested right in downstream appropriators to maintenance of the same point of return of irrigation waste water. * * *

"At least in the absence of bad faith or of arbitrary or unreasonable conduct, the same rule should be applicable to sewage waste or the effluent therefrom of a municipality or sanitation district." *Metropolitan Denver Sewage Disposal Dist. No. 1* v. *Farmers Res. & Irr. Co.*, 179 Colo. 36, 499 Pac. (2d) 1190, 1193 (1972). The court suggested that the legislature might wish to change the court's announced rule with respect to changes of points of return flows. 499 Pac. (2d) at 1194.

[79] With respect to the so-called abandonment of unperfected or conditional water rights in Colorado, see, in chapter 8, "Inchoate Appropriative Right–Conditional Decrees and Water Rights in Colorado."

[80] A number of Colorado cases regarding abandonment are discussed or cited in chapter 14 under "Abandonment and Statutory Forfeiture–Abandonment," including a 1955 Colorado case discussed under the subtopic "Abandonment Defined."

Abandonment occurs when there is nonuse coupled with intention to abandon. Nonuse for an unreasonable period creates a rebuttable presumption that there was an intention to abandon. *C. F. & I. Steel Corp.* v. *Purgatoire River Water Conservancy Dist.*, 183 Colo. 135, 515 Pac. (2d) 456, 457-458 (1973). This case discusses various factors that are to be considered and the question of economic and financial difficulties.

[81] Colo. Rev. Stat. Ann. § 37-92-103(2) (1973), formerly § 148-21-3(13).

[82] These procedures are discussed at notes 152-156 *infra*.

[83] Colo. Rev. Stat. Ann. § 37-92-402(2)(j) (1973), formerly § 148-21-28(2)(j).

A prescriptive water right may be acquired against one by another, through his open, notorious, exclusive, and uninterrupted adverse use of water for the statutory period.[84]

Rights of way for water conduits across both public and private lands, for conveyance of water for domestic, irrigation, mining, and manufacturing purposes, and for drainage, upon payment of just compensation, are accorded by the State constitution to all persons and corporations.[85] The Territorial right-of-way law of 1861, as subsequently enlarged, is still extant. This grants necessary rights of way across other lands for water ditches, which may be condemmed if the intervening landowners withhold their permission. But the shortest and most direct route must be followed, and the private ditch so constructed is subject to enlargement by others on payment of a reasonable proportion of the construction cost. No tract of improved or occupied land is to be burdened unnecessarily by more than one ditch without the owner's consent.[86]

Riparian Water-Use Doctrine Not Generally Recognized

Despite some deviations and inconsistencies in the judicial observations, noted below, it appears that in Colorado the riparian water use doctrine generally has not been recognized, as against appropriative rights, except perhaps in the case of domestic use.

Repudiation of the riparian water use doctrine was suggested in the earliest decisions of the Colorado Supreme Court in water controversies.[87] In 1882, in

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[84] *Pleasant Valley & Lake Canal Co.* v. *Maxwell*, 93 Colo. 73, 78, 23 Pac. (2d) 948 (1933); *Lomas* v. *Webster*, 109 Colo. 107, 122 Pac. (2d) 248, 250-251 (1942); *Greeley & Loveland Irr. Co.* v. *McCloughan*, 140 Colo. 173, 342 Pac. (2d) 1045, 1049 (1959). But such a right may not be acquired by prescription against any water or water right dedicated to or owned by the State or any public entity. Colo. Rev. Stat. Ann. §38-41-101(2) (1973), formerly §118-7-1(2).

In certain circumstances, one may be barred by estoppel or laches from exercising a water right. Regarding estoppel, see *Lower Latham Ditch Co.* v. *Louden Irrigating Canal Co.*, 27 Colo. 267, 274, 60 Pac. 629 (1900). Regarding laches, see *Great Western Res. & Canal Co.* v. *Farmers Res. & Irr. Co.*, 109 Colo. 218, 221-222, 124 Pac. (2d) 753 (1942); *Greeley & Loveland Irr. Co.* v. *McCloughan, supra*, 342 Pac. (2d) at 1050.

[85] Colo. Const. art. XVI, §7.

Another section of the constitution provides that "Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes." *Id.* art. II, §14.

[86] Colo. Rev. Stat. Ann. §§37-86-102 to 37-86-107(1973), formerly §§148-3-1 to 148-3-6. See *Leonard* v. *Buerger*, 130 Colo. 497, 501-504, 276 Pac. (2d) 986 (1954). For some early constructions of these statutes, see *Tripp* v. *Overocker*, 7 Colo. 72, 73-75, 1 Pac. 695 (1883); *Downing* v. *More*, 12 Colo. 316, 319-321, 20 Pac. 766 (1889); *Junction Creek & North Durango Domestic & Irrigating Ditch Co.* v. *Durango*, 21 Colo. 194, 195-197, 40 Pac. 356 (1895).

[87] *Yunker* v. *Nichols*, 1 Colo. 551, 553-555, 570 (1872); *Schilling* v. *Rominger*, 4 Colo.

(*Continued*)

answer to a contention of counsel that the common law riparian principles had prevailed in Colorado until 1876 and that the appropriation doctrine was first recognized and adopted in the State constitution, the principle of repudiation was expressed in specific terms.[88]

Although the riparian question then appeared to be definitely settled, the Colorado Supreme Court, in two decisions rendered late in the 19th century, included a somewhat confused discussion of ordinary domestic use, perhaps being treated as a recognized riparian right protected against appropriative rights in Colorado. However, the statements to that effect in both cases appear to have been *dicta.*[89]

During this same period at the turn of the century a Federal court, while acknowledging the exclusiveness of the appropriation doctrine with respect to irrigation, decided that nothing in the Colorado constitution or irrigation law in any way modified the rules of the common law respecting diversions of stream waters for manufacturing, mining, or mechanical purposes; that the law in this State as elsewhere favored the riparian owner for such purposes on his own premises.[90] However, that conclusion was expressly disapproved in a later decision by a higher Federal court as being not in accord with the State courts of Colorado, as standing alone, and as not sustained by what seemed to be the better reasoning.[91]

(*Continued*)
100, 103, 104 (1878). In the latter case the court said, "That the first appropriator of the water of a natural stream has a prior right to such water, to the extent of his appropriation, is a doctrine that we must hold applicable, in all cases, respecting the diversion of water for the purpose of irrigation."

[88] *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 446-447 (1882).
The doctrine of prior appropriation, it was held, had existed from the time of the earliest diversions of water in this land, most of which required irrigation for successful agriculture. The court said further: "We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation." *Id.* at 447.

[89] *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.*, 23 Colo. 233, 237, 48 Pac. 532 (1896); *Broadmoor Dairy & Live Stock Co.* v. *Brookside Water & Improvement Co.*, 24 Colo. 541, 545-546, 550, 52 Pac. 792 (1898). One or another of these cases was further discussed in *Sterling* v. *Pawnee Ditch Extension Co.*, 42 Colo. 421, 94 Pac. 339, 341 (1908); *Black* v. *Taylor*, 128 Colo. 449, 264 Pac. (2d) 502, 506 (1953).

[90] *Schwab* v. *Beam*, 86 Fed. 41, 44 (C.C.D. Colo. 1898).

[91] *Snyder* v. *Colorado Gold Dredging Co.*, 181 Fed. 62, 68 (8th Cir. 1910). The court stated: "The common-law doctrine in respect of the rights of riparian proprietors in the waters of natural streams never has obtained in Colorado. From the earliest times in that jurisdiction the local customs, laws, and decisions of courts have united in rejecting

But in the meantime, the same higher Federal court, in another case which it did not mention in this later case, discussed the riparian doctrine and implied that a riparian owner may apply water to beneficial use by virtue of his riparian status so long as he does not interfere with the recognized operation of the appropriation doctrine.[92] This case was acknowledged by the Colorado Supreme Court in a 1909 case which, however, indicated that the riparian doctrine had been long abolished in Colorado.[93]

In a 1965 case, the Colorado Supreme Court quoted approvingly an Idaho

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that doctrine and in adopting a different one which regards the waters of all natural streams as subject to appropriation and diversion for beneficial uses and treats priority of appropriation and continued beneficial use as giving the prior and superior right." *Id.* at 65.

[92] *United States Freehold Land & Emmigration Co.* v. *Gallegos*, 89 Fed. 769, 772-773 (8th Cir. 1898). The court said, *inter alia*, "By the rules of the common law, the appellant has the right to restrain the diversion of the flow of the water of this river from its natural channel, as against all the world. By the constitution and statutes of Colorado, it has the same right, although it never has appropriated any of the water to a beneficial use, as against every one but lawful prior appropriators; and, as the appellees are not such, it must have this right as against them." The court also said that since the appellant owned the land on both banks of the river, "the appellees can divert no water without entering upon and leading it across this land, and committing a continuing trespass upon it."

[93] *Sternberger* v. *Seaton Min. Co.*, 45 Colo. 401, 102 Pac. 168 (1909). The court said that since the defendant apparently had made a valid appropriation, "the doctrine of the case cited [*United States Freehold Land & Emmigration Co.* v. *Gallegos*, note 92 *supra*], that plaintiff, as a riparian owner merely, is entitled to restrain the acts of a mere trespasser, does not apply."

In this case, certain litigants had asserted common law riparian rights with respect to lands acquired before the State constitution was adopted, and before the adverse party's appropriation of water was made. The Colorado Supreme Court said: "[T]hey relied below solely upon their assumed common-law rights as riparian owners, which, since title thereto was acquired anterior to the adoption of our state Constitution and before the appropriation of defendant was made, they assert are superior to the latter. We are entirely satisfied that the sole question argued and submitted to the trial court by counsel on both sides was whether the common-law doctrine of continuous flow under the facts disclosed by this record exists in Colorado. At this late day it would seem to us, as it evidently did to the trial court, idle to make such contention in this state. The matter has long ago been set at rest. * * * The Supreme Court of the United States in several cases has approved and indicated its satisfaction with the decisions of the state courts which hold that the common-law doctrine has been abolished and has said that each state, without interference by the federal courts, may for itself, and as between rival individual claimants, determine which doctrine shall be therein enforced. * * *

"* * * The doctrine in this state, that the common-law rule of continuous flow of natural streams is abolished, is so firmly established by our Constitution, the statutes of the territory, and the state, and by many decisions of this court that we decline to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance." 102 Pac. at 169.

court opinion that " 'there is no such thing as a riparian right to the use of water as against an appropriator * * *.' "[94]

Ground Waters

Definite underground stream.—In a 1902 case, the Colorado Supreme Court indicated that underground waters which flow in well-defined and known channels, the course of which can be distinctly traced, are governed by the doctrine of prior appropriation. The existence and channels of such streams, though not visible, are "defined" and "known" within the meaning of the law when their course and flow are determinable by reasonable inference.[95]

Underflow of surface stream.—Although many important streams in the arid region may become dry during part of the year, there is normally at all times in many stretches of the stream what is known as the underflow. This is the subterranean volume of water which slowly finds its way through the sands and gravel constituting the bed of the stream, to which rights by appropriation may attach.[96] This water is as much a part of the stream as is the surface flow, and it is governed by the same rules.[97]

A party who seeks to divert water which reaches a stream and then disappears in the sand and gravel of the streambed has the burden of proving that such water does not become a part of the main stream.[98]

Ground waters tributary to a surface watercourse.—The Colorado Supreme Court has said, "[I]t is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream. * * * The burden

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[94] *Colorado River Water Conservation Dist.* v. *Rocky Mt. Power Co.*, 158 Colo. 331, 406 Pac. (2d) 798, 801 (1965). The court did not mention any of the earlier Colorado and Federal cases discussed above. The court noted a United States Supreme Court case, which had quoted the Idaho court, "It was pointed out in that opinion that the right to the maintenance of the 'flow' of the stream is a riparian right and is completely inconsistent with the doctrine of appropriation." 406 Pac. (2d) at 800. The case dealt with claimed rights to reserve the streamflow for preservation of fish life and fish propagation. In this regard, see the discussion of this case in note 28 *supra*.

With respect to other possible facets of riparian rights in Colorado, see chapter 6 at notes 154-156. See also *Hall* v. *Brannan Sand & Gravel Co.*, 158 Colo. 201, 405 Pac. (2d) 749 (1965), and *Thompson* v. *Clarks, Inc.*, 162 Colo. 506, 427 Pac. (2d) 314 (1967), regarding a riparian landowner's rights to accretions and relictions; and *Sternberger* v. *Seaton Min. Co.*, 45 Colo. 401, 102 Pac. 168, 169 (1909), and *Alexander Dawson, Inc.* v. *Fling*, 155 Colo. 599, 396 Pac. (2d) 599, 602 (1964), regarding fishing rights.

[95] *Medano Ditch Co.* v. *Adams*, 29 Colo. 317, 326, 68 Pac. 431 (1902).

[96] *Platte Valley Irr. Co.* v. *Buckers Irr. Mill. & Improvement Co.*, 25 Colo. 77, 82, 53 Pac. 334 (1898).

[97] *Buckers Irr. Mill. & Improvement Co.* v. *Farmers' Independent Ditch Co.*, 31 Colo. 62, 70, 72 Pac. 49 (1903).

[98] *Platte Valley Irr. Co.* v. *Buckers Irr. Mill. & Improvement Co.*, 25 Colo. 77, 53 Pac. 334 (1898).

of proof is on one asserting that such ground water is not so tributary, to prove that fact by clear and satisfactory evidence."[99]

The Water Right Determination and Administration Act of 1969,[100] discussed later,[101] contains significant provisions for integrating the use, determination, and administration of surface and physically interconnected ground waters.[102] The legislature declared it to be "the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state."[103] In furtherance of this policy, the legislature (1) declared that water rights previously vested, including appropriations from wells, are to be protected subject to the provisions of the act; (2) recognized, to the fullest extent possible, the existing use of ground water, either independently or in conjunction with surface rights; and (3) provided that the use of ground water may be considered as an alternate or supplemental source for surface decrees previously entered.[104]

Other provisions relating specifically to tributary ground water include provisions that (1) water appropriated from a well may be charged to its own appropriation; (2) the widest possible discretion to permit the use of wells shall prevail in authorizing alternate points of diversion from wells; (3) where a well draws from a stream system from which the owner has an appropriative right to divert or a right to have water diverted therefrom delivered to him, the owner may obtain the right to have such well made an alternate point of diversion; (4) where a well has been approved as an alternate point of diversion for a surface right, the well and surface means of diversion must be utilized to the extent feasible and permissable to satisfy the water right before diversions under junior rights may be ordered discontinued;[105] and (5) recognized that plans for augmentation[106] may be utilized in integrating ground and surface waters and provide that applications for approval of plans for augmentation "(including without limitation applications involving the use of wells as new or alternate means or points of diversion for surface water rights)" shall be

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[99] *Safranek* v. *Limon*, 123 Colo. 330, 228 Pac. (2d) 975, 977 (1951). See also *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131, 135 (1963).

[100] Colo. Rev. Stat. Ann. §37-92-101 *et seq.* (1973), formerly §148-21-1 *et seq.*

[101] See the discussions under "Determination of Conflicting Water Rights" and "Administration of Water Rights and Distribution of Water."

[102] This is discussed in greater detail in chapter 20 at notes 190-204.

The legislature had previously attempted, in a less significant manner, to integrate the administration of these waters in 1965. See the discussion in chapter 20 at notes 187-189.

[103] Colo. Rev. Stat. Ann. §37-92-102(1) (1973), formerly §148-21-2(1).

[104] *Id.* §§37-92-102(2)(a)-(c), formerly §§148-21-2(2)(b)-(d).

[105] *Id.* §§37-92-301(3)(a)-(d) and 37-92-502(2), formerly §§148-21-17(3)(b)-(e) and 148-21-35(2).

[106] Plans for augmentation are discussed at notes 149-151 *infra*.

handled in accordance with the Act as supplemented by the special procedures for plans for augmentation.[107]

The Act exempts from its provisions wells constructed for household or other specified limited purposes.[108] There are, however, permit requirements for such wells.[109] And notwithstanding these exemption provisions, water rights for wells of the type specified may be determined pursuant to the determination provisions of the Act.[110]

> "Underground water" as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream.[111]

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[107] Colo. Laws 1974, ch. 111, p. 440.

[108] Colo. Rev. Stat. Ann. §37-92-602(1) (1973), formerly §148-21-45(1). However, §§37-92-201 and 37-92-202, formerly §§148-21-8 and 148-21-9, which divide the State into seven water divisions and provide for the apportionment and general duties of division engineers, do apply to these waters. *Id.* §37-92-602(1).

[109] Except for certain wells that were in production as of May 22, 1971, or for which application was made prior to May 8, 1972, the State Engineer is required to "make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others or any other existing wells will be materially injured." If there will be such injury, the State Engineer shall deny the permit. Otherwise, he shall issue the permit, subject to such specified conditions with respect to the construction and use of the well as will prevent pollution, waste, or material injury to existing rights. *Id.* §37-92-602(3)(b)(I), formerly §148-21-45(3)(b)(i).

Any person aggrieved by a decision of the State Engineer granting or denying an application filed under this provision may file a petition for review with the water clerk for the division in which the well is located for a hearing before the water judge. *Id.* §37-92-602(3)(f), formerly §148-21-45(3)(f).

[110] *Id.* §37-92-602(4), formerly §148-21-45(4).

The latter provision resulted from a 1972 amendment with respect to such wells as to which the Colorado Supreme Court said, "Without any time limitation, the amendment grants to a well owner the permissive right to have the well's priority ajudicated." The court also held that the water judges of the State had jurisdiction to adjudicate the priority of small wells prior to this 1972 amendment. *Davis* v. *Conour*, 178 Colo. 376, 497 Pac. (2d) 1015, 1016 (1972).

[111] Colo. Rev. Stat. Ann. §37-92-103(11) (1973), formerly §148-21-3(4). This section also provides, "Such 'underground water' is considered different from 'designated ground water' as defined in section 37-90-103(6)," formerly §148-18-2(3), set out at note 114 *infra*. "Designated ground water" is exempt from the provisions of this Act. *Id.* §37-92-602(1)(a), formerly §148-21-45(1)(b).

In this regard, see the discussion of *Kuiper* v. *Lundvall* in note 114 *infra*.

The Colorado Supreme Court recently decided a related matter. It decided that by the removal of phreatophytes consisting of plants and trees on lands adjacent to a river that were consuming subsurface water which otherwise would have flowed to the stream (as well as by filling in a marshy area to prevent evaporation) one could not obtain a water right to the use of the saved water free from the call of the priority system applicable to the river. *Southeastern Colo. Water Conservancy Dist.* v. *Shelton*

Ground waters not tributary to a surface watercourse: Designated ground waters.—Prior to legislation enacted in 1965, nontributary ground waters were not subject to the doctrine of prior appropriation and the Colorado Supreme Court had not definitely formulated a rule with regard to the ownership or use of such waters.[112] With the enactment of the 1965 Ground Water Management Act, "designated ground water" is subject to appropriation.[113] The definition of "designated ground water," as amended in 1971, is:

> [T]hat ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin.[114]

Farms. Inc., ____ Colo. ____, 529 Pac. (2d) 1321 (1975). The court, *inter alia*, quoted Colo. Rev. Stat. Ann. §148-21-2(2)(c) (Supp. 1969), referred to at note 104 *supra*, as follows: "The existing use of ground water, either independently or in conjunction with surface rights, shall be recognized to the fullest extent possible, *subject to the preservation of other existing vested rights*." 529 Pac. (2d) at 1326. The court added the emphasis.

[112] "Whether in such case we should follow the California doctrine of reciprocal rights * * * or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined." *Safranek* v. *Limon*, 123 Colo. 330, 228 Pac. (2d) 975, 978 (1951). See *Whitten* v. *Coit*, 153 Colo. 157, 385 Pac. (2d) 131, 135 (1963).

A 1957 ground water law, repealed in 1965, was held to deal only with the manner of construction of wells in order to prevent waste. *Whitten* v. *Coit, supra*, 385 Pac. (2d) at 139, referring to Colo. Laws 1957, ch. 289, p. 863, Rev. Stat. Ann. §148-18-1 *et seq.* (1963), repealed, Laws 1965, ch. 319, §1, p. 1246. The court stated that by this legislation the legislature contemplated "that there would be *an equitable and efficient use of nontributary underground water* not pursuant to any theory of appropriation." 385 Pac. (2d) at 137-138.

[113] Colo. Rev. Stat. Ann. §37-90-102 (1973), formerly §148-18-1. This Act is discussed in more detail in chapter 20 at notes 210-222.

[114] Colo. Rev. Stat. Ann. §37-90-103(6) (1973), formerly §148-18-2(3).

The Colorado Supreme Court in a recent case concluded that ground water (located within the Northern High Plains Designated Ground Water Basin) which moved at such a slow rate that it "could not influence the rate or direction of movement of a stream for over a century" was not tributary water. The court concluded that it "cannot believe" the legislature, by the statutory definition of underground water in the Water Right Determination and Administration Act of 1969 (set out at note 111 *supra*), intended to treat such slowly moving water as tributary ground water. "We hold that as to the water taking over a century to reach the stream, the tributary character is *de minimis* and that this is not a part of the surface stream as contemplated by our Constitution." *Kuiper* v. *Lundvall*, ____ Colo. ____, 529 Pac. (2d) 1328, 1331 (1974).

In the latter regard, the court was referring to Colo. Const. art. XVI, §§5 and 6, set out at note 13 *supra*. The court stated later in the opinion: "We now approach the particular conclusions of unconstitutionality by the trial court. The first was that the

(*Continued*)

The Act provides for the formation of a 12-member Ground Water Commission. The functions of the Commission include the determination of designated ground water basins; holding hearings to determine the extent, by geographic description, of such designated ground water basins; supervision, control, and administration of the use of designated ground water; and creation of ground water management districts.[115] In 1967, the Commission was given more specific powers, included among which are the powers to (1) prohibit or limit the withdrawal of water from a well when it determines that such withdrawal would cause unreasonable injury to prior appropriators; (2) establish reasonable ground water pumping levels in areas having common designated ground water supplies; and (3) issue permits for the construction of replacement or substitute wells.[116]

The Act provides that permits to make withdrawals of designated ground water shall be obtained from the Commission in the form prescribed by the Commission.[117] An application for a permit shall be denied if it appears that

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(*Continued*)

[1965] Act 'is unconstitutional and in violation of Article XVI, Sections 5, and 6, of the Constitution of the state of Colorado insofar as said Act applies to tributary ground water.' This conclusion being predicated upon the water being tributary, we have already disposed of the matter." 529 Pac. (2d) at 1332. [The court went on to hold, *inter alia*, that the Act did not constitute an invalid delegation of judicial functions to an administrative agency, on the issues presented, referring to *Larrick* v. *North Kiowa Bijou Mgt. Dist.*, 181 Colo. 395, 510 Pac. (2d) 323 (1973). Regarding Colo. Const. art. XVI, §6, see also the discussion in note 123 *infra*.]

Here the ground water was moving at an assumed average rate of 237.5 feet per year, requiring 178 years to reach one river and 356 years to reach another. 529 Pac. (2d) at 1330. The court said, *inter alia*: "In our ruling that this slow flow of underground water is in effect non-tributary tributary [sic] water, it should be mentioned that the water in *Hall* v. *Kuiper*, 181 Colo. 130, 510 P.2d 329 (1973), was moving at the rate of about 1600 feet a year and would reach the river in about 40 years.

"In oral argument counsel for Lundvall conceded that the district judge did not follow Hall v. Kuiper, *supra*. Counsel stated that an affirmance on our part here on the particular facts in this case would not necessarily overrule *Hall*, but such an affirmance in theory would have the effect of overruling *Hall*. Counsel feels that Hall is contrary to *Fellhauer* [v. *People*, 167 Colo. 320, 447 Pac. (2d) 986 (1968)]. After reviewing *Hall*, we still think it is consistent with *Fellhauer*. We cannot agree that it upsets the *maximum utilization* of this great reservoir of water lying underground in the Northeastern part of the state." 529 Pac. (2d) at 1331-1332. The *Fellhauer* case is discussed in chapter 20 at note 188 and in notes 203 and 210.

In this quoted case, the district court had held that the slowly moving ground waters involved were tributary waters and that the 1965 Act was unconstitutional as applied to such waters. The supreme court reversed, holding that such waters were not tributary waters.

In the *Hall* case, which is discussed in note 123 *infra*, the court did not expressly deal with the issue of whether or how the rate of ground water movement would affect its tributary versus nontributary nature.

[115] Colo. Rev. Stat. Ann. §37-90-101 *et seq.* (1973), formerly §148-18-1 *et seq.*

[116] *Id.* §37-90-111, formerly §148-18-10.

[117] *Id.* §37-90-107, formerly §148-18-6. However, the State Engineer is given authority to

there are no unappropriated waters or if the appropriation would unreasonably impair existing water rights or would create unreasonable waste:

> In ascertaining whether a proposed use will create unreasonable waste or unreasonably affect the rights of other appropriators, the commission shall take into consideration the area and geologic conditions, the average annual yield and recharge rate of the appropriate water supply, the priority and quantity of existing claims of all persons to use the water, the proposed method of use, and all other matters appropriate to such questions. With regard to whether a proposed use will impair uses under existing water rights, impairment shall include the unreasonable lowering of the water level, or the unreasonable deterioration of water quality, beyond reasonable economic limits of withdrawal or use.[118]

If the Commission finds that there are no grounds for denying an application, a conditional permit shall be issued, subject to such reasonable conditions and limitations as the Commission may specify. After the water has been put to beneficial use and the other terms of a conditional permit have been met, the Commission shall order the State Engineer to issue a final permit with such limitations and conditions as the Commission deems necessary to prevent waste and to protect other appropriators.[119]

The Act also includes procedures for determining the relative priorities among users in the basin, including permittees and those exercising their rights prior to the effective date of the Act.[120]

Any person who is dissatisfied with any act, refusal to act, or decision of the

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approve permits for specified small capacity wells in designated ground water basins without regard to any of the other provisions of this Act. But, ground water management districts, referred to at note 122 *infra*, may further restrict the issuance of small capacity well permits by rules and regulations. *Id.* §37-90-105, formerly §148-18-4.

[118] *Id.* §37-90-107(5), formerly §148-18-6(5). See also §37-90-102, formerly §148-18-1 set out in chapter 20 at note 210. Under the circumstances of a 1970 case, the Colorado Supreme Court upheld the use of a so-called 3-mile test, including a maximum depletion rate of 40% in 25 years (said to have been developed for use in the Northern High Plains), in determining whether the proposed use of ground water would unreasonably impair existing water rights or create unreasonable waste. *Fundingsland* v. *Colorado Ground Water Comm'n*, 171 Colo. 487, 468 Pac. (2d) 835, 836-838 (1970). This is discussed in more detail in chapter 20, notes 210 and 216.

[119] Colo. Rev. Stat. Ann. §37-90-108 (1973), formerly §148-18-7.

[120] *Id.* §37-90-109, formerly §148-18-8. The Act provides, *inter alia*: (1) all claims based on beneficial use prior to May 17, 1965, shall relate back to the initial date of such use, while claims based on subsequent beneficial use shall date from the filing of an application therefor, unless it is rejected; (2) all "wells constructed as replacements for or as supplements to original wells for the same beneficial use shall be considered as a unit and awarded a priority date of the earliest well"; and (3) if two or more appropriations "either made before or after May 17, 1965, have a common date, the priority number shall be accorded by lot." Separate lists may be published for subdivisions of the designated basin when it is shown that a subdivision or area does not affect the supply of water available to another subdivision or area. *Id.*

Commission or State Engineer may, following prescribed statutory procedures, appeal to the district court of the county wherein the water rights or wells involved are located.[121]

Ground water management districts may be formed within designated ground water basins, provided that all ground water acquifers within the geographic boundaries of such a district have been designated as a part of the district by the Commission. The district's board of directors shall be resident landowners and have a variety of statutory powers.[122]

Ground waters outside designated ground water basins.—With respect to uses of ground waters located outside of a designated ground water basin, the 1965 Act provided that after its effective date no new wells shall be constructed nor the supply from existing wells increased or extended without a "permit to construct a well" from the State Engineer. If the State Engineer determines that the proposed use will materially injure the vested water rights of others, he shall deny the application. As amended in 1971, if he determines that there will be no such injury, *and there is unappropriated water available*, he shall issue a "permit to construct a well" which "shall set forth such conditions for drilling, casing, and equipping wells and other diversion facilities as are reasonably necessary to prevent waste, pollution, or material injury to existing rights." The State Engineer shall record the date of the receipt of application and preserve it and the permit so indexed "as to be useful in determining the extent of the uses made of various ground water sources."[123]

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[121] *Id.* § 37-90-115, formerly § 148-18-14.

[122] *Id.* § § 37-90-130 and 37-90-131, formerly § § 148-18-29 and 148-18-30. These statutory powers are discussed in chapter 20 at note 222.

These subsections also provide that district directors may adopt appropriate devices, procedures, measures, or methods in the control and administration of ground water extractions; the control measures are subject to the Commission's review and approval and to court appeal by dissatisfied persons. In the latter regards, see *Larrick* v. *North Kiowa Bijou Mgt. Dist.*, 181 Colo. 395, 510 Pac. (2d) 323 (1973); *North Kiowa-Bijou Mgt. Dist.* v. *Ground Water Comm'n*, 180 Colo. 313, 505 Pac. (2d) 377 (1973).

With respect to consultation with the Commission, see also Colo. Rev. Stat. Ann. § 37-90-111(1)(d) (1973), formerly § 148-18-10(1)(e).

[123] Colo. Rev. Stat. Ann. § 37-90-137 (1973), formerly § 148-18-36.

The 1965 legislation provided, "A 'permit to construct a well' shall not have the effect of granting nor conferring a water right upon the user * * *." Colo. Rev. Stat. Ann. § 148-18-36(3)(Supp. 1965). However, this provision was repealed by Colo. Laws 1971, ch. 370, § 5, p. 1325.

In *Hall* v. *Kuiper*, a 1973 case apparently involving an application for a permit under this legislation, the Colorado Supreme Court, among other things, said: "The water is hydrologically connected with the Cache La Poudre River, which is 13 miles distant. * * * The underground water moves toward the Cache La Poudre River at a rate of 3/10ths of a mile per year. * * * [In this regard, the case was mentioned later in *Kuiper* v. *Lundvall*, ____ Colo. ____, 529 Pac. (2d) 1328, 1332 (1974), as discussed in note 114 *supra*.]

"There was testimony on behalf of the State Engineer to the effect that, because of the long period of time it takes water to proceed underground from the places in

In 1973,[124] the legislature added the following provision:

> In the issuance of a permit to construct a well in those acquifers which do not meet the definitions of section 37-90-103(6) [regarding

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question to the river, the interruption of flow by the wells would have a steady diminutive effect on the river. In other words, while the wells would flow only during the irrigation season, the lessened flow caused thereby at the river would be the same the year round. We have found no evidence in the record to contradict this opinion.

"The applicants have emphasized the facts that the operation of the proposed wells would not materially affect other wells or surface rights in the area, and that it had not been shown that any particular surface right from the river would be materially affected. In contrast, the main thrust of the State Engineer's argument is that operation of the proposed wells would lessen the amount of water reaching the river and that the adjudicated surface rights on the river would, in aggregate, be deprived of these amounts.

* * * *

"The applicants cannot justify their right to well water upon the conclusion that no particular surface appropriator could show material injury. We ruled otherwise in *Felihauer* v. *People*, 167 Colo. 320, 447 P.2d 986 (1968)." *Hall* v. *Kuiper*, 181 Colo. 130, 510 Pac. (2d) 329, 330-331 (1973).

The court added, *inter alia*: "It was the spirit of *Fellhauer, supra*, to add weight to what was referred to as the 'new drama of maximum utilization,' *viz.*, among other things, to use as much underground water as possible. We dream and we hope that in some future day technology will provide a means whereby persons in the position of these applicants can use some water which would represent that reaching the stream during flood and storm stages. But today these are merely dreams. Under the state of this record and of science, to use the current vernacular, 'there is just no way.' " *Id.* at 332.

The court also said: "The applicants have taken the position that the permits must be issued by reason of the provision in Colo. Const. art. XVI, §6 which reads: 'The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.' In their reply brief the applicants state:

" 'The Applicant is certainly not asking that he be granted some sort of "super well" free of any regulation. All that he is asking is that he be granted his constitutional right to make an appropriation. The means of effecting this appropriation is through the construction of a well. Of course, this well would be subject to lawful regulation by the State Engineer.'

"We have already approved the rulings of the trial court which were, in effect, that the ground water sought to be intercepted is a part of the stream; that it reaches the stream in steady amounts the year around; and that a material portion of this water has been appropriated from the rivers. Under this state of facts, the argument amounts to a statement that the applicants are entitled under the Constitution to make an appropriation of *appropriated* water, although they cannot be permitted to use it. The constitutional provision relates to the appropriation of *unappropriated* water. The position of the applicants is the same as if they sought to take surface waters which were already appropriated and needed. In such a situation a drilling permit can be refused. Under the present state of technology to drill but not use a well in order to establish a priority date would be a vain and futile procedure." *Id.* at 332.

The court said it need not ascertain the effect of the 1971 amendment requiring a finding that there is unappropriated water available before issuing a permit (see the discussion above in the text), since the result here would have been the same with or without this amendment. The requested permit was denied.

Regarding Colo. Const. art. XVI, §6, see also the discussion in note 114 *supra*.

[124] Subsequent to the 1973 case of *Hall* v. *Kuiper*, discussed in note 114 *supra*.

> "designated ground water"[125]] or section 37-92-103(11) [regarding ground water tributary to a surface watercourse[126]], and do not meet the exemptions set forth in sections 37-90-105 and 37-92-602 [regarding small wells used for household and other specified limited purposes[127]], the provisions of subsections (1) and (2) of this section [regarding the issuance of permits[128]] shall apply; except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant or by the owners of the area, by their consent, to be served is considered to be unappropriated; the minimum useful life of the acquifer is one hundred years, assuming that there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit.[129]

Any person who is dissatisfied with any act, refusal to act, or decision of the State Engineer may, following prescribed statutory procedures, appeal to the district court of the county wherein the water rights or wells involved are located.[130]

Determination of Conflicting Water Rights

Prior to 1969, jurisdiction of all questions concerning the determination of water rights was vested in the district court of the proper county. One who claimed a water right in a water district in which rights had not been adjudicated could petition the court for an original adjudication.[131] All claimants were given notice to appear and make proof of their claims, and to resist other claims if they wished to do so. The court commanded the State Engineer to certify a complete list of filings, in his office, of appropriations in good standing; called upon the water commissioner or irrigation division engineer for information concerning diversion and storage structures; and sent to all persons on each list a copy of notice of the pending proceeding.[132] A referee could be appointed if necessary.[133] Based on the evidence, a decree was issued by the court determining and establishing the several priorities of right.[134] Supplemental adjudications (that is, adjudications subsequent to the original adjudication) were initiated and conducted in much the same manner as an original adjudication.[135] All this was a judicial proceeding from start to

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[125] This section, formerly §148-18-2(3), is set out at note 114 *supra*.
[126] This section, formerly §148-21-3(4), is set out at note 111 *supra*.
[127] These sections, formerly §§148-18-4 and 148-21-45, are discussed at notes 108-111 and in note 117 *supra*.
[128] See the discussion at note 123 *supra*.
[129] Colo. Rev. Stat. Ann. §37-90-137(4) (1973), formerly §148-18-36(5).
[130] *Id.* §37-90-115, formerly §148-18-14.
[131] Colo. Rev. Stat. Ann. §148-9-3 (1963).
[132] *Id.* §148-9-5.
[133] *Id.* §148-9-4.
[134] *Id.* §§148-9-11 to 148-9-14.
[135] *Id.* §148-9-7.

finish. The only duty required of the State water administrative organization was to send the court officially known names of claimants and owners of structures. The administrators did not participate in the proceedings at any time in any respect.[136]

With the enactment of the Water Right Determination and Administration Act of 1969, the Colorado system of determining water rights continues as a judicial proceeding but with variations in such proceedings and associated administrative provisions. Jurisdiction to determine "water matters" arising in each water division is vested exclusively in the district courts collectively acting through the water judge in that division.[137]

Any person desiring, among other things, a determination of a surface or tributary ground water right[138] shall file a verified application with the water clerk, setting forth facts in support of the application.[139] Following the publication of notice[140] and investigation by the referee,[141] a ruling is made by the referee, subject to review by the water judge.[142] Rulings of the referee

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[136] The pre-1969 procedures are discussed in more detail in chapter 15, at notes 162-211.

With respect to adjudication proceedings pending on the effective date of the 1969 Act, discussed below, see *Bond* v. *Twin Lakes Res. & Canal Co.*, 178 Colo. 160, 496 Pac. (2d) 311 (1972).

[137] Colo. Rev. Stat. Ann. §37-92-203(1) (1973), formerly §148-21-10(1). "Water matters" include only such matters as the 1969 Act or any other law shall specify to be heard by such water judge. *Id.* This impliedly includes effects of prior contracts on priorities awarded. *Perdue* v. *Fort Lyon Canal Co.*, 184 Colo. 219, 519 Pac. (2d) 954, 956 (1974).

[138] "Water right" is defined as "a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same." *Id.* §37-92-103(12), formerly §148-21-3(8). The phrase "waters of the state" is defined as "all surface and underground water in or tributary to all natural streams within the state of Colorado." This does not include waters of designated ground water areas. *Id.* §37-92-103(13), formerly §148-21-3(3). Designated ground water areas are discussed at notes 113-122 *supra*. 1973 amendments of the 1969 Act's definitions of "appropriation," "beneficial use," and "priority" are discussed in note 28 *supra*.

The 1969 Act contains provisions for integrating the use, determination, and administration of surface and physically interconnected ground waters. These are mentioned earlier under "Ground Waters–Ground waters tributary to a surface watercourse."

Except for §§37-92-201 and 37-92-202, formerly §§148-21-8 and 148-21-9, which divide the State into seven water divisions and provide for the appointment and general duties of division engineers, wells constructed for household or other specified limited purposes are exempt from the provisions of the Act. With certain exceptions, these wells are regulated by permit by the State Engineer. Notwithstanding these exemption provisions, water rights for wells of the type specified may be determined pursuant to the determination provisions of the Act. *Id.* §37-92-602, formerly §148-21-45. This is discussed in more detail at notes 108-111 *supra*.

[139] *Id.* §37-92-302(1), formerly §148-21-18(1).

[140] *Id.* §37-92-302(3), formerly §148-21-18(3).

[141] *Id.* §37-92-302(4), formerly §148-21-18(4).

[142] *Id.* §37-92-302(1), formerly §148-21-19(1).

protested within a specified time shall be confirmed, modified, reversed, or reversed and remanded by the water judge. Rulings of the referee which have not been protested shall be confirmed in the judgment and decree of the water judge except that the water judge may reverse or reverse and remand any such ruling which he deems contrary to law.[143] After the hearings on all matters have been concluded, the water judge shall enter a judgment and decree.[144] This is subject to appellate review except for those decrees which confirm a ruling to which no protest was filed.[145]

Prior to 1969, the comprehensive Colorado statutory system for the adjudication of water rights made specific provision for conditional decrees of rights to the use of water under appropriations only partially completed or not perfected. If proof of partial completion by the claimant was satisfactory to the court, a conditional decree was issued, conditioned upon application of the water to beneficial use within a reasonable time thereafter, the final decree in a subsequent proceeding to fix a quantity of water not in excess of the maximum fixed in the conditional decree. In this way, rights of partially completed appropriations were safeguarded pending completion and final adjudication, or forfeiture and cancellation, as the case might have been.[146]

With the enactment of the Water Right Determination and Adjudication Act of 1969, the legislature provided for determinations of, among other things, a conditional water right and the amount and priority thereof, including a determination that a conditional water right has become a water right by virtue of a completed appropriation. A person desiring such a determination shall follow the procedures described above for a determination of a water right. In every fourth calendar year following the year in which a conditional water right has been determined, the owner or user of the right, if he wishes to maintain the right, must obtain a finding by the referee of reasonable diligence in the development of the appropriation; failure to do so shall be considered an abandonment of the conditional water right.[147]

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[143] *Id.* § 37-92-304(5), formerly § 148-21-20(5).

[144] *Id.* § 37-92-304(7), formerly § 148-21-20(7).

[145] *Id.* § 37-92-304(9), formerly § 148-21-20(9).

[146] Colo. Rev. Stat. Ann. §§ 148-10-6 to 148-10-9 (1963), repealed, Laws 1969, ch. 373, § 20.

[147] Colo. Rev. Stat. Ann. § 37-92-301(4) (1973). The statute had originally provided for a biennial finding of reasonable diligence. Colo. Rev. Stat. Ann. § 148-21-17(4) (Supp. 1969). This was changed to 4 years by Laws 1973, ch. 443, § 1.

In a recent case regarding an application for a biennial finding of reasonable diligence regarding a conditional water rights decree, the Colorado Supreme Court said, *inter alia*, "[T]o prove due diligence there must be shown an intention to use the water, coupled with concrete action amounting to diligent efforts to finalize the intended appropriation." *Orchard Mesa Irr. Dist.* v. *Denver*, 182 Colo. 59, 511 Pac. (2d) 25, 28 (1973). Regarding factors considered with respect to a conditional water storage decree, see *Colorado River Water Conservation Dist.* v. *Twin Lakes Res. & Canal Co.*, 181 Colo. 53, 506 Pac. (2d) 1226 (1973).

For related matters, see the discussion at notes 29-32 *supra*.

The 1969 Act also provides for various changes of water rights[148] and plans for augmentation, which means "a detailed program to increase the supply of water available for beneficial use in a division or portion thereof" by, among other things, water exchange projects, developing new or alternate means or points of diversion, or developing new sources of water.[149] Special procedures are provided for filing and acting upon applications for such changes or plans for augmentation.[150] Such applications shall be approved "if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."[151]

The foregoing judicial procedure is augmented by statutory proceedings in which the division engineer in each division, with the approval of the State Engineer, provides the water clerk in his division with tabulations of all decreed water rights and conditional water rights in the division, in order of seniority.[152] Following required publication and notice of the tabulations, opportunity is provided for filing protests within a specified time. After the division engineer makes such revisions as he deems proper, further opportunity is provided for filing protests, whereupon the water judge shall hold a hearing and enter a judgment and decree which shall either incorporate the tabulation of the division engineer or incorporate it with such modifications as the water judge may determine proper after the hearing.[153] If no protests are filed, the water judge shall enter a judgment and decree incorporating and confirming the tabulations of the division engineer without modification.[154] These tabulation

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[148] Colo. Rev. Stat. Ann. §37-92-103(5) (1973), formerly §148-21-3(11).

[149] *Id.* §37-92-103(9), formerly §148-21-3(2).

[150] See, *inter alia*, §§37-92-301 to 37-92-305 and 37-92-307, formerly §§148-21-17 to 148-21-21 and 148-21-23. See also Colo. Laws 1974, ch. 111, p. 440, repealing and reenacting former §148-21-23, providing new special procedures for plans for augmentation.

[151] Colo. Rev. Stat. Ann. §37-92-305(3) (1973), formerly §148-21-21(3). If it would cause such an injurious effect, the applicant or anyone in opposition to the application shall be allowed (by the referee or water judge, as the case may be) to propose terms or conditions which would prevent such injurious effect, including certain specified types of terms or conditions. *Id.* §§37-92-305(3) and (4), formerly §§148-21-21(3) and (4).

Any decision of a water judge dealing with a change of water right or plan for augmentation may include, *inter alia*, the condition that its approval shall be subject to reconsideration on the question of injury to vested rights of others during any hearing commencing in the 2 calendar years succeeding the year in which such decision is rendered. *Id.* §37-92-304(6), formerly §148-21-20(6).

[152] *Id.* §§37-92-401(1)(a) and (4) and 37-92-402(1) and (2)(c), formerly §§148-21-27(1)(a) and (4) and 148-21-28(1) and (2)(d).

[153] *Id.* §§37-92-402(2)(a)-(e), formerly §§148-21-28(2)(b)-(f).

[154] *Id.* §37-92-402(2)(f), formerly §148-21-28(2)(g).

The described procedures apply to tabulations to be made by July 1, 1974, and each even-numbered year thereafter. Similar procedures were provided for the original tabulations to be made in 1970 [and completed in 1973 (see chapter 15, note 239)], although it is provided that if objections are filed after such original tabulations are

(*Continued*)

proceedings shall be considered general adjudication proceedings.[155] The judgment and decree of the water judge are subject to appellate review except for that part of the judgment or decree which confirms a part of a tabulation with respect to which no protest was filed.[156]

For a more detailed treatment of the foregoing summarized procedures and previous historical developments regarding statutory adjudication procedures in Colorado, see, in chapter 15, "Special Statutory Adjudication Procedures—Statutory Adjudication Procedures in Selected States—Colorado." This includes discussions of the rather complex provisions regarding priorities of water rights in the process of adjudicating, determining, and tabulating such rights.

Administration of Water Rights and Distribution of Water

The State Engineer is responsible for the administration and distribution of "waters of the state,"[157] defined as "all surface and underground water in or tributary to all natural streams within the State of Colorado"[158] The State is divided into seven water divisions that generally follow major watershed boundaries.[159] Each division is headed by a division engineer[160] who, under the general supervision of the State Engineer,[161] is responsible for the administration and distribution of water in his division.[162]

In distributing water, the State Engineer and the division engineers are to be governed by the priorities for water rights and conditional water rights established by adjudication decrees.[163]

The State Engineer and division engineers are directed to administer, distribute, and regulate the waters of the State in accordance with the constitution and laws of the State. But the legislature has decreed:

> It is the legislative intent that the operation of this section shall not be used to allow ground water withdrawal which would deprive senior

(*Continued*)
filed with the water clerk, "the water judge shall order such notice, conduct such proceedings, and enter such orders as he deems appropriate to deal with such protest pending the proceedings in section 37-92-402," formerly §148-21-28, which section pertains to the later tabulations. *Id.* §37-92-401(5), formerly §148-21-27(5).

[155] *Id.* §37-92-402(2)(k), formerly §148-21-28(2)(1).

[156] *Id.* §37-92-402(h), formerly §148-21-28(2)(i).

[157] Colo. Rev. Stat. Ann. §37-92-301(1) (1973), formerly §148-21-17(1). See also §37-80-102, formerly §148-11-3, regarding the general duties of the State Engineer.

[158] This does not include waters of designated ground water areas. *Id.* §37-92-103(13), formerly §148-21-3(3). Designated ground water areas are discussed at notes 113-122 *supra*. See particularly the powers of the Ground Water Commission discussed at note 116 *supra*.

[159] *Id.* §37-92-201, formerly §148-21-8.

[160] *Id.* §37-92-202, formerly §148-21-9.

[161] *Id.* §37-80-105, formerly §148-11-5.

[162] *Id.* §37-92-301(1), formerly §148-21-17(1).

[163] "All such priorities shall take precedence in their appropriate order over other diversions of waters of the state." *Id.* §37-92-301(3), formerly §148-21-17(3). See also §37-92-402(2)(g), formerly §148-21-28(2)(h).

> surface rights of the amount of water to which said surface rights would have been entitled in the absence of such ground water withdrawal, and that ground water diversions shall not be curtailed nor required to replace water withdrawn for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by such surface right under the priority system.[164]

To assist in the performance of these duties, the State Engineer may adopt rules and regulations. In the adoption of such rules and regulations, the State Engineer shall be guided by the principles set forth in section 37-92-502(2), formerly section 148-21-35(2), of the statutes (relating to orders to discontinue diversions) and by certain specified principles relating to the geologic characteristics of acquifers and the interrelationships between surface and tributary ground waters.[165]

The State Engineer and the division engineers are authorized to issue orders with respect to (1) the partial or total discontinuance of the use of water not applied to beneficial use or the use of water required by senior appropriators that would cause material injury to them,[166] (2) the release from storage of illegally or improperly stored waters, (3) the movement of water involved in plans for augmentation,[167] (4) the installation of measuring devices, and (5) entry by the State Engineer and division engineers and their assistants upon private property to inspect the use of water.[168] If any order has not been complied with, the violator may be enjoined.[169] Any person injured by the violation of an order, the violation of which has been properly enjoined, may recover treble damages.[170]

Hawaii[1]

Governmental Status

The Hawaiian Kingdom was consolidated and founded by Kamehameha I, who was overthrown in 1893. There followed in succession, a provisional

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[164] *Id.* § 37-92-501(1), formerly § 148-21-34(1). And § 37-92-102(2)(d), formerly § 148-21-2(2)(d), declares "No reduction of any lawful diversion because of the operation of the priority system shall be permitted unless such reduction would increase the amount of water available to and required by water rights having senior priorities."

[165] *Id.* § 37-92-501(2), formerly § 148-21-34(2).

[166] In this regard, each diversion shall be evaluated and administered on the basis of the circumstances and in accord with governing provisions in this article and the court decrees adjudicating water rights.

[167] Plans for augmentation are discussed at notes 149-151 *supra*.

[168] Colo. Rev. Stat. Ann. § 37-92-502 (1973), formerly § 148-21-35.

[169] *Id.* § 37-92-503(1), formerly § 148-21-36(1).

[170] *Id.* § 37-92-504, formerly § 148-21-37.

[1] The Hawaiian system of water rights and its accompanying system of land titles is discussed at length in Hutchins, W. A., "The Hawaiian System of Water Rights" (1946).

(*Continued*)

government, a republic in 1894, and annexation of the Islands to the United States in 1898.[2] The Hawaiian Organic Act, passed by Congress to provide a government for the Territory of Hawaii, was approved April 30, 1900, and went into effect June 14, 1900.[3] Hawaii was admitted to the Union August 21, 1959.[4]

State Administrative Agency

The Board of Land and Natural Resources has various functions under the Ground Water Use Act of 1959 (discussed later under that topic).[5]

Early Irrigation in Hawaii

Before colonialists came to Hawaii, a wet-land variety of taro or kalo—the most important food staple—was produced under irrigation in terraced ponds watered by intricate ditch systems. The ancient taro water rights are of outstanding importance in the present water law of Hawaii. According to a statement made in 1930 by the then Territorial Supreme Court, "Our system of water rights is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water."[6]

Interrelationship of Land Titles and Water Titles

The Hawaiian system of surface water rights is intimately related to the system of land titles. In no jurisdiction familiar to the author is the determination of questions of rights in watercourses more dependent upon the history of combined land and water use than in Hawaii.

Originally, all lands and waters were owned and controlled by the King, who made grants from time to time to the principal chiefs or "konohikis" under whom further divisions and subdivisions were made.[7] In 1848, the King made a voluntary division of lands between himself and the chiefs or konohikis, and immediately thereafter he made a second division of the retained area and

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(*Continued*)
This discussion is summarized in chapter 12, "The Ancient Hawaiian Water Rights." The present treatment is an abstract of essential facets of the system as contained in chapter 12, as modified by the 1973 *McBryde* decision discussed herein, together with some additional material on determination of conflicting water rights and on ground waters.

[2] Kuykendall, R. S., "The Hawaiian Kingdom, 1778-1854" (1938); Snell, J., "Historic Background," First Progress Report, Territorial Planning Bd. of Hawaii, pp. 4-12 (1939).

Senate Resolution ratifying treaty of annexation, Haw. Rev. Laws, p. 15 (1955). Joint Resolution of Congress to provide for annexation, 30 Stat. 750 (1898); Haw. Rev. Laws, pp. 13-14 (1955).

[3] Organic Act, Terr. Haw., 31 Stat. 141, ch. 339 (1900); Haw. Rev. Stat., pp. 23-76 (1968).

[4] 73 Stat. ch. 74 (1959).

[5] See also note 77 *infra* regarding the Board's regulation of artesian wells.

[6] *Territory of Hawaii* v. *Gay*, 31 Haw. 376, 395 (1930)

[7] Kuykendall, *supra* note 2; Thurston, L. A., "The Fundamental Law of Hawaii" (1904).

conveyed the larger part of it to "the chiefs and people."[8] From 1846 to 1855 a commission to quiet land titles made awards, adjudicating the kind and amount of land titles of claimants other than the King and government.[9]

The ancient land units to which Hawaiian water rights are commonly related are:[10]

(1) The *ahupuaa*, which varied in size from less than 1,000 acres to more than 100,000 acres.[11]

(2) The *ili*. This was either (a) *ili of the ahupuaa*, a subdivision made by the konohiki for his own convenience, or (b) *ili kupono*, carved out of the ahupuaa by the King and held independently of the konohiki.

(3) The *kuleana*, a small tract of land within a larger tract claimed by another. The term is commonly used to designate a tract of cultivated land awarded to a hooaina, or native tenant, by the land commission.[12]

Water Rights in Surface Watercourses Before the McBryde Decision

Prior to 1973, the great body of rights in surface watercourses comprised:

(1) Rights of major land divisions (ahupuaas and ilis kupono).

(2) Rights conveyed by the konohiki of an ahupuaa or ili kupono.

(3) Appurtenant rights of (a) kuleanas or small tracts of cultivated land awarded to native tenants, and (b) land units or parts of land units irrigated from ancient times.

(4) Statutory rights in gross which accrued to lawful occupants within an ahupuaa after it passed to private ownership.

(5) True prescriptive rights.

(6) Riparian rights in surplus freshet waters of a stream.

In 1973, the decision in *McBryde Sugar Company, Limited* v. *Robinson*[13] substantially affected certain of these rights, as discussed later.

Hawaii does not have an appropriation system regarding use of surface watercourses.[14]

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[8] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 722-723 (1864).

[9] Haw. Laws 1846, p. 107; Laws 1854, p. 21.

[10] See " Hawaiian Land Terms," Thrum's Hawaiian Annual, pp. 65-71 (1925); King, R. D., "Hawaiian Land Titles," First Progress Report, Territorial Planning Bd. of Hawaii, pp. 41-45 (1939).

[11] The characteristics of these land divisions are summarized in *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-242 (1879). See also *Palama* v. *Sheehan*, 50 Haw. 298, 300, 440 Pac.(2d) 95 (1968).

[12] For one case referring to such an award, see *Maikai* v. *A. Hastings & Co.*, 5 Haw. 133 (1884).

[13] *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 504 Pac.(2d) 1330, affirmed on rehearing, 55 Haw. 260, 517 Pac.(2d) 26 (1973).

[14] A regulatory permit system pertaining to ground waters is discussed later under "Ground Waters–Ground Water Use Act of 1959."

Ancient water rights.–(1) Ahupuaas and ilis kupono. A royal grant of an ahupuaa to a konohiki carried with it all natural resources thereon except what the King reserved for his own use. A common royal reservation was an ili–in such case termed ili kupono–with natural resources including water found upon it, over which the konohiki of the ahupuaa had no control. The use of water of an ili kupono belonged to the King and to his successor as konohiki of the ili, not to the konohiki of the ahupuaa of which it formed only a geographical part.[15] These grants or reservations were subject to paramount or established rights which may have been ancient appurtenant rights of kuleanas, prescriptive rights, or rights conveyed by deed.

With the changeover from taro (kalo) to sugarcane crops, more water was needed for irrigation; hence there were developed principles relating to the use of *surplus* waters of an ahupuaa or an ili kupono–meaning the quantity of water flowing in a stream of the ahupuaa or the ili in *excess* of that required to satisfy the ancient appurtenant and prescriptive rights attaching to the waters of such stream, which are discussed later.

The konohiki of either an ahupuaa or an ili kupono–or his successor–had as his ancient heritage the unqualified right of use of all *surplus* waters of streams that lay entirely within such land unit.[16] Subject to the paramount established rights, the konohiki of the ahupuaa or ili or his successor could use such surplus waters as he pleased–either within or outside the ahupuaa or ili, because the surplus waters were not appurtenant to any particular portion of it.[17]

The same principle of an unqualified right of use applied to the *surplus normal flow* of a stream that arose within an ahupuaa or an ili kupono and flowed thence into a lower ahupuaa. The konohiki of the unit on which the waters arose had the exclusive right of use. Rights to use *surplus floodwaters* in such case, however, were qualified by the rights of the konohiki of the lower ahupuaa. The respective rights of the konohikis in the surplus floodflows were to be determined by the principles of the riparian doctrine.[18] See the later discussion under "Riparian rights."

(2) Rights conveyed by the konohiki. So long as the holders of established rights were properly safeguarded, surplus waters of an ahupuaa could be separated therefrom by its owners and conveyed to others for use outside its boundaries.[19] Whether or not the deed to a portion of an ahupuaa expressly

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[15] *Territory of Hawaii* v. *Gay*, 31 Haw. 376, 380-382 (1930), affirmed, 52 Fed.(2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[16] Hutchins, *supra* note 1, at 69-74.

[17] See *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680-683 (1904); *In re Taxes, Waiahole Water Co.*, 21 Haw. 679, 682 (1913); *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 70 (1917); *Foster* v. *Waiahole Water Co.*, 25 Haw. 726, 734-735 (1921); *Territory of Hawaii* v. *Gay*, 31 Haw. 376, 384, 388 (1930).

[18] *Carter* v. *Territory of Hawaii*, 24 Haw. 47 (1917); *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930).

[19] *Foster* v. *Waiahole Water Co.*, 25 Haw. 726, 734-735 (1921).

mentioned appurtenances, the grant by the konohiki included as an appurtenance the artificial watercourses thereon and all the water that had been enjoyed therefrom from time immemorial.[20] However, a grant or lease of land without express mention of water rights included water privileges only if the easement already existed. A conveyance of "kula" or "dry" (unirrigated) land within an ahupuaa to which ditches were not constructed carried no *implied* grant of water privileges.[21]

(3) Appurtenant rights. A fundamental principle of Hawaiian water law, from the royal regime to the present, has been that lands which from time immemorial have enjoyed the use of water are entitled to that use as a matter of right.[22]

The general custom of early landlords was to authorize the continued delivery of water to "wet" (irrigated) kalo or taro lands for which distribution systems had been built. In some cases taro patches were laid out in terraces, water being turned from the ditch into the highest terrace to successively overflow into lower ones; in others, all patches were supplied directly from the ditch. In either instance, the use of water was perpetuated on a given tract. This land-water relationship which originated in custom eventually ripened into a legal appurtenance and became the basis of a valid water right.

These ancient water rights applied in many cases to "kuleanas" (homesteads of the common people), a term now used to designate small tracts of cultivated lands awarded to native tenants.[23] However, the right of any part of an ahupuaa which, by ancient use, was irrigated land was on an equality with that of irrigated kuleana land.[24]

The present importance of ancient taro irrigation water rights is out of proportion to the very small percentage of all irrigated land in Hawaii now devoted to this crop. Although these kuleana rights originally applied chiefly or wholly to taro culture, many have since become used for sugarcane.[25] They are still vested rights of a high order.

Prior to the decision in *McBryde Sugar Company, Limited* v. *Robinson*,[26] discussed later, the supreme court had said, "It has been held that water

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[20] *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 57-58 (1917).

[21] *Peck* v. *Bailey*, 8 Haw. 658, 661 (1867). The grantee in such case, having no claim upon the surplus waters of the ahupuaa, could not restrain diversion thereof by the konohiki to his own kula lands. *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 682-683, 690 (1904).

[22] See *Loo Chit Sam* v. *Wong Kim*, 5 Haw. 130, 132, 200, 201 (1884); *Ing Choi* v. *Ung Sing & Co.*, 8 Haw. 498 (1892); *Peck* v. *Bailey*, 8 Haw. 658, 661 (1867); *Wailuku Sugar Co.* v. *Hale*, 11 Haw. 475, 476 (1898); *Kohala Sugar Co.* v. *Wight*, 11 Haw. 644, 651 (1899); *Palolo Land & Improvement Co.* v. *Wong Quai*, 15 Haw. 554, 563 (1904).

[23] See *Territory of Hawaii* v. *Liliuokalani*, 14 Haw. 88, 95 (1902).

[24] *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 58 (1917).

[25] Rice irrigation was important for a time. *Loo Chit Sam* v. *Wong Kim*, 5 Haw. 200, 201 (1884). But after the first decade of the present century this culture rapidly declined.

[26] *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 504 Pac.(2d) 1330 (1973).

appurtenant to land for household purposes may be put to a different use; that water appurtenant to one piece of land may be used on another piece provided no one's rights are infringed by the change; and that improved methods for diverting water may be made use of upon like conditions."[27] The condition that no injury be inflicted on other rights was essential to the validity of all such changes in exercise of a water right.

In the *Carter* case, changes in both point and method of diversion were approved.[28] Changes in other cases depended on the invariable condition of noninjury to others. Those sanctioned have included changes in location of canal;[29] place of use,[30] including a change from one ahupuaa to another;[31] diversion of water to another watershed;[32] purpose of use, including changes from one irrigated crop to another;[33] and consolidation or exchange of water supplies under a rotation schedule.[34]

(4) Loss of ancient water right. The ancient Hawaiian water right may be lost by prescription (through adverse possession and use on the part of another for the statutory period of limitations). The *loss* of one's water right by prescription necessarily coincides with the *acquisition* by another party of a prescriptive right to use the water.

An ancient water right may also be lost by abandonment. "The alleged abandonment of an easement presents a question of intention and of fact, the burden of proof being upon the party who makes the allegation."[35]

Very few water rights cases involving questions of estoppel have reached the Supreme Court of Hawaii.[36] None have come to the author's attention in which actual losses of water right by estoppel were adjudged. However, principles and limitations upon estoppel should be applicable in Hawaii as in other jurisdictions.

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[27] *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 69 (1917).

[28] *Id.* at 51, 68.

[29] *Liliuokalani* v. *Pang Sam*, 5 Haw. 13 (1883).

[30] *Peck* v. *Bailey*, 8 Haw. 658, 666, 673 (1867). There is "no objection either in law or reason to allowing" such transfers. *Lonoaea* v. *Wailuku Sugar Co.*, 9 Haw. 651, 665 (1895).

[31] *Wong Leong* v. *Irwin*, 10 Haw. 265, 270-272 (1896). "There is no difference in principle between a transfer from one place to another in the same ahupuaa and a transfer from one ahupuaa to another."

[32] For cases giving tacit recognition of the practice as incidental to approved changes in place of use, see *Wong Leong* v. *Irwin*, 10 Haw. 265 (1896); *Foster* v. *Waiahole Water Co.*, 25 Haw. 726 (1921); *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930).

[33] *Peck* v. *Bailey*, 8 Haw. 658, 666 (1867). Changes in irrigated crops had been consistently upheld.

[34] *Horner* v. *Kumuliilii*, 10 Haw. 174, 180-182 (1895).

[35] *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 55 (1917). See *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 691 (1904).

[36] Compare *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 54-57 (1917); *Richards* v. *Ontai*, 19 Haw. 451, 460-461 (1909), 20 Haw. 335, 342 (1910). For general principles, see also *Nahaolelua* v. *Kaaahu*, 10 Haw. 18, 21 (1895); *Peabody* v. *Damon*, 16 Haw. 447, 456 (1905).

The water law of Hawaii does not include loss of water rights in surface watercourses by statutory forfeiture, which applies to appropriative rights in most Western States.

The discussion in this subtopic was not affected by the decision in *McBryde Sugar Company, Limited* v. *Robinson.*[37]

Statutory rights of occupants in ahupuaa.—A legislative enactment in 1850, which with slight modifications is still extant, granted fee simple titles to native tenants for their cultivated lands and house lots, and protected them in the enjoyment of certain rights. This enactment declared that people on lands to which landlords had taken fee simple titles had the right to take firewood and certain other products from the tracts where they lived for their own private use, together with a right to drinking water, running water, and the right of way.[38] These were said to be rights in gross to water for domestic purposes, which accrued to lawful occupants of land within an ahupuaa as against the ahupuaa itself after passing to private ownership, as distinguished from ancient appurtenant rights incident to particular lands.[39]

Prescriptive rights.—Writers of opinions published in connection with some early Hawaiian decisions used the term "prescriptive" to denote ancient appurtenant rights as well as those acquired by strictly adverse uses.[40] This was incorrect. The ancient uses of water by taro cultivators were not hostile to the konohiki, but were made with his permission and encouragement, as mutual business, with water supplied through systems which he controlled. This disregard of the clear legal distinction between adversely acquired rights to use water and always permissive use was eventually corrected by the supreme court.[41]

The true prescriptive right is recognized in Hawaii.[42] To establish a prescriptive title to a water right, there must have been an actual, open, notorious, continuous, and hostile use of the water for the statutory period of limitations,[43] under a claim of right.[44]

The decision in this subtopic was not affected by the decision in *McBryde Sugar Company, Limited* v. *Robinson.*[45]

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[37] *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 504 Pac. (2d) 1330 (1973).

[38] Haw. Laws 1850, § 7, pp. 202-203, Rev. Stat. § 7-1 (1968).

[39] *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 67 (1917); *Oni* v. *Meek*, 2 Haw. 87, 91-95 (1858).

[40] This was done repeatedly in *Peck* v. *Bailey*, 8 Haw. 658, 661, 665, 666, 671, 672 (1867), the earliest reported water rights decision, and in various other cases during the remainder of the century.

[41] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 683, 16 Haw. 113, 115-117 (1904).

[42] *Heeia Agric. Co.* v. *Henry*, 8 Haw. 447, 448 (1892).

[43] *Territory of Hawaii* v. *Gay*, 31 Haw. 376, 383 (1930).

[44] See *Wong Leong* v. *Irwin*, 10 Haw. 265, 271 (1896); *Kohala Sugar Co.* v. *Wight*, 11 Haw. 644, 648-650 (1899); *Kaneohe Ranch Co.* v. *Kaneohe Rice Mill Co.*, 20 Haw. 658, 666 (1911).

[45] *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 504 Pac.(2d) 1330 (1973).

Riparian rights.—References to the riparian doctrine appeared in various Hawaiian Supreme Court decisions beginning in 1867;[46] but it was not until 1917—50 years later—that a riparian right was definitely adjudicated.[47] As a result of that decision, and another rendered in 1930,[48] the riparian doctrine was applied, as between konohiki units, to the surplus freshet waters of a stream but not to the surplus normal flow.

Water Rights in Surface Watercourses After the McBryde Decision

In 1973, the Hawaii Supreme Court (in a four-to-one decision) decided *McBryde Sugar Company, Limited* v. *Robinson.*[49] The principal issues, as suggested by the supreme court's statement of facts and description of the trial court proceedings, appear to have been a determination of the amounts of surface stream water (1) to which the parties (the State, McBryde, Gay and Robinson, and other smaller users) were entitled under their appurtenant water rights[50] and (2) to which McBryde had acquired an adverse use.[51] Justice Levinson, in his dissenting opinion on rehearing, pointed out that in addition to these two issues, the trial court had also delineated the rights of the parties with respect to normal surplus water and storm and freshet surplus water.[52]

As one of its first conclusions, the court determined that under the Land Commission Act,[53]

> [T]he right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants.
>
> Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent *right to water was not intended to be, could not be, and was not transferred to the awardee*, and *the ownership of water in natural watercourses* streams and rivers *remained in the people* of Hawaii for their common good. Therefore, we *hold* that as between the State and McBryde, and between McBryde and Gay & Robinson, the State is the owner of the water [in question].[54]

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[46] See *Peck* v. *Bailey*, 8 Haw. 658, 661-662, 670-672 (1867); *Wailuku Sugar Co.* v. *Widemann*, 6 Haw. 185, 187 (1876); *Haiku Sugar Co.* v. *Birch, Tax Collector*, 4 Haw. 275, 277 (1880); *Wong Leong* v. *Irwin*, 10 Haw. 265, 270-272 (1896); *Cha Fook* v. *Lau Piu*, 10 Haw. 308, 313 (1896); *Brown* v. *Koloa Sugar Co.*, 12 Haw. 409, 411-412 (1900); *Scharsch* v. *Kilauea Sugar Co.*, 13 Haw. 232, 236 (1901); *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904).

[47] *Carter* v. *Territory of Hawaii*, 24 Haw. 47 (1917).

[48] *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930), affirmed, 52 Fed.(2d) 356 (9th Cir. 1931), certiorari denied, 284 U.S. 677 (1931).

[49] *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 504 Pac.(2d) 1330, affirmed on rehearing, 55 Haw. 260, 517 Pac.(2d) 26 (1973).

[50] Appurtenant water rights are discussed at notes 22-34 *supra.*

[51] 504 Pac.(2d) at 1333-1334.

[52] 517 Pac.(2d) at 29.

Incidentally, Justice Levinson had voted with the majority in the original hearing.

[53] Haw. Laws 1846, p. 107. This Act is discussed at note 9 *supra.*

[54] 504 Pac.(2d) at 1338-1339. Emphasis added.

However, the court affirmed, with some modifications, the trial court's determination of the parties' appurtenant water rights, acknowledging that when an award was made by the Land Commission or when a Royal Patent was issued, based on such an award, the conveyance carried with it the appurtenant right to water for taro cultivation.[55] The court concluded this phase of the case with a brief discussion of the question of transferability of the rights to other parcels of land and declared:

> We *hold* that the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant *and any contrary indications in our case law are overruled*. Thus, neither McBryde nor Gay & Robinson may transport water to another watershed, which they may have the right to use under their respective appurtenant water rights.[56]

The court next examined what other rights the parties might be entitled to. The court quoted an 1850 law, still extant, which in part provides, " 'The people [meaning owners of land] also shall have a right to drinking water, and running water * * *.' "[57] Relying on the words "running water," the court examined various riparian rights cases and the writings of commentators on the subject of riparian rights, and concluded, "We therefore *hold* that under the statute a proprietor of land adjoining natural water courses has riparian water rights."[58]

Turning to the rights of Gay and Robinson to "normal daily surplus water" awarded in *Territory of Hawaii* v. *Gay*,[59] the court said:

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[55] "The trial court's task * * * was to determine as precisely as possible the amount of water that was actually being used for taro cultivation at the time of the Land Commission Awards. The burden of proof was on the person asserting the right. The fact that in earlier or later times other land was in taro cultivation is irrelevant. And a reduction for fallowing should properly be made when it appears that at the time of the Land Commission Awards water was not being used to cultivate certain acreage." 504 Pac.(2d) at 1340. At this point, the court added, in a footnote: "It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii, and we are bound to follow it. We invite the legislature to conduct a thorough re-examination of the area." 504 Pac.(2d) at 1340 n. 15.

[56] 504 Pac.(2d) at 1341. Emphasis added.

[57] Haw. Laws 1850, p. 202, Rev. Stat. §7-1 (1968), quoted from 504 Pac.(2d) at 1341-1342. Court's bracketed addition. This statute is discussed at note 38 *supra*.

[58] 504 Pac.(2d) at 1344. Emphasis added. The court added: "Thus, McBryde, the State, and Gay & Robinson, as owners of parcels of land adjoining the Hanapepe River or Koula Stream have such rights—the right to use water flowing therein without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution and in the shape and size given it by nature. This right is incapable of measurement into number of gallons per day. Of course, the riparian right appertains only to land adjoining a natural watercourse for its use." *Id.*

[59] *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930).

> That decision was based upon the assumption that there would be a quantity of water which may be deemed "normal daily surplus water" after the water rights of all the owners of land in the Hanapepe Valley were determined; however, at that time, no determination as to the water rights of any of the owners of parcels of land in the Hanapepe Valley had been made. In a sense, the decision was made in a vacuum. Both the State and McBryde owning land abutting the Hanapepe River are entitled to riparian water rights over and above the appurtenant rights as determined by the trial court, and under the riparian doctrine they are entitled to the amount of flow of water in both the Koula Stream and Hanapepe River as water flowed in the stream and river at the time of the award without substantial diminution. In other words, they are entitled to have the flow of water in the Hanapepe River in the shape and size given it by nature. Thus, there can be no quantity of water which may be deemed "normal daily surplus water," and Gay & Robinson is entitled to nothing under the ruling of that case.[60]

Another question briefly considered by the court was the right to storm and freshet water. The court declared that since the title to water was reserved to the State under the mahele, " 'storm and freshet' water is the property of the State and we overrule Carter v. Hawaii, 24 Haw. 47 (1917)."[61]

On the matter of prescriptive rights, the trial court had held that McBryde had acquired prescriptive rights to water by adverse use. However, recognizing that prescription cannot run against the State, the trial court had deducted the amount of the prescriptive right for McBryde from the water rights of Gay and Robinson. The supreme court believed it was error to charge McBryde's prescriptive right against the rights of Gay and Robinson, since prescriptive rights cannot be acquired against the State.[62]

The court concluded its opinion with the following summary:

> 1. As between the State and McBryde, and McBryde and Gay & Robinson, the State is the owner of the water flowing in the Koula Stream and Hanapepe River. However, the owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water, but no property in the water itself.
>
> 2. The State, McBryde and Gay & Robinson have both appurtenant and riparian rights to water in connection with land within the Hanapepe Valley. However, under claim of such rights, neither McBryde nor Gay & Robinson may transport water to another watershed.
>
> 3. Under the doctrine of riparian rights, owners of land adjoining a natural watercourse have the right to a flow of a river or stream in the shape and size given it by nature. Thus, under such right there can be no "normal daily surplus" water.

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[60] 504 Pac. (2d) at 1345. Surplus water is discussed at notes 16-17 *supra.*

[61] 504 Pac. (2d) at 1345. Storm and freshet water is discussed at note 18 *supra.*

[62] 504 Pac. (2d) at 1345.

4. McBryde has no prescriptive right to water, as no one may claim title or interest against property owned by the State.

5. "Storm and freshet" water is the property of the State.

Neither McBryde nor Gay & Robinson has any right to divert water from the Koula Stream and Hanapepe River out of the Hanapepe Valley into other watersheds.[63]

Justice Marumoto concurred in much of the majority opinion but dissented on the following point.

I dissent from the decision set forth in the last paragraph of the foregoing opinion of the court that neither Gay & Robinson nor McBryde has any right to divert the water flowing in Koula Stream and Hanapepe River to watersheds beyond the Hanapepe Valley.

That decision has no relation whatsoever to the judgment appealed from in this case, and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued to this court.[64]

While the presentation of the facts in the various opinions in this case are not very clear, Justice Marumoto did point out that McBryde was using some of its water beyond the Hanapepe Valley.[65] And Justice Levinson in his dissent on rehearing said that Gay and Robinson were likewise using some of their water outside of the Hanapepe watershed.[66]

Later in Justice Marumoto's dissent it appears that his primary concern with the majority opinion was in the handling of the questions relating to storm and freshet water and normal surplus water and the related matters of *res judicata* and *stare decisis*. As he stated:

On the fifth and last issue, the circuit court determined that the storm and freshet water of Koula Stream and Manuahi Stream belonged to [Gay and Robinson] as part of the surplus water which the owner of the land on which a stream has its source is entitled to appropriate. In item 5, the majority holds that the ownership of storm and freshet water is in the State. I do not concur in that holding; nor do I agree with the determination of the circuit court on the issue.

I would follow Carter v. Territory, 24 Haw. 47 (1917), on the matter. In that case, this court divided the surplus water of a stream into normal surplus water and storm and freshet water, and held that the doctrine of riparian right was applicable to the latter.

I think that the holding in Carter v. Territory on storm and freshet water was proper. The right to storm and freshet water was an issue in the case. * * *

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[63] 504 Pac. (2d) at 1345-1346

[64] 504 Pac. (2d) at 1346.

[65] 504 Pac. (2d) at 1348 and 1349.

[66] 517 Pac. (2d) at 29.

246-767 O - 77 - 18

> The decision set forth in the last paragraph on the majority opinion involves a consideration of the doctrine of res judicata in its effect upon [Gay and Robinson], and a consideration of the principle of stare decisis insofar as it prevents McBryde from diverting the water appurtenant to its lands in the Hanapepe valley for use upon its lands beyond the valley.
>
> The majority professes to recognize in the body of the majority opinion, albeit reluctantly, that [the second opinion in *Territory of Hawaii* v. *Gay*, 31 Haw. 376 (1930)] is res judicata between the State and [Gay and Robinson], and holds that it is binding on the State. However, the decision effectively nullifies that holding to the extent that it denies [Gay and Robinson] the right to divert the normal surplus water of Koula Stream and Manuahi Stream to Makaweli.
>
> * * * *
>
> The principle of stare decisis, which is involved in the portion of the decision which prevents McBryde from diverting the water appurtenant to its lands in the Hanapepe valley for use in other areas does not require strict adherence to prior decisions as in the case of res judicata. Nevertheless, it counsels adherence to precedents, particularly with respect to precedents relating to property rights * * * [67]

A petition for rehearing was granted with respect to the issues of whether (1) Hawaii Revised Statute section 7-1[68] was material to the determination of the water rights of the parties and (2) owners of appurtenant water rights were entitled to apply those rights to lands other than those to which the court had found them appurtenant. The *per curiam* opinion of the court stated, "[W]e find no reason to change the decision filed herein."[69]

Justice Marumoto again dissented, stating that with respect to the second issue, dealing with the place of use of appurtenant rights, his views had been presented in his dissent to the first opinion. With respect to the first issue, whether section 7-1 of the statutes was material to the determination, he said he had not discussed it in his earlier dissent because he did not think it was an issue on appeal. However, assuming that it was a proper issue, he did not think that section 7-1 supported the holding of the court that it reserved to the State title to flowing water for the common good, and he therefore dissented.[70]

Justice Levinson, who voted with the majority in the original opinion, reversed his position and entered a lengthy dissent, quoting Justice Frankfurter, " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' "[71]

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[67] 504 Pac. (2d) at 1348-1349.

[68] This statute is discussed at notes 38 and 57 *supra.*

[69] 517 Pac. (2d) at 27.

[70] *Id.*

[71] 517 Pac. (2d) at 28.

Justice Levinson felt that in his opinion "the court committed error in holding that all surplus water belongs to the State and that private water rights, however acquired, may not be transferred to nonappurtenant land." [72]

Ground Waters

Definite underground stream.—In a number of cases the Hawaii Supreme Court has had occasion to discuss the matter of rights to use ground waters flowing in ascertained and defined streams. The judicial view appears to be that the rules of law that govern uses of water of definite underground streams are not the same as those that apply to other ground waters. It would also appear that one who asserts a right in a definite underground stream must prove the existence of such stream by competent testimony, although under other circumstances a presumption may arise that a defined channel underlies a surface channel. Whether proof would necessarily include, not only the existence but also the extent, location, and characteristics of the subterranean channel within reasonable limits, the court has not intimated.

The existence of such a subterranean stream was not proved in any of the cases that reached the supreme court (except in the case involving underflow, noted below), and so the general rules that apply to such streams have not been definitely announced by that court. However, there is a strong intimation that the holders of established rights in a spring fed by a definite underground stream would be protected against interference with this source of supply of the spring.[73]

Relation of underflow to rights in surface stream.—The Hawaii Supreme Court adjudicated this question in a case involving the Wailuku or Iao Stream on the Island of Maui.[74] The bed of Wailuku (Iao) Stream at the stretch in litigation was underlain by a stratum some 25 to 40 feet thick, composed of loose boulders, sand, and gravel, resting upon a practically impervious substratum. Diversion of a large part of the streamflow was on a rotation basis. As a result of the transfer upstream of certain daytime rights held by respondent, less water became available for the downstream nighttime users at 4:00 p.m. daily when they began making the diversions to which they were entitled. This was occasioned not only by the time normally required for the water to flow downstream, but also by the additional time needed daily to resaturate a part of the underlying gravel bed sufficiently to support the surface flow. The net result was a substantial lag in downstream movement of the water, with a substantial impairment of the nighttime users' exercise of their rights. The

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[72] 517 Pac. (2d) at 27. This dissent contains a detailed analysis of Hawaii water law on the points in issue.

[73] *Palolo Land & Improvement Co.* v. *Territory of Hawaii*, 18 Haw. 30 (1906). See also *Davis* v. *Afong*, 5 Haw. 216, 222-224 (1884); *Wong Leong* v. *Irwin*, 10 Haw. 265, 270 (1896).

[74] *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 693-694 (1904).

respondent therefore was required to release the entire stream each day at a sufficiently early hour to insure its reaching the lower ditches in its accustomed volume at the hour at which it was lawfully due there.

In reaching its conclusion on the point here considered, the supreme court did not lay down or even discuss any broad principles with respect to the underflow of a stream. The case was decided on the general principle, long established in Hawaii and elsewhere, that a change in the exercise of a water right is permissible only to the extent that it does not result in infringing the rights of others.

Nonartesian "percolating" waters.—While the Hawaiian courts recognized a distinction between ground water flowing in definite channels and percolating waters, they did not elaborate upon the significance of the distinction. Thus, the questions of ownership and rights of use of nonartesian percolating waters apparently were not settled.[75]

Artesian waters.—In *City Mill Company* v. *Honolulu Sewer & Water Commission*, the Supreme Court of Hawaii, among other things, indicated that the owners of land overlying an artesian basin own the artesian waters, have correlative rights therein, and each is entitled to a reasonable use of such waters with due regard to the rights of co-owners.[76]

Regulation of artesian wells.—A statute which previously applied expressly to artesian wells was amended in 1970 so as to apply to wells generally, but it still contains a provision that appears to relate particularly to artesian wells:

> A well through which water flows to the surface of the ground or to any porous substratum by natural pressure and is not capped, cased, equipped, or furnished with such control facilities as will readily and effectively arrest and prevent waste or unnecessary flow of any water from the well is declared to be a common nuisance. The owner, tenant, or occupant of the land upon which such a well is situated, or any person in charge of such a well, who causes, suffers, or permits such common nuisance or suffers or permits it to remain or continue, is guilty of a misdemeanor.[77]

Ground Water Use Act of 1959.—In 1959 the Hawaii Legislature enacted the "Ground Water Use Act."[78] This Act relates to all "ground water," defined as

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[75] See the discussion in chapter 20 at notes 238-240.

[76] *City Mill Co.* v. *Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929). This and other aspects of the case are discussed in chapter 20 at note 242.

[77] Haw. Rev. Stat. §§178-1 to -10 (1968), amended, Laws 1970, ch. 123. The quoted provision is in §178-2.

Regarding other aspects of this legislation, and other legislation regarding artesian wells in the District of Honolulu [Haw. Rev. Stat. §§71-1 to -4 (1968)], see the discussion in chapter 20 at notes 243-245.

Public regulation of artesian wells has been placed under the Board of Land and Natural Resources.

[78] Haw. Rev. Stat. §177-1 *et seq.* (1968).

This Act was enacted by the Legislature of the Territory of Hawaii. Haw. Laws 1959,

water under the earth's surface, whether or not "in perched supply, dike-confined, flowing or percolating in underground channels or streams, under artesian pressure or not, or otherwise."[79]

However, except for specified emergency powers discussed below,[80] regulation of ground water use under the Act is confined to areas which have been designated for regulation by the Board of Land and Natural Resources. " 'Designated ground-water area' means an area in which the board finds that the ground water must be regulated and protected for its best utilization, conservation, and protection in order to prevent threat of exhaustion, depletion, waste, pollution, or deterioration by salt encroachment * * *."[81] The Board may designate ground water areas for regulation, after public notice and hearing, where it is found that any of the following conditions exist now or in the foreseeable future: (a) use of ground water exceeds the rate of recharge, (b) excessive decline in ground-water levels, (c) increase in chloride content of water, materially reducing its value in use, (d) excessive preventable waste of water, or (e) proposed water developments leading to any of these conditions.[82]

After the designation of a ground water area, except with respect to domestic and preserved uses as defined in the Act,[83] water may be

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ch. 274, effective June 12, 1959. Following statehood on Aug. 21, 1959, its administration has been performed by the State. The Act was completely reenacted in 1961. Haw. Laws 1961, ch. 122.

This Act was not intended to repeal but, in the event of conflict, shall prevail over chapter 178 of the statutes, relating to the regulation of wells generally, and § § 71-1 to -4, relating to artesian wells under the control of the Board of Water Supply in the district of Honolulu. Haw. Rev. Stat. §177-35 (1968). Chapter 178 and § § 71-1 to -4 of the statutes are discussed in chapter 20 at notes 243-245.

[79] Haw. Rev. Stat. §177-2(6) (1968).

[80] The Act also provided that no right can be acquired to any of the ground waters in Hawaii by prescription. *Id.* §177-3.

[81] *Id.* §177-2(3).

[82] The Board may retain such establishment of a designated area while the justifying factors remain, but may rescind a designation after public hearing if such factors no longer prevail. *Id.* §177-5.

[83] *Id.* §177-19. For definitions of domestic and preserved uses, see § § 177-2 and -15.

New domestic uses may be initiated without regard to whether the taking reduces the water supply or any preserved use or use made pursuant to a permit. But no person making a domestic use may initiate a court action to compel reduction of any preserved use or prior permitted use in order to make sufficient water available for the domestic use. *Id.* §177-13.

Preserved uses include other existing uses. The direct withdrawal of water from a designated area for a lawful, beneficial nondomestic use being made on the effective date of the area's designation, in conjunction with facilities then under construction, or within 5 years prior thereto, may be continued if the use remains beneficial and the Act's provisions for the certification of existing uses (*Id.* §177-16) are complied with. Subject to a certain exception for municipal water supply, without Board authorization

(*Continued*)

withdrawn therefrom only in accordance with a permit from the Board.[84] The permit is to be issued for a specific period (not exceeding 50 years) depending on the kind of use, as determined by the Board.[85] Each permit is subject to certain conditions.[86] Unless specifically exempted, each permit shall provide that its holder may at any time, or after a specified time, be required to relinquish the permit if (1) there are one or more applicants to make more beneficial use, or as beneficial a use which would provide a more complete utilization of the available water; (2) there is no other water reasonably available; and (3) such applicants will furnish reasonable compensation to the permit holder.[87] Permits may be revoked for nonuse and certain other reasons.[88]

Except as provided in the Act,[89] no court may enjoin the use of water by anyone holding a valid permit. But if a permit causes injury to property rights, compensation may be had for actual damages in a suitable action.[90]

If a "water shortage"[91] occurs in such a designated area, after notice and hearing, new wells and new uses may be forbidden, existing uses and facilities modified, and water uses apportioned, limited, or rotated.[92]

In an "emergency" (defined as "a shortage of ground water in any ground-water area, whether established as a designated ground-water area or

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(*Continued*)
no preserved use may be modified by increasing the quantity or substantially changing the purpose or manner of use, or time of taking, or point of diversion. *Id.* §177-15. All or part of a preserved use may be extinguished for nonuse as provided in the Act. *Id.* §177-18.

For some additional details in these and other regards, see the discussion in chapter 20 under "Hawaii—Ground Water Use Act of 1959."

[84] *Id.* §177-19.

Prerequisites for a permit are: (1) available water; (2) beneficial use; (3) the most beneficial use and development of water resources will not be impaired; and (4) granting the permit will not substantially interfere with preserved uses, or with previous domestic or permitted uses, except as provided in the Act. *Id.* §177-22.

The Board may exempt for specific periods minimal quantities of water or types of uses or users in specified areas from permit requirements. *Id.* §177-23.

[85] *Id.* §177-24.

Regarding renewal of permits, see §177-28.

[86] *Id.* §177-25.

[87] *Id.* §177-27.

[88] *Id.* §177-29.

[89] The Board may request a court to enjoin violations of the Act or its rules, regulations, or orders. *Id.* §177-10.

[90] *Id.* §§177-30 and -31.

[91] Shortage is defined as "the absence of a sufficient quantity and quality of ground water in a designated ground-water area to supply lawful use of water." *Id.* §177-2(11).

[92] But domestic, municipal, and military uses shall be preferred to other uses, preserved uses preferred over permit uses, and among substantially similar permitted uses prior uses shall be preferred unless this would impair the public interest. *Id.* §177-33.

not, which threatens the public health, safety, and welfare."[93] after notice and hearing the Board may exercise certain additional powers.[94]

Determination of Conflicting Water Rights

The early water controversies in Hawaii related to the essentially small uses of water required for domestic purposes and for the irrigation of taro patches. With the decline in demand for taro and changeover to rice, which for a time was important, came contests over rice irrigation. But rice in turn gave way to sugar. With development of the sugar industry on a commercial scale, disputes arose over water claimed and actually used in former times under ancient taro rights and eventually transferred to sugarcane. And as the sugar industry continued to grow and its requirements for water increased, the issues extended to rights of use on a much larger scale than had been encompassed by the early native practices.

Despite these shifts in the agricultural and water economy of the Islands, the ancient principles governing rights to use water were retained. Necessarily, however, application of the fundamental principles to controversies of ever-widening scope required further appraisals and enlargements appropriate to the expanding economy, in which the use of "surplus" waters of streams—the excess over the quantity required to satisfy ancient appurtenant and prescriptive rights—had come to play such an important part.

Water rights have been established and controversies over their exercise have been settled (1) in the special statutory proceedings before commissioners of water rights, whose duties are now performed by the circuit judges; (2) before the circuit judges at chambers sitting as courts of equity; and (3) before the circuit courts in actions at law for damages. The decrees in such controversies have had the effect of adjudicating the water rights so established.[95]

Private ways and water rights.—As land titles came to be established and security in land tenure prevailed, the need for security in water titles, where the use of irrigated land was concerned, became increasingly apparent and important. Accordingly in 1860, the legislature amended a statute which had provided for commissioners to hear and determine all controversies respecting rights of way, by giving such commissioners corresponding power to settle controversies respecting rights in water.[96] After various changes over the years, a reenactment in 1907[97] provided that the term "commissioner" as used therein should refer to the judge of the circuit court within which the affected

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[93] *Id.* §177-2(5).

[94] And if the area is not a designated ground water area, it shall be so designated. *Id.* §177-34.

[95] For a discussion of jurisdictional principles and procedures, see Hutchins, W. A., "The Hawaiian System of Water Rights" 48-65 (1946).

[96] Haw. Laws 1860, p. 12, originally enacted, Laws 1856, p. 16.

[97] Haw. Laws 1907, Act 56.

property should be situated. This vested in the circuit judges, rather than appointed commissioners, jurisdiction of rights of private ways and water rights in controversies arising under the statute.

The circuit courts have jurisdiction to hear and determine all controversies with respect to rights of private way and water rights without the intervention of a jury.[98] Any interested person or the State may apply for the settlement of rights involved under these provisions by filing a complaint with the circuit court for the circuit in which the property affected is located. The court then issues a summons to each landowner or occupant with an interest in the controversy and may, in its discretion, also publish notice.[99] As far as possible, the rights of parties served by published notice who have not appeared in the action shall be ascertained by the court.[100] Appeals may be taken to the supreme court.[101]

Courts of equity.—Jurisdiction in equity, in a proper case for equity, exists concurrently with the jurisdiction in the proceedings regarding private ways and water rights where controversies respecting water rights are involved.[102]

In 1932 the supreme court observed, on demurrer, that in proper cases courts of equity have jurisdiction of water rights controversies even where the lands and waters are situated in another circuit. Hence the judge of the first circuit, sitting as a court of equity, has jurisiction to enjoin the illegal diversion of water when the land involved is situated in the fifth circuit. But when the same judge of the first circuit proceeds in cases arising under the statutes for private ways and water rights,[103] his jurisdiction is limited to cases in which the land is within his own circuit.[104]

Decrees.—Determination of the right to use water includes a determination of the actual extent of the right where possible.[105] A quantitative determination might be defined and measured either by time of use or in any other way that appears just and in accordance with the rights of the parties. Awards by time, or rotation, based upon ancient custom, were made in various cases.[106]

Other ancient methods of apportionment have also been preserved by judicial decree, notably the general practice of irrigating kalo in adjacent terraces by continuous flow from higher to lower levels.[107] In time of diminished

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[98] Haw. Rev. Stat. §664-32 (Supp. 1973).

[99] *Id.* §664-33.

[100] *Id.* §664-34.

[101] *Id.* §664-36.

[102] *Wailuku Sugar Co.* v. *Cornwell*, 10 Haw. 476, 477-480 (1896).

[103] Haw. Rev. Stat. §§664-31 to -36 (Supp. 1973).

[104] *Territory of Hawaii* v. *Gay*, 32 Haw. 404, 410-414, 418 (1932).

[105] *Loo Chit Sam* v. *Wong Kim*, 5 Haw. 130, 132-133 (1884); *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 69 (1917).

[106] See, e.g., *Liliuokalani* v. *Pang Sam*, 5 Haw. 13 (1883). See also *Lonoaea* v. *Wailuku Sugar Co.*, 9 Haw. 651, 662-664 (1895); *See Yick Wai Co.* v. *Ah Soong*, 13 Haw. 378, 380 (1901).

[107] *Wailuku Sugar Co.* v. *Hale*, 11 Haw. 475, 476 (1898). Preservation of ancient

streamflow, the normal division has been maintained, whether it related to a definite proportion of the normal flow[108] or to a time schedule.[109]

The statute relating to controversies over private ways and water rights requires the court to render such decision as may appear in each particular case to conform to vested rights and to be just and equitable between the parties. The decision must state expressly the findings of fact on the evidence, and the proportion of time for use and other matters necessary to the water right; and it may also regulate the methods by which water may be obtained and by which its supply may be controlled.[110]

Decrees rendered in settlement of water controversies have contained corrective orders for the purpose of enforcing the declared rights of the parties. Such an order in even the early commissioner decisions seems to have been accorded the force of an injunction. Any question there may have been as to this was dispelled by a supreme court decision rendered in 1884.[111]

Appeals may be taken by aggrieved parties to the supreme court in the manner and within the time prescribed by the rules of court.[112]

Idaho

Governmental Status

The Organic Act of Congress establishing the Territory of Idaho was approved March 3, 1863.[1] Idaho was admitted to statehood by Act of Congress approved July 3, 1890.[2]

Early Water Uses

Idaho is one of the numerous western regions into which so many California miners migrated when "diggings" in various foothill areas finally "played out" on an increasingly widespread scale. The less affluent gold seekers had the choice of giving up their mining livelihood or moving on to virgin territory.[3]

The Idaho mining industry's early influence upon water legislation is reflected in a provision in the first Territorial appropriation statute for posting notices of appropriation of water and for recording them with the county

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conditions at diversion structures: *Chun Lai* v. *Mang Young*, 10 Haw. 133, 134-135 (1895); *See Yick Wai Co.* v. *Ah Soong*, 13 Haw. 378, 382-383 (1901).

[108] *Peck* v. *Bailey*, 8 Haw. 658, 672 (1867).

[109] *Carter* v. *Territory of Hawaii*, 24 Haw. 47, 61-62 (1917). To the extent that it is equitable to all parties, the same principle of proportional diminution in time of shortage applies also to different lands along a single ditch.

[110] Haw. Rev. Stat. §664-34 (Supp. 1973).

[111] *Davis* v. *Afong*, 5 Haw. 216, 218 (1884).

[112] Haw. Rev. Stat. §664-36 (Supp. 1973).

[1] 12 Stat. 808 (1863).

[2] 26 Stat. 215 (1890).

[3] See Shinn, C. H., "Mining Camps, A Study in American Frontier Government" 276-280 (1948; originally published in 1885).

officials "within the time allowed in case of a mining claim," and in the 1889 constitutional provision that in any organized mining district those using the water for mining purposes or for milling connected with mining have preference over those using the same for manufacturing or agriculture, subject to the requirements of the law of eminent domain. These matters are referred to later.

State Administrative Agency

Until 1970, administrative functions with respect to the appropriation of water, certain functions regarding determination of conflicting water rights, and the administration of water rights and distribution of water were assigned to the Department of Reclamation, headed by the State Reclamation Engineer.[4] In 1970, this Department was changed to the Department of Water Administration and the title of State Reclamation Engineer was changed to Director of that Department.[5] In 1974, the Department of Water Administration was changed to the Department of Water Resources and the Director became head of that Department.[6]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—The Idaho constitution declares, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the state may regulate and limit the use thereof for power purposes."[7]

In 1881 the Territorial legislature provided for the appropriation of water, for posting notices at the point of diversion, for their recording as in the case of mining claims, and for procurement of rights of way.[8] Another contemporary act provided regulatory machinery governing the distribution of water with the services of watermasters.[9] There was further legislation in 1895 and

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[4] See Idaho Code Ann. § §42-1801 and -1804 (1948), 67-2403, and -3301 (1949).

[5] Idaho Laws 1970, ch. 12, amending Code Ann. §42-1801 (1948).

[6] Idaho Laws 1974, ch. 286, §1, and ch. 20, §31, amending Code Ann. §42-1804 (1948).

[7] Idaho Const. art. XV, §3. Section 3 further declares: "Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."

[8] Idaho Laws 1881, p. 267.

[9] *Id.* p. 273.

1899,[10] followed in 1903 by a comprehensive statute[11] which set up for the first time a State administrative agency and which as revised, codified, and amended is still in force.[12]

The Idaho Supreme Court, in its first reported decision relating to rights to the use of water, declared that the first appropriation of water for a useful or beneficial purpose gives the better right thereto, and that the right once vested—unless abandoned—must be protected and upheld.[13] The second reported decision in this field likewise affirmed the judgment of the trial court in favor of a prior appropriation of water,[14] and the three following ones reversed trial court judgments because they had failed to determine the rights of the parties according to their priorities of appropriation.[15]

In one of the earliest of these decisions, the supreme court subjected the trial court to considerable sarcastic criticism for rendering a judgment that not only failed to take adequate account of the plaintiff's prior appropriation, but purported to award priorities to all parties in an aggregate amount much greater than the maximum quantity of water flowing in the stream at its highest stage.[16]

Procedure for appropriating water.—After following for 22 years the posting and filing or so-called constitutional method of appropriating water, the legislature in 1903 adopted the administrative system which had originated in Wyoming and was then commanding attention in the West.[17] This placed the function of regulating appropriations under the jurisdiction of the State Engineer, to which office the present Department of Water Resources headed by the Director has succeeded.

Prior to 1971 legislation, discussed later, an intending appropriator of water in Idaho had the option of following alternative procedures—one the so-called constitutional method, the other the "statutory" method. The procedures were of equal validity. The fact that they coexisted resulted from judicial constructions of the sweeping effect of the original constitution of 1889.

The Idaho constitution as approved in 1889 contained a declaration that

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[10] Idaho Laws 1895, p. 174, Laws 1899, p. 380.

[11] Idaho Laws 1903, p. 223.

[12] Idaho Code Ann. § §42-101 *et seq.* (1948).

[13] *Malad Valley Irr. Co.* v. *Campbell*, 2 Idaho 411, 414, 18 Pac. 52 (1888).

[14] *Drake* v. *Earhart*, 2 Idaho 750, 757, 23 Pac. 541 (1890).

[15] *Hillman* v. *Hardwick*, 3 Idaho 255, 259-262, 28 Pac. 438 (1891); *Geertson* v. *Barrack*, 3 Idaho 344, 347, 29 Pac. 42 (1892); *Kirk* v. *Bartholomew*, 3 Idaho 367, 372, 29 Pac. 40 (1892).

[16] *Hillman* v. *Hardwick*, 3 Idaho 255, 259-262, 28 Pac. 438 (1891). Despite testimony to the effect that 150 inches was the maximum flowing in the creek at its highest stage and that the capacity of plaintiff's ditches was 125 inches, he was awarded only 75 inches although varying amounts went to the defendants aggregating 370 inches to June 15 and lesser quantities thereafter. The supreme court's unusual ridicule is in 3 Idaho at 260.

[17] Idaho Laws 1903, p. 223.

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."[18] It was never the intention of the 1903 legislation, according to the Idaho Supreme Court in 1911, to cut off the right an appropriator and user of water may acquire by actual diversion of the water and its application to a beneficial use.[19]

It may well be that the legislature never intended to impair the validity of an appropriation initiated under the previous law and carried to completion with reasonable diligence under the present one, and certainly there is nothing in the 1903 legislation to suggest such a purpose. But in appraising the actual legislative intent as to the force and effect of the new statute two items are noteworthy: (1) the 1903 legislature declared that all rights to divert and use water "shall hereafter" be acquired under the provisions of the new law;[20] and (2) the first report of the Idaho State Engineer, for the period March 1, 1903, to November 1, 1904—prior to the first interpretive decision in 1905, noted below—stated, "The irrigation law which was enacted at the Seventh Session of the Legislature, in 1903, completely changed the manner of obtaining rights to divert and use the waters of the streams of the State."[21] From these legislative and administrative statements it is a reasonable inference that judicial denial of the exclusiveness of the new procedure was not then anticipated by its proponents.

The basis for the well-established judicial recognition of these alternative methods of appropriating water was laid in the decision in the *Sand Point* case, rendered shortly after the 1903 statute was enacted, although actually the constitutional appropriation in this factual situation had been validly initiated under the prior act of 1899 and diligently prosecuted thereafter.[22] The court said, "A person desiring to appropriate the waters of a stream may do so either by actually diverting the water and applying it to a beneficial use, or he may pursue the statutory method by posting and recording his notice and commencing and prosecuting his work within the statutory time."

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[18] Idaho Const. art. XV, §3. In 1928, this sentence was amended by adding thereto a clause "except that the state may regulate and limit the use thereof for power purposes."

[19] *Nielson* v. *Parker*, 19 Idaho 727, 730-733, 115 Pac. 488 (1911).

[20] Idaho Laws 1903, p. 223, §41, Code Ann. §42-201 (Supp. 1974).

[21] Biennial Report of the State Engineer to the Governor of Idaho (1903-1904), p. 7. The first State Engineer went on to say: "This law was designed to establish a right to the use of water by direct means without the necessary recourse to the courts, which was a feature of the old law. The new law has been working most satisfactorily, and has increased the confidence of the general public and of the practical irrigator himself in the water rights and the benefits to be derived therefrom. That the citizens of the State have confidence in the law is evidenced by the large number of appropriations that have been made since the law became operative and the general activity throughout the State in irrigation matters."

[22] *Sand Point Water & Light Co.* v. *Panhandle Dev. Co.*, 11 Idaho 405, 412-414, 83 Pac. 347 (1905).

In writing the foregoing part of its opinion, and in thereafter pointing out the differences between statutory and nonstatutory appropriations, the court was patently confusing the new legislative act of 1903 with preceding ones. Despite its confused thesis, the purport of which is clear enough at this time, what the court actually held was that an appropriation initiated by posting and filing notice under the earlier law and completed with reasonable diligence after the 1903 act had replaced it had priority over an appropriation initiated by applying to the State Engineer for a permit under the 1903 law. Nevertheless, the case was cited by the same court a few years later as upholding appropriation by mere diversion and application to beneficial use despite statutory law that established formal procedure,[23] and it has generally been regarded as earliest in the line of supreme court cases in which the judicial principle of alternative methods of appropriating water was established.[24]

However, in 1971 the legislature amended the earlier 1903 legislation[25] so as to expressly provide, among other things, "Such appropriation shall be perfected *only* by means of the application, permit and license procedure as provided in this title: provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation."[26] This clearly manifests the legislature's intention to abolish the constitutional method as a method of appropriating water after the effective date of the 1971 legislation, except for appropriations commenced previously.[27]

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[23] *Nielson* v. *Parker*, 19 Idaho 727, 730-731, 115 Pac. 488 (1911).

[24] Some cases in which related matters were litigated include *Joyce* v. *Rubin*, 23 Idaho 296, 306, 130 Pac. 793 (1913); *Newport Water Co.* v. *Kellogg*, 31 Idaho 574, 578, 174 Pac. 602 (1918); *Bachman* v. *Reynolds Irr. Dist.*, 56 Idaho 507, 514, 55 Pac. (2d) 1314 (1936).

[25] This is described at note 20 *supra*.

[26] Idaho Laws 1971, ch. 177, Code Ann. §42-201 (Supp. 1974). (Emphasis added.)

This legislation also amended §42-103, described at note 29 *infra* so as to expressly provide that the right to use unappropriated waters "shall hereafter be acquired *only* by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted." (Emphasis added.)

[27] The validity of this legislation does not appear to have been decided by the Idaho Supreme Court. The court has, however, discussed Idaho Const. art. XV, §3 in upholding the validity of a 1963 amendment restricting ground water appropriation to the statutory method, as described at note 128 *infra*. Article XV, §3 of the Constitution, set out in full at note 7 *supra*, provides, *inter alia*, as indicated above at note 18, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes."

In *State, Dept. of Parks* v. *Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 Pac. (2d) 924, 929 (1974), the court's plurality opinion stated, without further

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All waters of the State, when flowing in their natural channels, including natural springs and lakes, are declared to be the property of the State, subject to appropriation.[28] Rights to use unappropriated waters of rivers, streams, and lakes may be so acquired.[29]

The Idaho Supreme Court has said:

> It is a fundamental concept that under our constitution, water which has already been appropriated is not subject to appropriation by another, unless it has been abandoned * * *. Idaho Const. Art. 15, §§3, 4, 5. Before any permit to appropriate water to a beneficial use can ripen into a right to use the water, it is basic that the permit holder must show a supply of unappropriated water. Idaho Const. Art. 15, §3.[30]

The appropriation must be for some useful or beneficial purpose.[31] Examples in the decided cases include irrigation of cropped land;[32] irrigation of uncultivated land;[33] municipal use, including both existing and future needs;[34] mining;[35] and millpower.[36] One appropriation included drinking, cooking, domestic purposes, watering of stock, and irrigating a truck garden.[37]

The principle that as between appropriators the first in time is first in right is declared in the Idaho constitution, the appropriation statute, and decisions of the supreme court.[38] The broad application of the principle is subject to certain preferences. See "Restrictions and preferences in appropriation of water." The date of priority shown on a license is the date of application to which the right relates.[39]

(*Continued*)

comment in this regard, that "The Idaho legislature in 1971 made compliance with the statutory procedure mandatory." The validity of this 1971 legislation was not in issue.

[28] Idaho Code Ann. §42-101 (1948).

[29] Idaho Code Ann. §42-103 (Supp. 1974).

A permit may not be issued to appropriate waters of any lake 5 acres or less in surface area, pond, pool, or spring located wholly on one's private land except to such owner or to another with the owner's written permission, formally verified. Idaho Code Ann. §§42-212 and -213 (1948). With respect to this statute's application to springs, see the discussion in chapter 18 at note 221.

[30] *Cantlin* v. *Carter*, 88 Idaho 179, 397 Pac. (2d) 761, 766 (1964).

[31] Idaho Code Ann. §42-104 (1948).

[32] *In re Robinson*, 61 Idaho 462, 469, 103 Pac. (2d) 693 (1940).

[33] *Rudge* v. *Simmons*, 39 Idaho 22, 27-28, 226 Pac. 170 (1924).

[34] *Beus* v. *Soda Springs*, 62 Idaho 1, 6-7, 107 Pac. (2d) 151 (1940).

[35] *Zezi* v. *Lightfoot*, 57 Idaho 707, 711-712, 68 Pac. (2d) 50 (1937).

[36] *Union Grain & Elevator Co.* v. *McCammon Ditch Co.*, 41 Idaho 216, 221-223, 240 Pac. 443 (1925).

[37] *Cottonwood Water & Light Co.* v. *St. Michael's Monastery*, 29 Idaho 761, 769, 162 Pac. 242 (1916).

[38] Idaho Const. art. XV, §3; Idaho Code. Ann. §42-106 (1948); *Application of Boyer*, 73 Idaho 152, 161, 248 Pac. (2d) 540 (1952).

[39] Idaho Code Ann. §42-219 (Supp. 1974).

Any person, association, or corporation may make an appropriation of water under the statute.[40] Water service organizations as well as individuals may make appropriations for sale or rental to others.[41]

One who proposes to acquire a right to the beneficial use of water of natural streams or other public waters is required, before doing any work in connection with the proposed project, to make an application to the Department of Water Resources for a permit to make the appropriation. Following publication of notice, protests may be filed, upon which hearings are held and decisions rendered subject to appeal to the courts. Criteria are provided by the statute for denial or partial approval of applications. See "Restrictions and preferences in appropriation of water," below. An application on which approval is endorsed constitutes a permit, which is the State's authorization to the applicant to proceed with construction of diversion works and to take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. Upon making proof of completion of works, the permittee receives from the Department a certificate. And upon making proof of application of water to beneficial use, he receives a license which is *prima facie* evidence of the holder's right to use the quantity of water indicated therein.[42] Any party aggrieved by a decision of the Department in proceedings for issuance of a permit, certificate, or license may appeal therefrom to the appropriate district court.[43]

Under the statutory procedure, the priority of the completed right relates back to the time of filing (with the State) the application for a permit to appropriate water, and so it dates its inception therefrom.[44] But under the constitutional method of appropriation[45] the priority of right dates only from the time of application of the water to beneficial use.[46] As noted above, legislation enacted in 1971 amended the earlier legislation to manifest an intention to abolish the previously optional constitutional method after the 1971 act's effective date, except for such appropriations commenced previously.[47]

In order to obtain the benefit of the doctrine of relation, it is necessary that in all respects the statutory procedure be followed strictly.[48] Under the

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[40] *Id.* §42-202.

[41] Idaho Const. art. XV, § §1, 2, 4, 5, 6.

[42] Idaho Code Ann. § §42-201 to -213, -217 to -225 (1948), as amended.

[43] Idaho Code Ann. § §42-203 and -204 (Supp. 1974) and -224 (1948).

[44] Idaho Code Ann. §42-219 (Supp. 1974).

But see note 48 *infra* regarding the effect on priority of failure to comply with statutory requirements.

[45] This is discussed at note 17 *et seq., supra.*

[46] *Crane Falls Power & Irr. Co.* v. *Snake River Irr. Co.*, 24 Idaho 63, 81-82, 133 Pac. 655 (1913).

[47] See the discussion at notes 25-27 *supra.*

[48] *Big Wood Canal Co.* v. *Chapman*, 45 Idaho 380, 405-406, 263 Pac. 45 (1927). In

(*Continued*)

statutory procedure, no appropriation is complete until the water has been applied to a beneficial use.[49] An appropriation begun under the constitutional method, without conforming to the statutory procedure, likewise could be completed by applying water to the beneficial use for which appropriated.[50]

The Idaho Water Resources Board, as the constitutional water agency within the Department of Water Resources, may file applications and obtain permits to appropriate, store, or use the unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects.[51]

(*Continued*)
certain instances, appropriations of permittees who failed to fulfill all necessary conditions were made to depend upon actual diversion and application to beneficial use, which of course precluded relating the date of priority back to the date of filing. *Rabido* v. *Furey*, 33 Idaho 56, 63, 190 Pac. 73 (1920); *Basinger* v. *Taylor*, 36 Idaho 591, 597-598, 211 Pac. 1085 (1922). However, the statute provides that when proof of application of water to beneficial use is made later than the date stated in the permit or any authorized extension, the priority shall relate to a date subsequent to the date of filing the application for a permit, the period of postponement to be equal to that of the delay. Idaho Code Ann. §42-219 (Supp. 1974). Sections 42-204 and -217 to -218a contain limitations and provisions regarding completion dates, extensions, etc.

[49] *Basinger* v. *Taylor*, 30 Idaho 289, 299, 164 Pac. 522 (1917).

[50] Prior to the 1971 legislation discussed above, a statutory appropriator who had conformed to the statutory procedure and filed his application *before* a nonstatutory (constitutional-method) claimant began work but who completed his appropriation and obtained his license *after* the nonconformist had completed application of the water to beneficial use—even though months or years afterward—had the prior right. On the other hand, a right acquired under the constitutional method was superior to any right that an appropriator *later in time* could procure under either method. One who completed his nonstatutory (constitutional-method) appropriation before another claimant applied to the State for a permit was therefore first in right and could not be deprived of it by the issuance of a permit or license to his adversary by the State. *Nielson* v. *Parker*, 19 Idaho 727, 733-734, 115 Pac. 488 (1911).

A nonstatutory (constitutional-method) appropriator of course had no fees to pay to the State in acquiring his right. However, in establishing or defending his right, he lacked the advantage of the public record of acquisition and completion available to the statutory claimant, and so had to rely on other evidence. Completion of a statutory appropriator's application of water to beneficial use became a matter of public record when he was ready to make proof, whereas a constitutional-method appropriator was under no duty to make proof unless and until it was necessary to defend his water right or else lose it, which might not occur until long afterward. In the meantime, unless the claimant was forewarned, records may not have been kept.

As noted above, the 1971 legislation manifested the legislature's intention to abolish the previously optional constitutional method except for such appropriations commenced previously.

The legislation regarding distribution of water, as amended in 1973, provides, *inter alia*, that for such purposes, during scarcity of water "the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right" if necessary to supply such rights in the stream or water supply comprising a water district. Idaho Code Ann. §42-607 (Supp. 1974), discussed at note 154 *infra*.

[51] This shall be done in the same manner and subject to all State laws regarding

Idaho legislation also has authorized and directed the Governor to appropriate, in trust for the people of the State, all or so much of the unappropriated water of certain lakes as may be necessary for their preservation for scenic beauty, health, recreation, or other specified purposes. The legislation provides, among other things, that no proof of completion of any works of diversion shall be required.[52]

Other legislation has directed the State Park and Recreation Board to appropriate certain unappropriated waters in trust for the people of the State.[53] In a recent decision, the Idaho Supreme Court dealt with one of these legislative provisions, which directed the Board to appropriate unappropriated water in a certain area and preserve the water for its scenic beauty and recreational purposes in trust for the people of the State, and declared such use to be a beneficial use.[54] In this case the views of two justices were presented in the plurality opinion, a third justice wrote a specially concurring opinion, and two of the five justices dissented.[55] The majority of the court upheld the validity of this statute on the issues decided. The plurality opinion held that the statute did not violate the constitutional mandate,

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appropriation of water except that the Board need not pay any fees for its appropriations. Idaho Code Ann. § § 42-1732 and -1734(g) (Supp. 1974).

The Water Resources Board *inter alia* also has the power and duty to progressively formulate an integrated, coordinated program for conservation, development, and use of all unappropriated water resources of the State, based on studies and public hearings, and guided by several criteria, including a provision that existing rights and relative priorities of water established in Idaho Const. art. XV, § 3 (set out at note 7 *supra*) shall be protected and preserved. *Id.* §42-1734(b).

[52] Idaho Code Ann. § § 67-4301 to -4306 (1973).

[53] Idaho Code Ann. § 67-4307 to -4312 (Supp. 1974).

[54] *Id.* §67-4307.

[55] *State, Dept. of Parks* v. *Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 Pac. (2d) 924 (1974). In his specially concurring opinion, Justice Bakes began, "I concur in the result reached by Chief Justice Shepard in his plurality opinion, although not necessarily everything stated therein. Additionally, I wish to address in a different manner the question of whether or not the preservation of the waters of Malad Canyon in a natural state is a beneficial use that may be appropriated without the means of a diversion." 530 Pac. (2d) at 929.

As described in the plurality opinion, "In essence the statute directs the Department of Parks of the State of Idaho to appropriate in trust for the people of Idaho certain unappropriated natural waters of the Malad Canyon in Gooding County, Idaho. Additionally, it declares (1) that the preservation of the waters for scenic beauty and recreation uses is a beneficial use of water; (2) that the public use of those waters is of greater priority than any other use save domestic consumption, and (3) that the unappropriated state land located between the highwater marks on either bank of these waters is to be used and preserved in its present condition as a recreational site for the people of Idaho." 530 Pac. (2d) at 925. But the question of priority as provided in the second statutory declaration, in the quoted description of the statute, was not included in the three "primary questions" that the plurality opinion said the case presented and apparently was not considered in it or the concurring opinion. 530 Pac. (2d) at 924-925.

mentioned earlier,[56] that the "right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied * * *."[57] The plurality opinion also held that (1) in this instance scenic beauty and recreational purposes were validly declared by the statute to be a beneficial use,[58] and (2) under this legislation there need not be an actual physical diversion of the water in order to support an appropriation. The plurality opinion stated that in Idaho, "As a general proposition one must set forth the location and description of a proposed physical diversion of water in an application for a permit to appropriate water. I.C. §42-202." However, "We deem it to be the intent of the Idaho Legislature to dispense with any physical diversion requirement in the case of the appropriation directed in I.C. §67-4307."[59] The plurality opinion also held that the Idaho constitution does not require actual physical diversion.[60]

The statutory procedure for appropriation of water includes provisions relating to storage.[61]

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[56] This is quoted at note 7 *supra*.

[57] The plurality opinion rejected the contention, suggested by certain language of a previous opinion [*Board* v. *Enking*, 56 Idaho 722, 58 Pac. (2d) 779 (1936)], that the constitution imposes an absolute prohibition on the State's appropriating water. The plurality opinion said, *inter alia*, "In contrast with the situation in *Enking* and the fears of the court expressed therein, I.C. §67-4307, at issue herein, only authorizes the Department of Parks to appropriate, in trust for the public, certain clearly designated waters for nonconsumptive use. We are of the opinion that the legislature in the instant case has not adopted an insidious scheme in an attempt to monopolize the state's unappropriated waters or to condemn already appropriated waters. Only in a geographical sense can there be said to be any interference with a future private appropriative right since the legislatively authorized use is nonconsumptive and once the waters have left the area delineated by the statute they are and will be subject to routine private appropriation." 530 Pac. (2d) at 927.

[58] The majority of the court rejected the contention that the five uses mentioned in Idaho Const. art. XV, §3 (domestic, agriculture, mining, manufacturing, and power) are the only cognizable beneficial uses under the Idaho constitution. 530 Pac. (2d) at 927-928.

In a concurring opinion, Justice Bakes said, *inter alia*, "What we have decided in this case is that the use now before us, although not specifically listed in Article 15, §3, of the Constitution is beneficial because, considering today's circumstances, the legislative classification is reasonable based on the record. I would restrict today's holding to the narrow proposition that the use before us is beneficial so long as, and only so long as, the circumstances of water use in the state have not changed to the extent that it is no longer reasonable to continue this use at the expense of more desirable uses for more urgent needs." 530 Pac. (2d) at 932.

[59] 530 Pac. (2d) at 929. See also the concurring opinion, 530 Pac. (2d) at 934.

[60] 530 Pac. (2d) at 928. See also the concurring opinion, 530 Pac. (2d) at 932-934.

[61] Idaho Code Ann. §42-202 (Supp. 1974). See *Knutson* v. *Huggins*, 62 Idaho 662, 668, 115 Pac. (2d) 421 (1941); *Payette Lakes Protective Assn.* v. *Lake Res. Co.*, 68 Idaho 111, 121-123, 189 Pac. (2d) 1009 (1948).

Applications for permits for the impoundment of water in a reservoir with an active storage capacity in excess of 10,000 acre feet must first be submitted to the Water

With respect to the question of trespass and water rights, the Idaho Supreme Court said in another recent case:

> The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.
>
> In the case at bar the land designated as the point of diversion and place of use in appellants' original application was private property not owned by the appellants and therefore no valid water right could be developed on it. Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right.[62]

Restrictions and preferences in appropriation of water.—An application to appropriate water may be rejected, or approved for a reduced quantity of water or upon conditions, if the proposed use conflicts with existing rights, or the water supply is insufficient, or there is delay, speculation, lack of good faith, or lack of financial resources, or if in case of a renewal permit there is lack of diligence. Otherwise, applications made in proper form which contemplate application of available water to beneficial use must be approved.[63]

The statute governing the appropriation of water provides that no one shall be authorized to divert for irrigation purposes more water than 1 cubic foot per second of the normal flow for each 50 acres of land to be irrigated, or more than 5 acre feet of stored water per annum for each acre to be irrigated, unless

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Resources Board for its approval or disapproval. Idaho Code Ann. §42-1737(a) (Supp. 1974).

[62] *Lemmon* v. *Hardy*, 95 Idaho 778, 519 Pac. (2d) 1168, 1170 (1974).

However, in an earlier case the court said, "The trespass must be physical, not merely *mental*." *Idaho Power Co.* v. *Buhl*, 62 Idaho 351, 358, 111 Pac. (2d) 1088 (1941), referring to *Basset* v. *Swenson*, 51 Idaho 256, 259-262, 5 Pac. (2d) 722 (1931), in which the data necessary for use in applying for a permit to appropriate water were obtained by triangulation survey from a highway, without going upon private land. As there was no physical trespass, issuance of a permit to the applicant was valid and he was thereupon allowed to condemn a right to enter the property in order to effectuate the diversion of water authorized in his permit.

In the *Lemmon* case, the Director of the Department had relied on the *Basset* case and on *Marshall v. Niagra Springs Orchard Co.*, 22 Idaho 144, 125 Pac. 208 (1912), in holding that it was not speculation to file an application for use of water on designated land without a possessory interest in the land. The court said those cases were distinguishable from the instant *Lemmon* case since in those cases "[t]he power companies possessed the power of condemnation which permitted them to acquire the necessary land. They were not seeking land upon which to beneficially use the water, but solely for the power site generation purposes. The appellants in this action had shown no means of acquiring the land stated in their original application." 519 Pac. (2d) at 1171.

[63] Idaho Code Ann. § §42-203 and -204 (Supp. 1974).

See the discussion in note 29 *supra* with respect to restrictions on the issuance of permits to use certain waters located wholly on one's private land except to the landowner or with his permission.

it can be shown to the satisfaction of the Department of Water Resources that a greater quantity is necessary.[64] Another section provides that no license or court decree shall confirm the right to use more water for irrigation purposes than 1 second foot for each 50 acres unless the Department or the court, respectively, is satisfied that more is necessary.[65]

An important section of the Idaho constitution has been mentioned earlier.[66] This in part declares preferences in the use of appropriated water. Priority of appropriation gives the better right as between water users; but when the supply of water of any natural stream is not enough for all, domestic use has first preference[67] and agriculture is preferred over manufacturing. In an organized mining district, mining purposes or milling purposes connected with mining are preferred over manufacturing and agriculture. But the exercise of such preferences is subject to the laws regulating exercise of the power of eminent domain. And the Idaho Supreme Court has held that water could not be taken from prior appropriators without compensation in order to supply the domestic needs of others.[68] It also has been held that the constitutional preference in favor of mining does not authorize or excuse filling up of natural stream channels or discharge of poisonous minerals into their waters.[69]

Some aspects of the Idaho appropriative right.—The appropriative right of diversion and beneficial use of water[70] is valuable property.[71] It is real property,[72] appurtenant to the land to which the water is applied.[73] But the water right may be separated from the land, separately conveyed, and made appurtenant to other land.[74]

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[64] *Id.* §42-202.

[65] Idaho Code Ann. §42-220 (1948).

[66] Idaho Const. art. XV, §3, set out at note 7 *supra.*

[67] This is subject to such limitations as may be prescribed by law.

[68] *Basinger* v. *Taylor*, 30 Idaho 289, 294-295, 164 Pac. 522 (1917); *Montpelier Mill. Co.* v. *Montpelier*, 19 Idaho 212, 219-220, 113 Pac. 741 (1911).

[69] *Ravndal* v. *Northfork Placers*, 60 Idaho 305, 311, 91 Pac. (2d) 368 (1939); *Bunker Hill & Sullivan Min. & Concentrating Co.* v. *Polak*, 7 Fed. (2d) 583, 585 (9th Cir. 1925).

See note 55 *supra* regarding a statutory preference provision in an appropriation of certain waters by the State Park and Recreation Board under Idaho Code Ann. §67-4307, and see also §§67-4308 to -4311 (Supp. 1974).

[70] *Griffiths* v. *Cole*, 264 Fed. 369, 372 (D. Idaho 1919).

[71] *Head* v. *Merrick*, 69 Idaho 106, 109, 203 Pac. (2d) 608 (1949).

[72] *Hale* v. *McCammon Ditch Co.*, 72 Idaho 478, 488, 244 Pac. (2d) 151 (1951). It includes the right to have the water flow in the stream to the appropriator's point of diversion. *Bailey* v. *Idaho Irr. Co.*, 39 Idaho 354, 358, 227 Pac. 1055 (1924); *Weeks* v. *McKay*, 85 Idaho 617, 622, 382 Pac. (2d) 788 (1963).

[73] Idaho Code Ann. §§42-101, -220 (1948), and -1402 (Supp. 1974); *Follet* v. *Taylor Bros.*, 77 Idaho 416, 425-426, 294 Pac. (2d) 1088 (1956); *Anderson* v. *Cummings*, 81 Idaho 327, 340 Pac. (2d) 1111 (1959). Conveyance with land: Idaho Code Ann. §§42-220 (1948) and -1402 (Supp. 1974); *Russell* v. *Irish*, 20 Idaho 194, 198, 118 Pac. 501 (1911); *Paddock* v. *Clark*, 22 Idaho 498, 510, 126 Pac. 1053 (1912).

[74] *First Security Bank of Blackfoot* v. *State*, 49 Idaho 740, 746, 291 Pac. 1064 (1930); *In re Robinson*, 61 Idaho 462, 469, 103 Pac. (2d) 693 (1940). Conveyance of title to

The Idaho constitution contains several sections relating to appropriation of water for sale, rental, or distribution, and to regulation of distribution and use.[75] The supreme court recognizes that one who makes an appropriation for such purposes has a valuable property right,[76] and that title to the appropriative right to water carried in a ditch for such purposes is in the ditch owner.[77] However, the commercial canal enterprise and the consumer must depend upon each other for success in their respective water activities,[78] and one who acquires a right of use under such an arrangement retains it so long as he pays a reasonable rate and complies with reasonable regulations.[79]

The right to water once sold to an applicant "becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use."[80] The court also has said that an irrigation district holds title in trust to the waters and irrigation works which it manages for its water users.[81]

As between appropriators, priority gives the better right, and "Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made," regardless of whether the junior's diversion is upstream or downstream from the senior's.[82] Junior appropriators, likewise, are entitled to protection against wrongful acts on the part of earlier appropriators.[83] A junior appropriator in Idaho may insist, as against his seniors, upon a continuance of conditions that existed not only *at*

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water right must be made in the same manner as title to land. *Hale* v. *McCammon Ditch Co.*, 72 Idaho 478, 488, 244 Pac. (2d) 151 (1951). But under some circumstances parol transfers have been upheld as between the parties pursuant to principles of equity. *Stowell* v. *Tucker*, 7 Idaho 312, 313-315, 62 Pac. 1033 (1900); *Francis* v. *Green*, 7 Idaho 668, 675, 65 Pac. 362 (1901); *Reynolds Irr. Dist.* v. *Sproat*, 70 Idaho 217, 221-222, 214 Pac. (2d) 880 (1950).

[75] Idaho Const. art. XV, § § 1-6.

[76] *Murray* v. *Public Util. Comm'n*, 27 Idaho 603, 619-620, 150 Pac. 47 (1915).

[77] *Farmers' Co-op. Ditch Co.* v. *Riverside Irr. Dist.*, 14 Idaho 450, 457-459, 94 Pac. 761 (1908); *Nampa & Meridian Irr. Dist.* v. *Barclay*, 56 Idaho 13, 18-19, 47 Pac. (2d) 916 (1935).

[78] *Hard* v. *Boise City Irr. & Land Co.*, 9 Idaho 589, 596, 76 Pac. 331 (1904).

[79] *Capital Water Co.* v. *Public Util. Comm'n*, 44 Idaho 1, 19-20, 262 Pac. 863 (1926).

[80] *Farmers' Co-op. Ditch Co.* v. *Riverside Irr. Dist.*, 14 Idaho 450, 458-459, 94 Pac. 761 (1908).

[81] *Harsin* v. *Pioneer Irr. Dist.*, 45 Idaho 369, 375, 378, 363 Pac. 988 (1927); *Bradshaw* v. *Milner Low Lift Irr. Dist.*, 85 Idaho 528, 381 Pac. (2d) 440 (1963).

[82] *Beecher* v. *Cassia Creek Irr. Co.*, 66 Idaho 1, 9-10, 154 Pac. (2d) 507 (1944).

The first appropriator can make an appropriation of the entire flow of a stream if he can and does apply the entire quantity of water to beneficial use within the limits of his right and if it is necessary for the purposes for which the right was acquired. *Keller* v. *Magic Water Co.*, 92 Idaho 276, 441 Pac. (2d) 725, 733 (1968); *Village of Peck* v. *Denison*, 92 Idaho 747, 450 Pac. (2d) 310, 313-314 (1969).

[83] *Van Camp* v. *Emery*, 13 Idaho 202, 208, 89 Pac. 752 (1907).

but also *subsequent to* the time he made his appropriation.[84] He may divert water to which senior appropriators are entitled during such times as it is not required by the latter in the necessary and proper irrigation of their lands.[85] And enlargements of an appropriation necessarily have priorities junior to any rights that have intervened between the date of the original appropriation and that of the enlargements.[86]

The Idaho Supreme Court has declared that an appropriator may not divert more water than necessary for the beneficial purpose served regardless of alleged seniority in right through priority in time. Moreover, the public policy against wasting water prohibits additional diversion of irrigation water, as part of the same appropriation, to compensate for unreasonable conveyance loss. The appropriator "must construct flumes, pipes, or other lining if necessary to prevent such unreasonable loss. * * * Accordingly, waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use."[87] However, a reasonable conveyance loss is allowable, the "reasonableness" in a particular case depending upon the circumstances thereof.[88]

One may make a prior appropriation of a certain quantity of water to be used for a designated period of time, and another person may make an appropriation of a like quantity from the same source during another period and as to that quantity be a prior appropriator himself.[89]

The Idaho Supreme Court has held that contracts providing for rotation in

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[84] *Crockett* v. *Jones*, 42 Idaho 652, 657, 249 Pac. 483 (1926), 47 Idaho 497, 503-504, 277 Pac. 550 (1929).

It appears, however, that not in all situations does the downstream appropriator have an unqualified right to the continuance of return flow conditions upstream upon which he claims dependence. Under the circumstances of two cases, the Idaho Supreme Court denied the claim because the return flow from upper lands was so excessive as to impute wastefulness rather than beneficial use to the exercise of the original appropriative right. Thus, in one case, it was held that the upstream owner could not be required to continue to irrigate the original land nor to waste 75 percent of the decreed water for the benefit of the lower appropriator. And in the other case, "It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit." In other words, the rule that a junior appropriator has the right to a continuation of stream conditions as they were when he made his appropriation will not be so construed as to compel the senior to waste his water by use on the original land. *Colthorp* v. *Mountain Home Irr. Dist.*, 66 Idaho 173, 179-182, 157 Pac. (2d) 1005 (1945); *Application of Boyer*, 73 Idaho 152, 162-163, 248 Pac. (2d) 540 (1952). See also *Jones* v. *Big Lost River Irr. Dist.*, 93 Idaho 227, 459 Pac. (2d) 1009, 1012 (1969).

[85] *Uhrig* v. *Coffin*, 72 Idaho 271, 275, 240 Pac. (2d) 480 (1952).

[86] *Union Grain & Elevator Co.* v. *McCammon Ditch Co.*, 41 Idaho 216, 221-223, 240 Pac. 443 (1925).

[87] *Glenn Dale Ranches, Inc.* v. *Shaub*, 94 Idaho 585, 494 Pac. (2d) 1029, 1032 (1972).

[88] *Clark* v. *Hansen*, 35 Idaho 449, 456, 206 Pac. 868 (1922). See also note 104 *infra* regarding another 1922 Idaho case.

[89] *Dunn* v. *Boyd*, 46 Idaho 717, 721-723, 271 Pac. 2 (1928); *Uhrig* v. *Coffin*, 72 Idaho 271, 275, 240 Pac. (2d) 480 (1952).

the delivery of water may be enforced by the courts.[90] In 1920 the court refused to sanction imposition of rotation practices upon water users accustomed to continuous delivery, without their consent;[91] but more recently it approved provisions in a decree imposing a rotation system upon delivery of certain transferred water but with limitations designed to safeguard rights of other users not parties to the transaction.[92]

Water from a reservoir or other source of supply may be turned into a ditch or natural channel and substituted or exchanged for an equal quantity (minus transmission losses) diverted from the stream into which the water flows or from a tributary thereof, provided rights of prior appropriators are properly protected.[93] Where a clear case of benefit and noninjury is made, such an exchange may be and has been approved.[94] But it is not sanctioned if the exchange would be detrimental to prior water users or would result in depriving them of a property right.[95]

In 1969, the legislature enacted specific procedures relating to State administrative approval for exchange of waters.[96]

The Idaho water rights statute provides that one entitled to the use of water or owning land to which water is appurtenant may change the point of diversion or place of use of the water, or both, if water rights of others are not thereby injured. If the right is represented by shares of corporate stock, or if the system is controlled by an irrigation district, the organization's consent is required for changes to outside lands.[97] Administrative procedure is provided by the statute for making such changes under supervision of the Department of Water Resources, subject to appeal to the district court.[98] The Idaho Supreme Court held that any change in point of diversion respecting a right acquired under the extant statute is governed by these provisions,[99] but that a change

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[90] *State* v. *Twin Falls Canal Co.*, 21 Idaho 410, 433, 439-443, 121 Pac. 1039 (1911); *Helphery* v. *Perrault*, 12 Idaho 451, 453, 454, 86 Pac. 417 (1906).

[91] *Muir* v. *Allison*, 33 Idaho 146, 162-163, 191 Pac. 206 (1920).

[92] *Beecher* v. *Cassia Creek Irr. Co.*, 66 Idaho 1, 8-9, 154 Pac. (2d) 507 (1944). See also *Simonson* v. *Moon*, 72 Idaho 39, 47, 237 Pac. (2d) 93 (1951); *Ramseyer* v. *Jamerson*, 78 Idaho 504, 514-515, 305 Pac. (2d) 1088 (1957).

[93] Idaho Code Ann. §42-105 (Supp. 1974).

[94] *Reno* v. *Richards*, 32 Idaho 1, 5, 178 Pac. 81 (1918); *Board of Directors of Wilder Irr. Dist.* v. *Jorgensen*, 64 Idaho 538, 546-550, 136 Pac. (2d) 461 (1943); *Almo Water Co.* v. *Darrington*, 95 Idaho 16, 501 Pac. (2d) 700, 704 (1972).

[95] *Daniels* v. *Adair*, 38 Idaho 130, 135-136, 220 Pac. 107 (1923); *Berg* v. *Twin Falls Canal Co.*, 36 Idaho 62, 64-66, 213 Pac. 694 (1922). In the later case the supreme court frowned upon an attempt to acquire the right to turn appropriated water into the lowline canal of an irrigation company and to take an equivalent amount out of its highline canal.

[96] Idaho Code Ann. § 42-240 (Supp. 1974). See also §42-105.

[97] *Id.* §42-108.

[98] *Id.* §42-222.

[99] *Washington State Sugar Co.* v. *Goodrich*, 27 Idaho 26, 40, 41, 147 Pac. 1073 (1915).

(*Continued*)

with respect to a right antedating the 1903 statute without following the procedure does not forfeit the right if others are not injured.[100]

In the latter case, decided in 1931, the court failed to note the significant difference between statutory and nonstatutory (constitutional) appropriations in Idaho, the statutory procedure not being the exclusive procedure. Legislation in 1971 has made the statutory method exclusive, although appropriations commenced before its effective date may be perfected under the constitutional method.[101] The current Idaho statutes provide that an application be made to the Department of Water Resources for changes in diversion points of water rights apparently acquired under either the statutory or constitutional methods.[102]

Junior appropriators benefiting from return flow from upstream lands of seniors have been able to forestall transfer of the upstream rights to other areas in some instances,[103] but not where the return flow was so excessive as to impute wastefulness in exercise of the upstream right.[104]

(*Continued*)

In *Keller* v. *Magic Water Co.*, 92 Idaho 276, 441 Pac. (2d) 725, 732-734 (1968), the facts in the case were said to constitute merely an amendment of a permit to show the correct point of diversion rather than an authorized change in the point of diversion. The court also concluded that there was only one diversion even though the diversion works consisted of a dam and two pumping units separated by location and time of construction, with the natural channel constituting part of the transportation system. When the second pumping unit was completed, the appropriator's date of priority dated back to the initial date of application for all waters beneficially used. The court refuted the contention that two separate and different points of diversion were being utilized, the second point being subsequent in time and thus subsequent in priority to others' rights.

[100] *Harris* v. *Chapman*, 51 Idaho 283, 297, 5 Pac. (2d) 733 (1931).

The court held also that in case of a desired change in place of use under circumstances to which the statute did not apply, the water right owner might proceed in a court of equity. *First Security Bank of Blackfoot* v. *State*, 49 Idaho 740, 744, 745, 291 Pac. 1064 (1930).

[101] See the discussion at note 26 *supra.*

[102] Idaho Code Ann. § §42-108 and -222 (Supp. 1974).

[103] *Hall* v. *Blackman*, 22 Idaho 556, 558, 126 Pac. 1047 (1912); *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 28-29 (9th Cir. 1917).

[104] *Colthorp* v. *Mountain Home Irr. Dist.*, 66 Idaho 173, 179-182, 157 Pac. (2d) 1005 (1945); *Application of Boyer*, 73 Idaho 152, 162-163, 248 Pac. (2d) 540 (1952); *Jones* v. *Big Lost River Irr. Dist.*, 93 Idaho 227, 459 Pac. (2d) 1009, 1012 (1969).

In a 1922 Idaho case, the Idaho Supreme Court said that an appropriator who had effected a saving of a 10 percent loss of water by changing the point of diversion "has materially augmented the amount of water available from the stream for beneficial use and should have a prior right to its use. This is not the case with the saving of 50 per cent, which is brought about by eliminating the loss from the old Farmers' ditch. * * * The loss of 50 per cent in the Farmers' ditch between the old point of diversion of the individual appellants and the place where they applied the water on their land was not a reasonable loss. The farmers could not reasonably have been expected to build a cement lined ditch at the cost of $100,000, as suggested by one of the

There is no specific statutory authority in Idaho for making changes in purpose of use of appropriated water, and few supreme court decisions have involved it; but the principles with respect to changes in point of diversion and place of use apparently are generally similar.[105]

The abandonment of a water right is a relinquishment of the right with the intention to forsake it.[106] Nonuse is not evidence of abandonment if it results from circumstances over which the holder of the right has no control.[107] The lack of intention to abandon the water right is obvious in cases in which the water continues to be used after some change is made in the means of exercising it. For example, a water right is not abandoned by changing the place of use to other lands.[108]

The Idaho legislation provides that all rights to the use of water, whether acquired under this legislation or otherwise, not beneficially used for 5 years for the purpose for which appropriated shall be lost and forfeited. Any right to the use of water lost through nonuse or forfeiture shall revert to the State and be again subject to appropriation under the statute. The statute provides procedures authorizing the Director of the Department of Water Resources to extend the time for forfeiture for an additional period not to exceed 5 years upon a showing of good and sufficient cause for the nonuse.[109] The Idaho Supreme Court held that to consummate a forfeiture under the statute, nonuse of the water must have been continuous for 5 *consecutive* years.[110]

A prescriptive water right may be acquired against one by another by his open, notorious, exclusive, and uninterrupted adverse use of water for the statutory period.[111] But 1969 legislation has provided that no adverse use of water is permissable regarding waters being administered by duly elected watermasters, as noted later.[112]

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witnesses. But they could have been reasonably expected to prevent the water spreading out at several places * * *." *Basinger* v. *Taylor*, 36 Idaho 591, 597, 211 Pac. 1085 (1922).

[105] See *Washington State Sugar Co.* v. *Goodrich*, 27 Idaho 26, 44, 147 Pac. 1073 (1915), discussed in chapter 9 at note 240; *Zezi* v. *Lightfoot*, 57 Idaho 707, 711-712, 68 Pac. (2d) 50 (1937), discussed in chapter 9 at note 223.

[106] *Joyce* v. *Murphy Land & Irr. Co.*, 35 Idaho 549, 555, 208 Pac. 241 (1922).

[107] *Hodges* v. *Trail Creek Irr. Co.*, 78 Idaho 10, 16, 297 Pac. (2d) 524 (1956).

[108] *Harris* v. *Chapman*, 51 Idaho 283, 296, 5 Pac. (2d) 733 (1931).

[109] Idaho Code Ann. §42-222(2) (Supp. 1974).

With respect to some confusion caused by the words "shall be lost and abandoned" in a former provision, see chapter 14, note 327.

[110] *Carrington* v. *Crandall*, 65 Idaho 525, 531, 147 Pac. (2d) 1009 (1944).

[111] *Pflueger* v. *Hopple*, 66 Idaho 152, 155-158, 156 Pac. (2d) 316 (1945). For elements of a prescriptive right, see *Harris* v. *Chapman*, 51 Idaho 283, 297-298, 5 Pac. (2d) 733 (1931); *Bachman* v. *Reynolds Irr. Dist.*, 56 Idaho 507, 519, 55 Pac. (2d) 1314 (1936); *Linford* v. *Hall & Son*, 78 Idaho 49, 54, 297 Pac. (2d) 893 (1956); *Hall* v. *Blackman*, 8 Idaho 272, 283, 68 Pac. 19 (1902); *Almo Water Co.* v. *Darrington*, 95 Idaho 16, 501 Pac. (2d) 700, 704-705 (1972).

[112] Idaho Code Ann. §42-607 (Supp. 1974), discussed at the end of note 154 *infra*.

Long and continuous knowing acquiescence in another's use and enjoyment of a property or privilege may preclude one—by estoppel—from subsequently asserting his own claim.[113]

The right of way over State lands is granted to persons for installation of works for conveyance of water.[114] Likewise, individuals as well as organizations may condemn rights of way for conduits across private lands.[115]

Decisions Regarding Riparian Water-Use Doctrine

In the second of its decisions with respect to water rights, in 1890, the Idaho Supreme Court affirmed judgment in favor of one who claimed as a prior appropriator of stream water which he used and needed for beneficial purposes, as against a party who subsequently entered and patented public land crossed by the stream and who claimed as a riparian proprietor.[116]

In a 1939 case involving a dispute between a riparian landowner and an

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[113] *Hillcrest Irr. Dist.* v. *Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 408-409, 411, 66 Pac. (2d) 115 (1937). Compare the factual situation in *Jensen* v. *Boise-Kuna Irr. Dist.*, 75 Idaho 133, 140-142, 269 Pac. (2d) 755 (1954).

"It must be shown that the defendant has been misled to his injury by the failure of the plaintiff to assert its earlier right." *Mountain Home Irr. Dist.* v. *Duffy*, 79 Idaho 435, 443, 319 Pac. (2d) 965 (1957).

See the discussion in chapter 14 at notes 971-973 regarding Idaho court opinions with respect to the matter of estoppel by reason of laches and at note 957 regarding mutual estoppel. See also *Almo Water Co.* v. *Darrington*, 95 Idaho 16, 501 Pac. (2d) 700, 704-705 (1972).

[114] Idaho Code Ann. §42-1104 (1948).

[115] *Id.* §§42-1101 to -1108. See *Marshall* v. *Niagara Springs Orchard Co.*, 22 Idaho 144, 153, 125 Pac. 208 (1912); *Bassett* v. *Swenson*, 51 Idaho 256, 259-263, 5 Pac. (2d) 722 (1931).

[116] *Drake* v. *Earhart*, 2 Idaho 750, 757, 23 Pac. 541 (1890).

In *Hutchinson* v. *Watson Slough Ditch Co.*, 16 Idaho 484, 493, 101 Pac. 1059 (1909), the court stated: "[T]here is no such thing in this state as a riparian right to the use of waters as against an appropriator and user of such waters who has pursued the constitutional and statutory method in acquiring his water right. In order to acquire a prior or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters and divert the same as it is for any other user of water to do so. But a riparian owner still retains such right to have the waters flow in the natural stream through or by his premises as he may protect in the courts as against persons interfering with the natural flow, or who attempt to divert or cut off the same wrongfully and arbitrarily, and without doing so under any right of location, appropriation, diversion, or use, and who do not rest their right to do so upon any right of use or appropriation." The court held, "The riparian owner's right to use the water for domestic and culinary purposes and watering his stock, and to have the water flow by or through his premises, is such a right as the law recognizes as inferior to a right acquired by appropriation, but superior to any right of a stranger, intermeddler, or interloper." 16 Idaho at 494.

In 1912 the United States Supreme Court concluded that the riparian water-use doctrine had been repudiated in Idaho so far as it conflicted with appropriative rights. *Schodde* v. *Twin Falls Land & Water Co.*, 224 U.S. 107, 121-125 (1912).

appropriator, the court said, "The right of riparian ownership has been abrogated in Idaho."[117]

In a 1963 decision, use of water by a person having apparently only "rights or privileges of a riparian owner" was permitted so long as it did not interfere with decreed rights of an appropriator.[118]

Ground Waters

Subterranean watercourse.—Very little litigation concerning this type of watercourse has been reported in the decisions of the Idaho Supreme Court. In one of the ground water cases, decided in 1922, the prevailing opinion stated that there was a clear distinction between the right to appropriate waters of a subterranean stream and the right to appropriate percolating waters which form no part of such a stream.[119] The writer of the opinion wished not to be understood as stating that the right to appropriate waters of subterranean streams did not exist in Idaho. His stated position was that mere percolating waters or waters gathered together in wells upon the lands of the owner of the fee were not subject to appropriation by a third party, either under the constitution or the statutes of the State. But in subsequent cases the court has favored the prior appropriation doctrine regarding percolating waters, as discussed below.

Percolating waters.—With the exception of the 1922 case discussed above, the Idaho Supreme Court decisions regarding rights to the use of percolating ground waters have favored the doctrine of prior appropriation. In a 1930 case, ground waters seeping from gravel underlying a large area, and which naturally constituted part of the natural underground supply of a surface stream, were held subject to appropriation.[120] In 1931, the court took a view directly

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[117] *Jones* v. *McIntire*, 60 Idaho 338, 352, 91 Pac. (2d) 373 (1939). This statement was repeated in a 1947 case. *Maher* v. *Gentry*, 67 Idaho 559, 565, 186 Pac. (2d) 870 (1947).

[118] *Weeks* v. *McKay*, 85 Idaho 617, 382 Pac. (2d) 788, 792 (1963). At another point the court said, however, "Appellant concedes that any right which he has to the water of said lake are inferior to the decreed rights of respondents to 160 inches of said water, plus such storage rights as they may have acquired. Consequently it is unnecessary to a determination of the issue in this case to define what rights, if any, appellant has to such water." 382 Pac. (2d) at 790.

The court also said, "The trial court found that if the dam in controversy is maintained at a height of 20 inches above the concrete base or footing of the dam, it will permit the same amount of water to escape from the lake and proceed down Lower Rainey Creek to respondent's diversion point as would occur if its channel had remained undisturbed. Under such condition it will not be appellant's responsibility, if, during any period of the year, the amount of water flowing from the lake is less than the quantity to which respondents are entitled." 382 Pac. (2d) at 791-792.

See also the concurring opinion of Justice Bakes in *State, Dept. of Parks* v. *Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 Pac. (2d) 924, 933 (1974).

[119] *Public Util. Comm'n* v. *Natatorium Co.*, 36 Idaho 287, 305, 211 Pac. 533 (1922).

[120] *Union Cent. Life Ins. Co.* v. *Albrethsen*, 50 Idaho 196, 202-204, 294 Pac. 842 (1930).

opposed to that of the prevailing 1922 opinion and adopted the doctrine of prior appropriation in relation to a common body of artesian water underlying the lands of the litigants.[121] The doctrine of absolute ownership of ground waters was rejected. In another 1931 case, the court ruled that percolating ground waters may be appropriated by diversion and application to a beneficial use.[122]

Legislation regarding ground water.—The Idaho statutes provide that the right to use "subterranean waters", as well as waters of rivers, streams, lakes, and springs, may be acquired by appropriation.[123] Other legislation (enacted in 1951 and subsequently enlarged and amended) pertains specifically to ground water appropriation and administration.[124] It defines ground water as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving."[125]

Early appropriators are protected in the maintenance of "reasonable ground water pumping levels" as established by the Director of the Department of Water Resources.[126] All preexisting ground water rights are validated and exemptions apply to wells for domestic drainage purposes.[127]

A 1963 amendment restricts ground water appropriation to the statutory method.[128] The first step in appropriating ground water is to apply to the Department of Water Resources for a permit.[129] If the locality in which the desired appropriation is to be made has *not* been designated as a critical ground

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[121] *Hinton* v. *Little*, 50 Idaho 371, 374-380, 296 Pac. 582 (1931).

[122] *Silkey* v. *Tiegs*, 51 Idaho 344, 5 Pac. (2d) 1049 (1931). See *Baker* v. *Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 Pac. (2d) 627, 632-633 (1973).

[123] Idaho Code Ann. §42-101 (1948).

[124] Idaho Code Ann. §§42-226 to -239 (Supp. 1974). Unless otherwise provided, the provisions of the general water appropriation statute continue to govern ground water rights. *Id.* §42-239.

[125] *Id.* §42-230.

[126] *Id.* §42-226.

This provision was construed and applied in *Baker* v. *Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 Pac. (2d) 627, 636-637 (1973).

[127] Idaho Code Ann. §§42-227 and -228 (Supp. 1974).

[128] *Id.* §42-229.

The previously optional, so-called constitutional, method of perfecting an appropriative right, simply by means of diversion and application to beneficial use, is no longer permissible except for such an appropriation commenced before the effective date of this amendment. *Id.* Its validity in this regard was upheld in *State ex rel. Tappan* v. *Smith*, 92 Idaho 451, 444 Pac. (2d) 412, 417 (1968), in which the court said it "does not deny the right to appropriate water, but regulates the method and means by which one may perfect a right to the use of such water. The regulation is in accord with Article 15, Sections 1 and 3, of Idaho's Constitution, and with I.C. §§42-103 and 42-226." This statement in the *Smith* case was quoted in *Baker* v. *Ore-Idaho Foods, Inc.*, 95 Idaho 575, 513 Pac. (2d) 627, 633 (1973), in which the court added, "*Smith* says the state may regulate appropriations of ground water without violating our constitutionally mandated prior appropriation system."

[129] Idaho Code Ann. §42-202 (Supp. 1974).

water area, the Director of the Department of Water Resources shall issue a permit in accordance with the provisions governing applications to appropriate waters of the State, provided the application otherwise meets the requirements of those provisions.[130]

A critical ground water area is any ground water basin or portion thereof that does not have sufficient ground water to provide a reasonably safe supply for existing or projected irrigation or other uses, in view of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the Director of the Department of Water Resources.[131] In a designated critical area, a permit may be denied[132] if there is reason to believe that there is insufficient water available for appropriation at the proposed well.[133]

The Director of the Department of Water Resources is to control the appropriation and use of ground water and protect the people of the State from depletion of ground water resources.[134] He may take corrective action with respect to flowing or nonflowing wells on public or private lands and may require cessation of their use pending correction of defects. He may prohibit or limit withdrawals of water when not legally available.[135] It is specifically provided:

> Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge.[136]

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[130] *Id.* §42-233a, referring to §§42-203 and -204.

Upon completion of construction and application of water to beneficial use, a "license" is to be issued to the permittee. Idaho Code Ann. §§42-219 (Supp. 1974) and -220 (1948).

[131] Idaho Code Ann. §42-233a (Supp. 1974).

A public hearing is required regarding such a designation, as well as regarding its subsequent removal or a change in the critical area's boundaries. *Id.*

[132] Alternatively, a permit may be issued for less than the requested amount of water.

[133] Idaho Code Ann. §42-233a (Supp. 1974).

The legislation regarding critical ground water areas was applied in *State ex rel. Tappan* v. *Smith*, 92 Idaho 451, 444 Pac. (2d) 412, 417 *et seq.* (1968).

[134] Idaho Code Ann. §42-231 (Supp. 1974).

[135] *Id.* §42-237a.

See also §§42-1601 to -1605 (1948) regarding administrative control of the flow of artesian wells by the Director of the Department of Water Resources.

[136] Idaho Code Ann. §42-237a(g) (Supp. 1974).

This provision was applied in *Stevenson* v. *Steele*, 93 Idaho 4, 453 Pac. (2d) 819, 827 (1969); *Baker* v. *Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 Pac. (2d) 627, 635-636 (1973).

As discussed at note 126 *supra*, early ground water appropriators are protected in the

(*Continued*)

Legislation enacted in 1972 contains permit requirements and regulations for the construction and operation of wells and injection wells utilized for the extraction of geothermal resources.[137]

Determination of Conflicting Water Rights

Prior to 1969, water rights were generally determined in ordinary civil actions, supplemented by the statutory provisions discussed under the following subtopics: "Request by trial court for hydrographic examination" and "Summary supplemental action."

Adjudication legislation of 1969.—In 1969, Idaho adopted a statutory procedure for adjudicating water rights of a water system.[138] The adjudication process is initiated by a court action begun by the Director of the Department of Water Resources[139] and a court order is required which authorizes him to

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(*Continued*)
maintenance of "reasonable ground water pumping levels" as established by the Director of the Department of Water Resources.

The Director of the Department of Water Resources also may determine areas of common ground water supply. If they affect streamflow in an organized water district, he may incorporate them therein, otherwise in separate water districts to be created. Idaho Code Ann. §42-237a (Supp. 1974).

[137] Idaho Laws 1972, ch. 301, Code Ann. §42-4001 *et seq.* (Supp. 1974).

A "geothermal resource" is defined as "the natural heat energy of the earth, the energy, in whatever form, which may be found in any position and at any depth below the surface of the earth present in, resulting from, or created by, or which may be extracted from such natural heat, and all minerals in solution or other products obtained from the material medium of any geothermal resource. Geothermal resources are found and hereby declared to be sui generis, being neither a mineral resource nor a water resource, but they are also found and hereby declared to be closely related to and possibly affecting and affected by water and mineral resources in many instances." *Id.* §42-4002(c).

[138] Idaho Code Ann. §42-1406 to -1414 (Supp. 1974).

Water system is defined to include "stream, lakes, ground waters, or any other body of water, tributaries and contributory sources thereto * * *." *Id.* §42-1406.

The 1965 legislation which created the Water Resources Board empowered the Board to "institute judicial proceedings to have water rights established by court decree on any stream, lake or underground water basin * * *." *Id.* §42-1734(c).

A statute enacted in 1903 provided that State water commissioners could bring suits to adjudicate the rights of claimants to use water of streams. Idaho Laws 1903, §§34-36. These sections were declared unconstitutional in the following year and were omitted from subsequent revisions and compilations. *Bear Lake County* v. *Budge*, 9 Idaho 703, 75 Pac. 614 (1904). The supreme court objected to the method of serving summons; to compelling a county to pay costs in an action to settle private water rights only; and to attempting to determine, under the police power, private rights to private property without due process of law.

[139] The action may be begun on his own initiative or upon petition by five or more or a majority of the water users of any water system. Idaho Code Ann. §42-1406 (Supp. 1974). The action is begun by the Director's petition to a district court. The district judge may determine whether the waters in the water system to be adjudicated are interconnected and whether the Director's petition embraces some waters which are

make an examination of the water system, joint water rights claimants, and determine the various water rights existing in the water system.[140] "The director of the department of water resources shall examine the claims filed and conduct such further investigation as is necessary to evaluate and ascertain the extent and nature of each water right existing within the system." He shall then prepare a report "in the nature of a proposed finding of water rights." The report and filed claims are filed with the district court which issues a decree adjudicating the water rights. If no objections are filed with respect to any water right, the judge shall affirm the Director's determination of such water right.[141]

> The decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a decree has been entered, any water user who has been joined and who failed to appear and submit proof of his claim as provided in this act shall be barred and estopped from subsequently asserting any right theretofore acquired upon the waters included within the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed.[142]

Request by trial court for hydrographic examination.—The water rights statute of Idaho provides that when a suit is filed in a district court for the purpose of adjudicating water rights on a stream, the judge "may request" the Department of Water Resources to make an examination of the stream diversions and uses and to prepare a map and statement to be accepted as evidence in such determination.[143] Formerly, the statute had read "shall request," and that mandate to "request" this administrative help was held by the supreme court to be directory—whether or not the request was made was left to the sound discretion of the judge.[144]

Summary supplemental action.—A summary supplemental adjudication of water rights may be secured in cases in which stream priorities have been determined by court decree and it thereafter appears (1) that some holder of

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not tributary or excludes some tributary waters which should be included to achieve a complete adjudication of all rights that might be affected thereby. If funds are availalbe for the Director's investigation, the judge shall issue an order defining the boundaries of the water systems to be adjudicated and authorize the Director to begin his investigation and determination of the various rights existing in the system. *Id.* §42-1407.

[140] *Id.* §§42-1407 to -1409.

[141] *Id.* §42-1410.

[142] *Id.* §42-1411.

[143] *Id.* §42-1401.

Water system is defined to include "streams, lakes, ground waters, or any other body of water, tributaries and contributory sources thereto * * *." *Id.*

[144] *Boise City Irr. & Land Co.* v. *Stewart*, 10 Idaho 38, 57, 77 Pac. 25, 32 (1904). Regarding the payment of costs under this provision, see *Blaine County Inv. Co.* v. *Gallet*, 35 Idaho 102, 104-108, 204 Pac. 1066 (1922).

a water right was not included as a party in the decree, or (2) that someone has subsequently acquired a right of use from the stream.[145] Action is brought against the watermaster or, if none, against the Department of Water Resources. The plaintiff must accept, as binding upon him, the former decree.[146] Water shall be distributed to him in accordance with the summary supplemental adjudication in the same manner as though he had had his right included in the former decree. However, the right thus established is *prima facie* merely, subject to attack in a court of competent jurisdiction at any time by any aggrieved person. This remedy is held to be merely cumulative and as not precluding a claimant from having title to his water right quieted under the provisions of section 6-401.[147]

Administrative determination of certain adverse claims.—Holders of surface or ground water rights thought to be adversely affected by later ground water rights, or of ground water rights by later water rights, may complain under oath to the Director of the Department of Water Resources. A local ground water board, comprised of the Director of the Department of Water Resources, an engineer or geologist, and a resident irrigation farmer—who hold office until and only until the matter is disposed of—holds a hearing. The board determines the existence and nature of the water rights and whether prior rights are infringed, and may make corrective orders, subject to appeal to the courts.[148]

Administration of Water Rights and Distribution of Water

The Department of Water Resources shall administer the laws relative to distribution of water in accordance with rights of prior appropriation.[149] The State is, by statute, divided into three water divisions[150] and the Department is authorized to create water districts for administration of stream systems or independent sources of water supply, the appropriative priorities of which have been adjudicated.[151] Under the Department's direction, watermasters are to distribute the waters in their water districts.[152] Watermasters and their regular assistants are elected by eligible persons owning or having a right to

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[145] Idaho Code Ann. §42-1405 (1948).

This provision also applies to water rights acquired under ground water legislation discussed earlier. See the discussion at notes 123-137 *supra*. Idaho Code Ann. §42-237f (Supp. 1974), referring to §§42-1401 to -1405.

[146] See *Big Wood Canal Co.* v. *Chapman*, 45 Idaho 380, 385-387, 263 Pac. 45 (1927).

[147] *Mays* v. *District Ct.*, 34 Idaho 200, 205-207. 200 Pac. 115 (1921).

[148] Idaho Code Ann. §§42-237b to -237e (Supp. 1974).

For cases involving such matters, see *Stevenson* v. *Steele*, 93 Idaho 4, 453 Pac. (2d) 819 (1969); *Hart* v. *Stewart*, 95 Idaho 781, 519 Pac. (2d) 1171 (1974).

[149] Idaho Code Ann. §§42-602 and -1804 (Supp. 1974).

[150] Idaho Code Ann. §42-601 (1948).

[151] *Id.* §42-604.

[152] Idaho Code Ann. §42-607 (Supp. 1974).

use water, the right being defined as a right which "has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of Water resources."[153] As amended in 1973, the statute provides:

> [A]ny person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated or decreed right therein, or right therein evidenced by permit or license issued by the department of water resources, shall, for the purposes of distribution during the scarcity of water, be held to have a right subsequent to any adjudicated, decreed, permit, or licensed right in such stream or water supply, and the watermaster shall close all headgates of ditches or other diversions having no adjudicated, decreed, permit or licensed right if necessary to supply adjudicated, decreed, permit, or licensed right in such stream or water supply.[154]

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[153] *Id.* §42-605.

[154] *Id.* §42-607. Idaho Laws 1973, ch. 262, §2, p. 534.

A somewhat similar provision had been included in the applicable legislation prior to a 1969 amendment (Laws 1969, ch. 305, §2, p. 913) which omitted it. The former provision, however, referred only to adjudicated versus nonadjudicated rights. Idaho Code Ann. §42-607 (1948).

In a case decided prior to the 1973 amendment, the Idaho Supreme Court held, *inter alia*, that the 1969 amendment "shows a clear intention on the part of the legislature to eliminate any preference of adjudicated water rights over unadjudicated water rights in times of water scarcity and that the watermaster has no jurisdiction or control over unadjudicated water rights." *DeRousse* v. *Higginson*, 95 Idaho 173, 505 Pac. (2d) 321, 325 (1973). The court noted, "Before the 1969 amendment, 42-607 was twice mentioned by this court as providing that the watermaster has the duty during the times of scarcity of water to treat unadjudicated water rights as inferior and subordinate to decreed rights. *See* Big Wood Canal Co. v. Chapman, 45 Idaho 380 at 405, 263 P. 45 (1927); State v. Hall, 90 Idaho 478 at 489, 413 P. (2d) 685 (1966)." *Id.*

In the *DeRousse* case, the court upheld the plaintiff's contention that under the 1969 amendment "the watermaster has no jurisdiction or control over unadjudicated water rights claimed to have been appropriated in the constitutional method by diversion and appropriation to beneficial use." 505 Pac. (2d) at 324. The court said it was "not necessary to discuss the constitutional and other contentions of the parties." 505 Pac. (2d) at 327. In regard to the constitutional versus statutory method of appropriation, see "Appropriation of Water–Procedure for appropriating water," *supra.*

Anyone who willfully wastes water for irrigation or willfully tampers with a headgate or other measuring or regulating device shall be guilty of a misdemeanor and is subject to arrest. Idaho Code Ann. §18-4309 (Supp. 1974). In this regard, see *State* v. *Hall*, 90 Idaho 478, 413 Pac. (2d) 685 (1966), discussed in another regard, as mentioned above, in the later *DeRousse* case.

In 1969, prior to the 1973 amendment of §42-607 discussed above, this section also was amended so as to provide that "so long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user." Idaho Laws 1969, ch. 305, §2, p. 913.

Some statutory provisions specifically applicable to ground water resources have been discussed earlier.[155]

Kansas

Governmental Status

The Territory of Kansas was organized on May 30, 1854.[1] Kansas was admitted to the Union by Act of Congress January 29, 1861.[2]

State Administrative Agency

Administrative functions relating to State control and regulation of the appropriation of water are vested chiefly in the Chief Engineer, Division of Water Resources of the Kansas State Board of Agriculture.[3]

In certain instances—adoption and enforcement of rules, regulations, and standards,[4] and establishment of field offices and appointment of water commissioners therefor[5]—the law provides that the action of the Chief Engineer shall be subject to approval of the State Board of Agriculture. In certain others—aiding in distribution of decreed water,[6] and acting as referee in adjudications under certain circumstances[7]—the Division of Water Resources and its Chief Engineer either share the responsibility or hold it alternatively. Otherwise the Chief Engineer is the designated administrative agent. His overall mandate reads as follows:[8]

> The chief engineer shall enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation.

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—The first Kansas legislation authorizing appropriation of water—enacted in 1886—provided that running water flowing in a river or stream might be appropriated for irrigation

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[155] See the discussion at notes 134-136 *supra.*

[1] 10 Stat. 277, 283 (1854).

[2] 12 Stat. 126 (1861).

[3] Some related functions of the State Water Resources Board are discussed under "Appropriation of Water of Watercourses—State Water Plan Storage Act," *infra*, and in note 114 *infra*. That Board consists of seven members appointed by the Governor with the advice and consent of the State Senate. Kans. Stat. Ann. §74-2605 (Supp. 1974).

[4] Kans. Stat. Ann. §82a-706a (1969).

[5] *Id.* §82a-706e.

[6] *Id.* §82a-719.

[7] *Id.* §82a-725.

[8] *Id.* §82a-706.

purposes, and that as between appropriators the first in time shall be first in right. Appropriations were initiated by posting and filing notices.[9]

Previously, according to the Kansas Supreme Court, rights to use water by priority of possession had not been recognized in the State.[10] Irrigation had not been necessary for the needs of the early home builders in Kansas, it was said, and local customs of appropriating water were invalid, so that there were no vested and accrued water rights to be protected by the congressional act of 1866.[11] Decisions of the supreme court, the opinion stated, were based on principles of the common law, which interpretation the legislature had been content to accept. Hence it was not until 1886, when the population had increased sufficiently to induce legislation "for the laudable purpose of encouraging irrigation,"[12] that the State policy with respect to appropriation of water for irrigation purposes changed and that rights by priority of possession could accrue.

Recognized though the appropriation doctrine then was, its actual establishment was a long, difficult process owing to adherence of the courts for decades to the principle of riparian supremacy. Not until the middle of the 20th century did appropriation proponents receive substantial judicial encouragement. This is discussed later under "Interrelationships of the Dual Systems."

Procedure for appropriating water.—The original method of initiating an appropriation of water by posting a notice at the point of diversion and filing a copy in the appropriate county office was supplemented in 1917 by legislative authorization to appropriate water upon application to the Kansas Water Commission, the duties of which were transferred in 1927 to the Division of Water Resources of the State Board of Agriculture.[13] Both of these procedures remained in the statutes until 1941, when the original 1886 provisions were repealed.[14]

In 1945, the Kansas Legislature declared that, subject to vested rights,[15] all waters within the State may be appropriated for beneficial use as provided in the applicable statute. No appropriative right could be acquired without first obtaining the prior approval of the Chief Engineer of the Division of Water Resources, except for domestic purposes as defined in the statute.[16] As amended in 1957, it is provided further that no water right of any kind may be acquired thereafter solely by adverse use, adverse possession, or estoppel.[17]

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[9] Kans. Laws 1886, ch. 115.

[10] *Clark* v. *Allaman*, 71 Kans. 206, 240-241, 80 Pac. 571 (1905).

[11] 14 Stat. 253, §9 (1866).

[12] 71 Kans. at 238.

[13] Kans. Laws 1917, ch. 172, Gen. Stat. Ann. §§24-901 to -905 (1935).

[14] Kans. Laws 1941, ch. 261.

[15] Kans. Laws 1945, ch. 390, Stat. Ann. §82a-703 (1969). A "vested right" is the right of a common law or statutory claimant to continue using water that was actually applied to beneficial use on or before the effective date of the 1945 act, or within a reasonable time thereafter by means of works then under construction. *Id.* §82a-701.

[16] *Id.* §§82a-705 and -705a.

[17] *Id.* §82a-705.

Surface or ground waters may be appropriated under the statute.[18] Purposes named in the law are domestic, municipal, irrigation, industrial, recreational, and water power;[19] but undoubtedly this is not intended to be an exclusive list, for it appears only with respect to precedence in case of certain conflict of uses (see "Restrictions and preferences in appropriation of water," below) and another section states that "all waters within the state may be appropriated for beneficial use as herein provided."[20]

A "person" may make an appropriation, "person" being defined as a natural person, partnership, organization, corporation, municipality, and any agency of the State or Federal Government.[21] "Appropriator" is a person who has a perfected appropriation right.[22]

Use of water for domestic purposes[23] instituted after June 28, 1945, to the extent that it is beneficial, constitutes an appropriation right without the necessity of first obtaining approval of the Chief Engineer;[24] but any person using water for domestic purposes after that date, or intending to make such use after the 1957 amendment, *may* apply for a permit under the formal procedure.[25] For purposes other than domestic use, an intending appropriator must make application to the Chief Engineer for a permit to make the appropriation.

The application may be filed either before or after commencement of any work in connection with construction, enlargement, or extension of any works for the diversion, storage, or use of water. This, however, is a procedural detail, for it is clearly the intent of the statute that, barring the specifically excepted domestic uses, no water right may be acquired without pursuing the prescribed steps and perfecting the intended right in the manner set out in the statute. Approval of an application constitutes a permit to proceed with construction of works and with diversion and use of the water. After completion of works and application of water to the proposed use in conformity with the permit, the permittee is issued a certificate of appropriation.[26]

Priority of an appropriation right to use water for any beneficial purpose other than domestic relates back to the time of filing the application therefor with the Chief Engineer. Priority of a domestic water appropriation right dates from the time of filing the application therefor (if one is filed),

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[18] *Id.* § 82a-707.

[19] *Id.*

[20] *Id.* § 82a-703.

[21] *Id.* § § 82a-701(a) and -709.

[22] *Id.* § 82a-701(e).

[23] Domestic use "means the use of water by any person or by a family unit or household for household purposes, or for the watering of livestock, poultry, farm and domestic animals used in operating a farm, and for the irrigation of lands not exceeding a total of one acre in area for the growing of gardens, orchards and lawns." *Id.* § 82a-701(c).

[24] *Id.* § § 82a-705 and -705a.

[25] *Id.* § 82a-709.

[26] *Id.* § § 82a-709 to -714.

or from the time of making actual use of the water for such purpose, whichever is earlier.[27]

Procedure for appeal to the courts from administrative orders and decisions of the Chief Engineer is provided for cases in which an appeal authorized by the statute is taken.[28] Appeal is specifically authorized in cases of determination of vested rights,[29] change in exercise of water right,[30] application for permit to appropriate water,[31] and declaration of abandonment and termination of water right.[32]

Restrictions and preferences in appropriation of water.—If a proposed use will not impair a use under an existing water right[33] nor prejudically and unreasonably affect the public interest, an application to appropriate water therefor that is made in good faith and in proper form and which contemplates utilization of water for beneficial purposes, "within reasonable limitations," must be approved by the Chief Engineer. Any application which does not meet these prerequisites must either be rejected, or be modified to conform to the public interest

> to the end that the highest public benefit and maximum economical development may result from the use of such water. In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration the area, safe yield and recharge rate of the appropriate water supply, the priority of existing claims of all persons to use the water of the appropriate water supply, the amount of each such claim to use water from the appropriate water supply, and all other matters pertaining to such question. With regard to whether a proposed use will impair a use under an existing water right, impairment shall include * * * the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit. * * *
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> * * * It shall be an express condition of each appropriation * * * that the right of appropriation shall relate to a specific quantity of water and that such right must allow * * * for the reasonable increase or decrease of the streamflow at the appropriator's point of diversion * * *.[34]

The Kansas declaration of "principles governing appropriations" of water was first enacted in 1945 and extensively revised in 1957.[35] The 1945 Kansas

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[27] *Id.* § 82a-707(e).
[28] *Id.* § 82a-724
[29] *Id.* § 82a-704.
[30] *Id.* § 82a-708b.
[31] *Id.* § 82a-711.
[32] *Id.* § 82a-718.
[33] With respect to vested rights, see the discussion at note 15 *supra.*
[34] Kans. Stat. Ann. § § 82a-711 and -711(a) (1969).
[35] Kans. Laws 1945, ch. 390, § 7, Stat. Ann. § 82a-707 (1969).

version declared that where appropriations of water for different purposes conflict, they must take precedence in a stated order (repeated in 1957 and given verbatim below), and that as between appropriators the first in time is the first in right. The 1957 legislature undertook to reconcile these apparently unreconcilable declarations by enacting the following as part of section 82a-707 of the Kansas statutes:

> (b) Where uses of water for different purposes conflict such uses shall conform to the following order of preference: Domestic, municipal, irrigation, industrial, recreational and water power uses. However, the date of priority of an appropriation right, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it. The holder of a water right for an inferior beneficial use of water shall not be deprived of his use of the water either temporarily or permanently as long as he is making proper use of it under the terms and conditions of his water right and the laws of this state, other than through condemnation.
>
> (c) As between persons with appropriation rights, the first in time is the first in right.

The Kansas Legislature did not in terms authorize the condemnation of early priority rights for inferior uses of water for the purpose of putting the water to superior use. However, the above language in section 82a-707(b) is probably to be construed as an implied authorization to this effect. If not, the purpose of declaring an order of preference and then stating explicitly that in time of water shortage it is the date of priority, not the purpose of use, that controls the exercise of the appropriative right, is not evident.

Some aspects of the Kansas appropriative right.—It is provided by statute that all water rights of every kind shall be appurtenant to the land on which they are established by the use of water, and shall pass with all conveyances of the land whether or not mentioned in the deeds, unless expressly excepted therefrom.[36] In the 1957 amendment of the water appropriation act, the definition of "water right" includes the following: "It is a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance."[37]

An appropriation right does not constitute ownership of the water appropriated, but remains subject to the principle of beneficial use.[38]

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[36] Kans. Stat. Ann. §42-121 (1973).

[37] Kans. Stat. Ann. §82a-701(g) (1969).

Anyone may apply for an appropriation permit even though the application pertains to use of water by another or upon or in connection with lands of another, provided any right acquired thereunder shall attach to the lands on or in connection with which the water is used and remain subject to the control of the landowners. *Id.* §82a-708a.

[38] *Id.* §82a-707(a).

Subject to vested rights and prior appropriation rights, any person entitled to use water for beneficial purposes may store the same for use thereafter so long as the process is consistent with reasonable storage and conservation practices. Failure to apply or use such water during the period of collection and storage does not impair the right.[39]

Rights of way for diverting, storing, or conveying water may be acquired by exercise of the power of eminent domain.[40] "Any person, association or corporation" desiring to construct waterworks for "domestic or industrial uses," if unable to agree with the landowner for a right of way therefor, may acquire the easement by condemnation.[41]

Users of water from irrigation works may agree in writing to rotate their water supplies; and proprietors of two or more works may, with written consent of the water users, agree in like manner to rotate all or part of the combined supply. The practice is lawful only if other water users are not thereby injured. Rotation agreements covering more than one season must be recorded in the county records.[42]

Natural streams or channels may be used to convey water, due allowance to be made for losses by evaporation and seepage.[43]

The holder of a water right[44] has the statutory right to change the point of diversion, place of use, or purpose of use of the water without losing priority of right, provided that he (1) applies to the Chief Engineer for approval; (2) demonstrates that the proposal is reasonable, will not impair any existing right, and relates to the same local source of water supply; and (3) receives the Chief Engineer's approval. The Chief Engineer shall approve or reject the application in accordance with the provisions and procedures for processing original applications to appropriate water. Aggrieved persons may appeal to the courts.[45] In case a change in a natural stream channel results in destruction or serious impairment of a ditch diversion, the proprietor may extend the ditch to a new place of diversion without loss of priority if no injury is inflicted upon others.[46]

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[39] Kans. Stat. Ann. §42-313 (1973).

Anyone who constructs or alters a dam or other water obstruction or who changes or diminishes the current of any stream must obtain the consent of the Chief Engineer. Kans. Stat. Ann. §82a-301 (1969). Dams placed in private streams which do not exceed 10 feet in height and do not impound more than 15 acre-feet of water are exempt from this permit requirement. *Id.* §82a-304. Regarding the Chief Engineer's approval of dams built as part of the Federal agricultural conservation program, see §§82a-312 to -314.

[40] Kans. Stat. Ann. §§42-316 to -320 (1973).

[41] *Id.* §42-317.

[42] *Id.* §§42-340 to -347.

[43] *Id.* §42-303.

[44] "Water right" is defined as any vested right or appropriation right. Kans. Stat. Ann. §82a-701(g) (1969).

[45] *Id.* §82a-708b.

[46] Kans. Stat. Ann. §42-304 (1973). *(Continued)*

Kansas has two provisions relating to loss of a water right as a result of 3-years' inexcusable nonuse. One provision says that 3-years' continuous failure of an appropriator to make lawful and beneficial use of the water without due and sufficient cause "shall constitute a forfeiture and surrender of such right."[47] The other provision, as amended and reenacted in 1957, says that "every water right of every kind shall be deemed abandoned and shall terminate" when, without due and sufficient cause, no lawful beneficial use is made of the water under such right for 3 successive years. It prescribes a procedure for a declaration of abandonment and termination by the Chief Engineer after notification to the holder to appear and show cause, subject to judicial appeal.[48] Despite the basic differences between abandonment and forfeiture when strictly construed, the phrase "shall be deemed abandoned" probably indicates that the legislative declaration of abandonment and termination dispenses with any necessity of intent to abandon the water right on the part of the water right holder. No judicial construction of this provision has come to the attention of the author.

Principles relating to prescriptive water rights have been stated in the opinions in several reported cases.[49] However, the 1957 amendment of the water rights statute provides that "no water rights of any kind may be acquired hereafter solely by adverse use, adverse possession, or by estoppel."[50]

State Water Plan Storage Act.—In 1974, the Kansas Legislature passed the State Water Plan Storage Act under which the legislature declared that water in conservation storage water supply capacity in reservoirs named in the State water plan[51] on the effective date of this Act "on which the state has given a commitment are hereby recognized as waters belonging to the state subject to the provisions of this act."[52]

Notwithstanding any other provisions of the statutes, the State Water Resources Board[53] is authorized

> to acquire on behalf of the state the right to divert and store the waters

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(*Continued*)

In *Whitehair* v. *Brown*, 80 Kans. 297, 300, 102 Pac. 783 (1909), the Kansas Supreme Court held that a right acquired by prescription does not depend upon the use to which a dam is put, and that riparian owners cannot complain of a change in that respect unless increased obstruction of the streamflow results.

[47] Kans. Stat. Ann. §42-308 (1973).

[48] Kans. Stat. Ann. §82a-718 (1969).

[49] See, e.g., *Clark* v. *Allaman*, 71 Kans. 206, 245-246, 80 Pac. 571 (1905); *Jobling* v. *Tuttle*, 75 Kans. 351, 362-364, 89 Pac. 699 (1907); *Whitehair* v. *Brown*, 80 Kans. 297, 300, 102 Pac. 783 (1909); *Wallace* v. *Winfield*, 96 Kans. 35, 38, 149 Pac. 693 (1915); *Frizell* v. *Bindley*, 144 Kans. 84, 93, 58 Pac. (2d) 95 (1936); *Garden City Co.* v. *Bentrup*, 228 Fed. (2d) 334, 340-341 (10th Cir. 1955).

[50] Kans. Stat. Ann. §82a-705 (1969).

[51] The State water plan is governed by Kans. Stat. Ann. §82a-901 *et seq.* (1969).

[52] Kans. Stat. Ann. §82a-1302 (Supp. 1974).

[53] The Water Resources Board is mentioned in note 3 *supra*.

> of all streams flowing into the conservation storage water supply capacity of the reservoirs named in the state water plan sufficient to insure a yield of water from the reservoir for beneficial use through a drought having a two percent (2%) chance of occurrence in any one year with the reservoir in operation. The rights of the state under this section and which are acquired under section 4 [82a-1304], known as "water reservation rights," shall be subject to all vested rights, appropriation rights, approved applications for permits to appropriate water and other vested property interests acquired prior to the state's acquisition, but not to those acquired thereafter.[54]

The Act contains specified procedures for the Board to follow in seeking the approval of the Chief Engineer of the State for acquiring "water reservation rights" and exempts the Board from having to obtain an appropriative right or the approval of the Chief Engineer under the appropriation statutes in acquiring these water reservation rights.[55]

> Whenever the board finds that a proposed withdrawal and use of water will advance the purposes [of the state water plan], it may enter into written contracts with any persons for withdrawal and use of waters from conservation water supply capacity committed to the state. Every such contract shall comply with the provisions of this act. The board shall not contract for withdrawals of water from a particular reservoir which in the board's opinion are in excess of the yield capability from such reservoir of conservation water supply committed to the state computed to provide water through a drought having a two percent (2%) chance of occurrence in any one year with the reservoir in operation. All contracts under this section shall have terms of not less than ten (10) years. Whenever the board finds that it will advance the purposes set forth in this act and [of the state water plan], the board may dispose of waters from the conservation water supply capacity committed to the state not required to meet contract requirements under this section.[56]

The Riparian Doctrine

A marked and rather abrupt change took place in the middle of the 20th century with respect to the relative positions of the riparian and appropriation doctrines in Kansas. This is a part of the later discussion of "Interrelationships of the Dual Systems," and will not be further considered here. So far as possible, the present topic is restricted to aspects of the riparian doctrine, and rights of riparian owners as against each other, as developed by the courts of Kansas prior to the mid-20th century, without attention to riparian-appropriative relationships. To get its right perspective in the jurisprudence of

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[54] Kans. Stat. Ann. § 82a-1302 (Supp. 1974).

[55] *Id.* § 82a-1304, referring to § 82a-701 *et seq.*

[56] *Id.* § 82a-1305.

The Act contains procedures with respect to the letting of these contracts and the diversion of water under these contracts.

Kansas one must go on to the later discussion of "Interrelationships of the Dual Systems."

Adoption of the riparian doctrine.—The Kansas Supreme Court recognized and applied the doctrine of riparian rights in several early decisions,[57] and expounded it at length in 1905 in the leading case of *Clark* v. *Allaman.*[58] It was held in this latter case that the common law had been adopted by the legislature as the rule of action and decision while Kansas was still a Territory; that included in the common law system were rules respecting rights to use the water of running streams; and that such rules became the law of the Territory and the State for every stream within its borders. This was reiterated some 40 years later.[59]

Riparian waters.—The riparian doctrine was applied to flows of water of surface streams,[60] as well as to waters of a lake which the court found to be part of a natural watercourse including an inlet channel and an outlet channel leading to a river.[61]

Riparian land.—Requisites as to classification of riparian land were that the tract (1) must be contiguous to a watercourse, and (2) lie within the watershed of the stream.[62] If a tract extended from the bank of a particular stream across the top of the watershed divide, only that portion that drained toward the stream in question could be riparian to it. Within these limits, said the court, the principles of the modified riparian doctrine should control, "irrespective of the accidental matter of governmental subdivisions of the land."

Riparian proprietors.—In general, the supreme court observed, owners of land riparian to a watercourse might exercise the rights incident to such land by reason of its contiguity to the stream.[63] Although the riparian right was held to extend to use of water for domestic and agricultural purposes on or in connection with the land, a city owning land contiguous to a stream was held to have no right, solely in the exercise of its riparian right, to divert water therefrom for the purpose of selling it to all inhabitants of the city, or to persons remote from the stream.[64] A statement made in another case—

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[57] *Shamleffer* v. *Council Grove Peerless Mill Co.*, 18 Kans. 24, 31-33, 26 Am. Dec. 765 (1877); *Emporia* v. *Soden*, 25 Kans. 588, 604, 606, 608-609, 37 Am. Rep. 265 (1881); *Campbell* v. *Grimes*, 62 Kans. 503, 505, 64 Pac. 62 (1901).

[58] *Clark* v. *Allaman*, 71 Kans. 206, 224-229, 237-241, 80 Pac. 571 (1905).

[59] *State ex rel. Peterson* v. *State Bd. of Agric.*, 158 Kans. 603, 605, 149 Pac. (2d) 604 (1944). See also *Finney County Water Users' Assn.* v. *Graham Ditch Co.*, 1 Fed. (2d) 650, 651 (D. Colo. 1924); *Kansas* v. *Colorado*, 185 U.S. 125, 146 (1902); *Kansas* v. *Colorado*, 206 U.S. 46, 95 (1907); *Colorado* v. *Kansas*, 320 U.S. 383, 399-400 (1943).

[60] *Clark* v. *Allaman*, 71 Kans. 206, 224, 229, 80 Pac. 571 (1905). See *Emporia* v. *Soden*, 25 Kans. 588, 604, 37 Am. Rep. 265 (1881).

[61] *Dougan* v. *Board of County Comm'rs*, 141 Kans. 554, 562, 43 Pac. (2d) 223 (1935).

[62] *Clark* v. *Allaman*, 71 Kans. 206, 244-245, 80 Pac. 571 (1905).

[63] 71 Kans. at 245.

[64] *Wallace* v. *Winfield*, 96 Kans. 35, 38, 149 Pac. 693 (1915); *Emporia* v. *Soden*, 25 Kans. 588, 607, 37 Am. Rep. 265 (1881).

although not necessary to the decision therein—was to the effect that a railway company as a riparian proprietor may make reasonable use of stream water for the purpose of supplying its engines and operating its railroad, consistently with the equal rights of other riparian owners.[65]

Nature and extent of the riparian right.—The Kansas Supreme Court held consistently that the flow of water in the natural stream channel was an unquestioned property right of the riparian proprietor,[66] annexed to the land as part and parcel of the realty.[67]

Both early and late in the long period of riparian predominance, the supreme court took the position that the riparian owner had the right to such benefits as might result from the uninterrupted flow of the stream through its natural channel across or contiguous to his land.[68] Nevertheless, throughout practically this entire period, modifications of the "uninterrupted natural flow" theory were also being stated in various cases. For example, in an 1881 case the court said: "While the undiminished flow of the stream is considered to be the right of every riparian owner, yet this right has always been limited to this extent: that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock."[69] In 1936, in its syllabus in a leading case, the court stated that each riparian has a primary right to all water needed for domestic use and watering stock, after which all proprietors are equally entitled to share for irrigation purposes what remains in the stream.[70] And in 1949 the supreme court discussed the riparian doctrine and the two theories—natural flow and reasonable use—under which it was applied, and asserted that the latter theory had been adhered to in Kansas whenever the common law doctrine of riparian rights had been under consideration by the supreme court.[71]

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[65] *Atchison, T. & S. F. Ry.* v. *Shriver*, 101 Kans. 257, 258, 166 Pac. 519 (1917).

[66] *Emporia* v. *Soden*, 25 Kans. 588, 604, 37 Am. Rep. 265 (1881).

[67] *Shamleffer* v. *Council Grove Peerless Mill Co.*, 18 Kans. 24, 31-33, 26 Am. Dec. 765 (1877); *Frizell* v. *Bindley*, 144 Kans. 84, 91, 58 Pac. (2d) 95 (1936); *Smith* v. *Miller*, 147 Kans. 40, 42, 75 Pac. (2d) 273 (1938).

[68] *Shamleffer* v. *Council Grove Peerless Mill Co.*, 18 Kans. 24, 31, 33, 26 Am. Dec. 765 (1877); *Frizell* v. *Bindley*, 144 Kans. 84, 91-92, 58 Pac. (2d) 95 (1936); *Dougan* v. *Board of County Comm'rs*, 141 Kans. 554, 562, 43 Pac. (2d) 223 (1935); *Smith* v. *Miller*, 147 Kans. 40, 42, 75 Pac. (2d) 273 (1938). See also *Durkee* v. *Board of County Comm'rs*, 142 Kans. 690, 51 Pac. (2d) 984 (1935).

[69] *Emporia* v. *Soden*, 25 Kans. 588, 606, 37 Am. Rep. 265 (1881).

[70] *Frizell* v. *Bindley*, 144 Kans. 84, 91-92, 58 Pac. (2d) 95 (1936). See also *Campbell* v. *Grimes*, 62 Kans. 503, 505, 64 Pac. 62 (1901); *Clark* v. *Allaman*, 71 Kans. 206, 241, 80 Pac. 571 (1905); *Atchison, T. & S.F. Ry.* v. *Shriver*, 101 Kans. 257, 258, 166 Pac. 519 (1917); *Wallace* v. *Winfield*, 96 Kans. 35, 40, 149 Pac. 693 (1915); *Wallace* v. *Winfield*, 98 Kans. 651, 653-654, 159 Pac. 11 (1916).

[71] *Heise* v. *Schulz*, 167 Kans. 34, 41-43, 204 Pac. (2d) 706 (1949). See *Weaver* v. *Beech Aircraft Corp.*, 180 Kans. 224, 303 Pac. (2d) 159 (1956).

The court indicated that water may be used for domestic and stockwatering purposes and, subject to these primary uses, for other uses such as irrigation.[72]

Interrelationships of the Dual Systems

The appropriation and riparian doctrines of water rights existed side by side in the jurisprudence of Kansas from the time of enactment of the water appropriation statute of 1886.[73]

In 1905, in *Clark* v. *Allaman*, by reference to a leading Nebraska riparian rights decision,[74] the Kansas Supreme Court agreed that the doctrine of prior appropriation may exist in the same State with the doctrine of riparian rights.[75] The court also held that the common law doctrine of riparian rights, while fundamental in the jurisprudence of Kansas, had been modified by the legislation first enacted in 1886 and supplemented in following years "for the laudable purpose of encouraging irrigation." Attention was called to the recognition of diversion and appropriation of water for beneficial purposes as a public use, for which the right of eminent domain might be invoked. Manifestly, said the court, proceedings under these statutes cannot operate to the destruction of previously vested common law rights.

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[72] As mentioned at note 69 *supra*, in an 1881 case the court said that "each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock." *Emporia* v. *Soden*, 25 Kans. 588, 606, 37 Am. Rep. 265 (1881). And the court stated in the syllabus to a 1936 case that each riparian has a primary right to all water needed for domestic use and watering stock, after which all proprietors are equally entitled to share for irrigation purposes what remains in the stream. *Frizell* v. *Bindley*, 144 Kans. 84, 58 Pac. (2d) 95 (1936). See also *Campbell* v. *Grimes*, 62 Kans. 503, 505, 64 Pac. 62 (1901); *Clark* v. *Allaman*, 71 Kans. 206, 241, 80 Pac. 571 (1905); *Atchison, T. & S.F. Ry.* v. *Shriver*, 101 Kans. 257, 258, 166 Pac. 519 (1917); *Wallace* v. *Winfield*, 96 Kans. 35, 40, 149 Pac. 693 (1915); *Wallace* v. *Winfield*, 98 Kans. 651, 653-654, 159 Pac. 11 (1916). In a 1949 case, the court said and repeated in its syllabus that "an upper riparian proprietor may impound water for beneficial use for domestic purposes as long as he does not commit waste, and does not *unreasonably* use or divert the water away from the lower riparian owners." (Emphasis added.) *Heise* v. *Schulz*, 167 Kans. 34, 41, 204 Pac. (2d) 706, 710 (1949). This language appears to be somewhat more restrictive than the court's earlier language regarding domestic use, but the court did not expressly negate its earlier language and quoted its previous statement in *Clark* v. *Allaman, supra*, 71 Kans. at 241, that "The restrictions upon the use of water for irrigation, after the primary uses for quenching thirst and for domestic requirements are subserved, are those which justice and equity suggest." Also, in noting that the reasonable use theory had been extended to irrigation in *Frizell* v. *Bindley, supra*, the court quoted its statement in that case, 144 Kans. at 93, to the effect, *inter alia*, that the use of water for irrigation is "subject to its primary uses of lavandum and potandum." See also *Weaver* v. *Beach Aircraft Corp.*, 180 Kans. 224, 303 Pac. (2d) 159 (1956), which may shed some further illumination on the matter.

[73] Kans. Laws 1886, ch. 115.

[74] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 356, 93 N.W. 781 (1903).

[75] *Clark* v. *Allaman*, 71 Kans. 206, 237-239, 241, 80 Pac. 571 (1905).

From the language used in *Clark* v. *Allaman* the principle of prior appropriation, subject to protection of previously vested common law rights, appeared to have the encouragement of the Kansas Supreme Court. On the strength of the statutes and of this judicial encouragement, Kansas emerged as a dual system State, and several decades passed before the seeming rapport was tested by a major conflict.

Ineffective modification of riparian doctrine by earlier statutes.—For 30 years after rendering the decision in *Clark* v. *Allaman* the Kansas Supreme Court had no occasion to pass upon the riparian-appropriation interrelationship. A report to the Governor of Kansas in 1944 stated that water uses under the common law appeared to have reached their greatest point in the 1870's and to have gone since then through a steady decline. Kansas changed from an economy which required that streamflow be maintained without diminution (justifying adoption of the common law at that time) to one which more and more had its foundation in appropriation and diversion of water for beneficial uses.[76]

Originally, in Kansas, statutory appropriations of water were made by posting and filing notices under the statute of 1886 and diverting and applying the water to beneficial use.[77] In 1917 the legislature created the Kansas Water Commission and authorized the appropriation of surface or ground waters upon application to the Commission. This function was transferred to the Division of Water Resources of the State Board of Agriculture in 1927.[78] On neither occasion did the legislature repeal the posting and filing authorization. It may be noted that the Governor's committee, in its 1944 report, indicated its belief that the legislature sought in the 1917 enactment to set up an administrative agency to have control over the appropriation and use of water.[79] Nevertheless, the posting and filing method remained the one generally followed.[80]

Finally, in 1936, the supreme court again considered the 1886 statute, but withheld judgment as to its full purport.[81] The court held the statute ineffectual as conferring upon a riparian proprietor, who undertook to appropriate water pursuant to its provisions, any right of priority in use of the water as against the owners of riparian lands held under United States land patents that antedated the statute, whose rights and privileges were prescribed and governed by the common law. Judgment was reserved, however, as to the

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[76] "The Appropriation of Water for Beneficial Purposes—A Report to the Governor on Historic, Physical and Legal Aspects of the Problem in Kansas," by a committee appointed by him to study the subject and report its findings and suggestions (1944).

[77] Kans. Laws 1886, ch. 115.

[78] Kans. Laws 1917, ch. 172, Laws 1927, ch. 203.

[79] Note 76 *supra*, at 5.

[80] U.S. Dept. Commerce, Bur. Census, Fifteenth Census of the United States, 1930: Irrigation of Agricultural Lands, p. 27.

[81] *Frizell* v. *Bindley*, 144 Kans. 84, 91-93, 58 Pac. (2d) 95 (1936).

effect of the 1886 law on the riparian status of lands that passed to private ownership after its enactment, inasmuch as a decision thereon was not necessary in the instant case. After taking judicial notice that in 1886 a large area of land in western Kansas was still part of the public domain, the court acknowledged that the *Clark* v. *Allaman* decision recognized the possibility that the statute of 1886 might be valid as applied to lands thereafter patented, and quoted the statement therein that the two opposing doctrines may exist in the same State, but added the warning: "But where they do coexist, it must be by valid legislation, not by judicial decree."[82]

Thus, Kansas rather unexpectedly faced the fact that after a half-century the effectiveness of its 1886 statute in modifying the riparian doctrine was still not fully decided, and that the implications were not encouraging to appropriation proponents. In 1941 the legislature repealed the 1886 provisions authorizing posting and filing notices of appropriation,[83] which left the State administrative procedure originating in 1917 as the only statutory medium through which water could be appropriated.

Immediately upon the 1941 repeal of the 1886 procedure, applications to appropriate water began to be filed with the Division of Water Resources, and the Division's hearing on one application led to an action in *quo warranto* to inquire into its authority to hold such a hearing, in *State ex rel. Peterson* v. *State Board of Agriculture*.[84] The controversy involved a proposed appropriation of ground water, but the supreme court made no distinction between surface stream and ground water in emphatically reaffirming the common law right of the landowner to waters either on or in his land. It was held that the State officials had no statutory authority to conduct a hearing on the application of anyone to appropriate ground waters or to regulate, allocate, or distribute them. The unquestioned implication of the decision was that the Division was equally without authority to act on an application to appropriate water from a surface stream. Thus the 1917 administrative statute was no more effective in modifying the common law riparian doctrine than was its 1886 posting and filing predecessor.

The effective 1945 statute.—The decision in the *Peterson* case, discussed above, left the Kansas water appropriation system in a vacuum. In view of the judicial attitude toward previous legislative procedures, the Governor promptly appointed a committee to study the State water laws and make recommendations before the end of the year.[85] The committee acted upon the premise that conditions in the State and needs of the people had changed greatly since early adoption of the common law as applied to water use—so greatly as to justify

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[82] 144 Kans. at 93.

[83] Kans. Laws 1941, ch. 261.

[84] *State ex rel. Peterson* v. *State Bd. of Agric.*, 158 Kans. 603, 605-614, 149 Pac. (2d) 604 (1944).

[85] See note 76 *supra.*

such modification thereof as would provide an effectual system of prior appropriation, while allowing anyone damaged by the appropriator's use to recover for actual damages.

The 1945 legislature passed an act which followed closely the legislation recommended by the Governor's committee.[86] Nowhere in the statute or in the 1957 amendment thereof is the term "riparian" used; instead, "common law claim" relates to both surface and ground waters. Experience in other States, particularly Nebraska and Oregon, in deflating the importance of unused common law rights was adapted to Kansas conditions.

Extensive amendments of the 1945 law were made in 1957 following conferences held by the Kansas Water Resources Board and the Division of Water Resources, State Board of Agriculture, with representatives of other State and Federal agencies. The exchanges of ideas at these meetings, oriented and supplemented with much supporting material in a report issued by the Water Resources Board,[87] had an important bearing on enactment of the amendments which followed.

The present law dedicates all water within the State to the use of the people thereof, subject to control and regulation by the State. Subject to vested rights, all waters may be appropriated for beneficial use.[88] "Vested right" is the right of a common law or statutory claimant to continue the use of water that was actually applied to beneficial use on or before the effective date of the 1945 act, or within a reasonable time thereafter by means of works then under construction;[89] and it may not be impaired except for nonuse.[90] No permittee shall be prevented or enjoined from proceeding with his appropriation by anyone without a vested right, prior appropriation right, or earlier permit.[91] A common law claimant injured by an appropriation or by construction and operation of authorized works may have compensation in a suitable action at

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[86] Kans. Laws 1945, ch. 390.

[87] Kansas Water Resources Board, "Report on the Laws of Kansas Pertaining to the Beneficial Use of Water." Bull. No. 3 (1956).

[88] Kans. Stat. Ann. § § 82a-702 and -703 (1969).

[89] *Id.* § 82a-701(d).

[90] *Id.* § 82a-703.

The statute also provides that every water right of *every kind* shall be deemed abandoned and shall terminate when, without due and sufficient cause, no lawful beneficial use is made of water under such right for 3 successive years. *Id.* § 82a-718. Thus, without calling a vested common law claim to the use of surface water a riparian right, the Kansas statute provides for cancellation and termination of such right, as well as other rights, in the event the holder fails, without sufficient cause, to make beneficial use of the water over a consecutive 3-year period. This provision, no judicial construction of which has come to the author's attention, is discussed at note 48 *supra*.

Incidentally, as discussed at note 50 *supra*, the 1957 amendment of the water rights statute also provided that "no water rights of any kind may be acquired hereafter solely by adverse use, adverse possession, or by estoppel." Kans. Stat. Ann. § 82a-705 (1969).

[91] Kans. Stat. Ann. § 82a-712 (1969).

law for damages proved for any property taken.[92] But any holder of a valid water right or permit may enjoin a subsequent diversion by a common law claimant who has no vested rights without first having to condemn those common law rights. An appropriator also may protect his priority by injunction as against a later appropriator.[93] Domestic uses are exempt from appropriation permit requirements, although such uses initiated after the 1945 act constitute appropriative rights.[94]

The validity of this legislation has been sustained by both State and Federal courts on the several points presented for determination.[95]

Summary of the interrelationships.—After nearly three-quarters of a century of riparian predominance, the interrelationships of appropriative and riparian claimants in Kansas underwent a substantial and rather abrupt change during the mid-20th century.

In the year following a Kansas Supreme Court decision strongly reaffirming the common law right with respect to both surface and ground waters as against an attempted statutory appropriation, the legislature in 1945 blazed a new trail in enacting a statute aimed at limiting common law rights to actual beneficial use, and so strengthening appropriative rights as against common law claims not based on actual use of water. The validity of this legislation has been

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[92] *Id.* § 82a-716. See also § 82a-721a which states, "Nothing in this act shall be construed as limiting any right of an owner of an estate or interest in or concerning land to recover damage for any injury done to his land or to any water rights appurtenant thereto."

[93] *Id.* § 82a-716 (1969).

[94] *Id.* § 82a-705 and -705a.

[95] *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 555-556, 207 Pac. (2d) 440 (1949); *Baumann* v. *Smrha*, 145 Fed. Supp. 617 (D. Kans. 1956), affirmed per curiam, 352 U.S. 863 (1956); *Williams* v. *Wichita*. 190 Kans. 317, 374 Pac. (2d) 578 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963); *Hesston & Sedgwick* v. *Smrha*, 192 Kans. 647, 391 Pac. (2d) 93 (1964).

The *Emery* case, *supra*, involved a surface watercourse. The other cases involved percolating ground waters.

Although the *Williams* case, *supra*, dealt with percolating ground waters, it approvingly discussed the *Emery* case, *supra*, which involved a surface watercourse. The court said, *inter alia*, "There we were concerned with the privileges of adjacent owners and here with the privileges of surface owners. In either case, the privileges are amenable to reasonable regulation." 374 Pac. (2d) at 594. At another point in the *Williams* case, the court said that the holding in an earlier case (*Wallace* v. *Winfield*, 98 Kans. 651, 159 Pac. 11 (1916), that a riparian had only a right to the *use* of the water of a river and not title to the corpus of the water until reduced to his possession, control, and management) is, by analogy, applicable to ground waters. The court also said that much of the language in its former cases pertaining to absolute ownership of percolating water was *dicta* and, moreover, that "the use of the term 'ownership' as applied to percolating water has never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself." 374 Pac. (2d) at 588. In the *Hesston* case, *supra*, the court reaffirmed its opinion in the *Williams* case.

sustained by both State and Federal courts on the several points presented for determination.

Considerable modification of the riparian doctrine as finally interpreted by the supreme court necessarily resulted. Beneficial use of water is now as essential to the establishment of a common law claim for nondomestic use as to that of an appropriator. (Domestic uses are exempt from appropriation permit requirements, although such uses initiated after the 1945 act constitute appropriative rights.) The constitutional requirement of due process is met by according to a common law claimant compensation in an action at law for proved damages for property taken by an appropriator. And a common law user with a determined vested right may enjoin diversions which impair such uses. On the other hand, the holder of a valid statutory appropriative right may enjoin a subsequent diversion by a common law claimant who has no vested rights, without the necessity of prior condemnation.

The Supreme Court of Kansas was moved to accept the adequacy of these protective measures by taking the modern public interest approach to water rights problems, rather than the previous practice of attempting to solve them largely on the basis of individual interest alone. The key principle in the court's thesis is the beneficial use that the individual is making of the water or has the right to make of it.

Ground Waters

Underflow of stream.—It was held in 1881 that waters percolating laterally from a surface stream, and intercepted by a well close to the stream channel, were not the property of the owner of the overlying land under the doctrine of absolute ownership of percolating water and that their withdrawal for use on distant lands was actionable on the part of a riparian landowner whose water supply was diminished as a result of the withdrawal.[96]

Appropriation statute applies to all ground waters.—There is now no distinction in the statutory law of Kansas between percolating waters and definite underground streams. "Surface or ground waters of the state may be appropriated as herein provided."[97]

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[96] *Emporia* v. *Soden*, 25 Kans. 588, 608-609, 37 Am. Rep. 265 (1881).

In an interstate case, the United States Supreme Court held that evidence of an alleged underflow of the Arkansas River did not warrant a finding that the subsurface water constituted a second and separate stream. *Kansas* v. *Colorado*, 206 U.S. 46, 114-115 (1907). It was the Court's opinion that the surface and subterranean flows constituted one stream.

[97] Kans. Stat. Ann. §82a-707 (1969). With respect to the validity of this legislation, see the discussion at note 95 *supra*.

A statute in existence prior to the appropriation legislation of 1945, and repealed therein (Kans. Laws 1945, ch. 390, §25), related to ownership, appurtenance, and preference in purposes of use of "waters flowing in subterranean channels and courses, or flowing or standing in subterranean sheets and lakes," in a designated part of the State. Kans. Gen. Stat. Ann. §42-305 (1935). So far as ascertained, this provision was not construed by the Kansas Supreme Court.

General criteria to be considered in acting upon applications for appropriations are described above under "Restrictions and preferences in appropriation of water." Among other things, the Chief Engineer (of the Division of Water Resources, Kansas State Board of Agriculture) shall consider the area, safe yield, and recharge rate of the appropriate water supply. "With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit." It shall be an express condition of each appropriation that such right must allow for a reasonable raising or lowering of the static water level at the point of diversion, provided that, in determining such reasonable raising or lowering, the Chief Engineer shall consider "the economics of diverting or pumping water for the water uses involved; and nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be raised or lowered at the point of diversion of a prior appropriator, so long as the rights of holders of existing water rights can be satisfied under such express conditions."[98]

Ground waters tributary to a surface watercourse.—A statute provides that no person shall take or appropriate waters of a subterranean supply that naturally discharge into a surface stream to the prejudice of a prior appropriator of water of such stream.[99]

Artesian waters.—Another statute provides:

> Every person complying with the provisions of this act, and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such waters to the extent to which the same shall be so applied within a reasonable time after the commencement of the works, and such appropriation shall have effect as of the day of commencement of such works, provided the same is prosecuted with reasonable diligence; otherwise from the time of the application of the waters thereof to beneficial uses.[100]

An act regulating artesian wells defines an artesian well as a well sunk to an artesian stratum over 400 feet deep from which water is raised to or above the surface of the earth by artificial means.[101] An artesian well that is not capped or fixed with a device to readily prevent the flow of water from such well is a public nuisance, and the person who permits such nuisance is guilty of a misdemeanor.[102] Any person who permits water from such a well to flow or

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[98] Kans. Stat. Ann. § § 82a-711 and -711a (1969).
[99] Kans. Stat. Ann. §42-306 (1973).
[100] *Id.* §42-307.
[101] *Id.* §42-401.
[102] *Id.* §42-402

waste unnecessarily is also guilty of a misdemeanor.[103] Water may not be transported from an artesian well for a distance of: (1) more than 1½ miles through an earth ditch, or (2) more than 2½ miles through a concrete ditch, and (3) in any manner for more than 2½ miles except for drilling purposes. Anyone wishing to use artesian waters for drilling purposes must obtain a permit therefore.[104]

Ground water management districts.—The legislation pertaining to such districts, which was repealed and reenacted in 1972,[105] declares, among other things:

> It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas. It is, therefore, declared that in the public interest it is necessary and advisable to permit the establishment of groundwater management districts.[106]

Such a district has been given a variety of powers including the power to "adopt, amend, promulgate, and enforce by suitable action, administrative or otherwise, reasonable standards and policies relating to the conservation and management of groundwater within the district which are not inconsistent with the provisions of this act" or the statutory provisions pertaining to appropriation of water.[107] It may recommend to the Chief Engineer rules and regulations necessary to implement and enforce the policies of the district's board of directors, to be effective within such district.[108] The district also may construct, operate, and maintain works for drainage, recharge, storage, distribution or importation of water, and levy user charges and land assessments.[109] Before undertaking active management, the board shall prepare a management program.[110]

Formation of ground water management district may be initiated by petition of at least 15 eligible voters in the proposed district. Its formation must be approved by the Chief Engineer, based upon specified criteria, and by majority vote of eligible voters in the district.[111]

Determination of Conflicting Water Rights

Rights of water users on effective date of 1945 act.—Under this act, as amended in 1957, the Chief Engineer of the Division of Water Resources,

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[103] *Id.* §42-404.
[104] *Id.* §42-406.
[105] Kans. Stat. Ann. §82a-1020 *et seq.* (Supp. 1974).
[106] *Id.* §82a-1020.
[107] *Id.* §82a-1028(n), referring to §82a, art. 7.
[108] *Id.* §82a-1028(o).
[109] *Id.* §§82a-1028(g) and (h) and -1030.
[110] *Id.* §82a-1029.
[111] *Id.* §§82a-1022 to -1025.

Kansas State Board of Agriculture, was directed by the statute to gather data and other information "essential to the proper understanding and determination of the vested rights of all parties using water for beneficial purposes other than domestic" on the act's effective date.[112] The act provides that, based upon his observations and measurements, it is his duty to make an order determining the rights of all such parties beneficially using water on or before the effective date of the enactment (June 28, 1945), and the then extent of their uses. All water users whose rights are so determined must be notified as to the contents of the order of determination.[113] Any such water user who deems himself aggrieved by the order of determination may appeal to the district court. The order of determination is in full force and effect from the date of its entry in the Chief Engineer's office unless and until its operation is stayed by an aggrieved water user's appeal to the district court.[114] But the 1957

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[112] Kans. Stat. Ann. § 82a-704 (1969). Vested rights are defined in § 82a-701(d), described at note 89 *supra.*

[113] The statutory requirement as to service of the order of determination must be followed strictly in order to afford the water user an apportunity to take an appeal if he so desires. *Artesian Valley Water Conservation Assn.* v. *Division of Water Resources*, 174 Kans. 212, 214-215, 255 Pac. (2d) 1015, 1017 (1953).

[114] In a 1962 case, the Kansas Supreme Court said, *inter alia*: "The scheme of the Act was that vested rights of common-law users would be ascertained by the chief engineer of the Division of Water Resources (82a-704) based upon pre-1945 usage for beneficial purposes. When such water-use rights are determined, the Act recognizes a superior vested right of such users to continue their pre-1945 uses in the same amounts and at the same rate of diversion that were then in effect." *Williams* v. *Wichita*, 190 Kans. 317, 374 Pac. (2d) 578, 591 (1962), appeal dismissed "for want of a substantial Federal question," 375 U.S. 7 (1963), rehearing denied, 375 U.S. 936 (1963). Although the Kansas Supreme Court was construing the act as amended in 1957, it did not expressly consider the proviso discussed immediately below in the text and other 1957 amendments discussed in note 115 *infra*. This perhaps was because the principal issues decided in the case apparently were the act's constitutionality and its effect on a permittee's rights versus a nonapplicant's *unused* rights to use ground waters, rather than its effect on rights based on pre-1945 beneficial use. 374 Pac. (2d) at 580, 591, 594-596. The court said, "While [the act] was amended in several particulars in 1957, the amendments treated of procedure, and did not affect the general scheme to establish the appropriation doctrine in Kansas, and to reduce the advantage of location of lands riparian to surface streams and overlying ground waters as against appropriations of water for beneficial use on nonriparian and nonoverlying lands." 374 Pac. (2d) at 590. The court also said, "There are many procedural and other terms of the Act which implement the doctrine of appropriation. For the purpose of this case, however, it is not necessary that these be detailed." 374 Pac. (2d) at 591-592.

Sections 82a-701 to -720 of the act were previously upheld, prior to the 1957 amendments, against a constitutional attack that they improperly conferred legislative or judicial powers upon the Chief Engineer. *State ex rel. Emery* v. *Knapp*, 167 Kans. 546, 207 Pac. (2d) 440, 444, 448 (1949). The court said, *inter alia*, "If the state is to control and regulate the waters of the state other than for domestic use it must ascertain what other use is being made of the water by riparian owners, and the act is not invalid because it authorizes the chief engineer to ascertain what other use is being made of the property and to require the owner to furnish a statement of such use and

amendments also added the following proviso: "*Provided*, That no such determination shall be deemed an adjudication of the relation between any

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to obtain the approval of the chief engineer thereto, with the right of the owner to appeal to the district court from the determination of the chief engineer. Neither of the provisions, G.S. 1947 Supp., Ch. 82a, art. 7, nor those in G.S. 1947 Supp. 42-701 to 42-704 [pertaining to irrigation districts], confer legislative power upon the chief engineer." 207 Pac. (2d) at 448.

However, a 1956 report of the Kansas Water Resources Board, in which recommendations were made for amendments in the legislation, asserted that in the opinion by former Chief Justice Harvey in *State ex rel. Emery* v. *Knapp, supra*, "he does not suggest that any possible property rights stand or fall upon this ex-parte determination. Nor does he suggest that beneficial uses, under claim of right existing at the date of the act are not validly existing property rights. Considerations of basic principles impel us to the position that the legislature did not design the section for the purpose of extinguishing every right that the chief engineer did not determine to be a vested right." Kansas Water Resources Bd., "Report on the Laws of Kansas Pertaining to the Beneficial Use of Water," Bull. No. 3, p. 96 (1956). The Board asserted that §82a-704 of the Kansas water appropriation act "may be approached from three points of view. Firstly, it may be considered as mere administrative procedure for cataloguing vested rights and not as a proceeding for the adjudication of property rights. Secondly, it may be considered as the necessary procedure for the valid continuation of vested property rights. Thirdly, it may be considered as a new rule whereunder entirely new property rights are created.

"Under the second view, and possibly under the third, there is a serious question as to the section's constitutionality. The reason is this: The section does not require the chief engineer to give any user notice or hearing [prior to entering an order]. And in practice, the chief engineer has probably not given formal notice or held hearings prior to entering orders although he has solicited information from the various users and has now determined, presumably, all the vested-right users in the state. [In this regard, see also Noe, W. L., "Water Law Procedures in Kansas," 5 Kans. L. Rev. 663, 663-664 (1957).] A great many water users have acquired vested property rights under rules of property that were in existence prior to the chief engineer's determination of them. If the state recognizes and protects those rights only if the chief engineer determines those rights, and if he does so under procedure requiring no notice or hearing, the procedure lacks the fundamental elements of due process guaranteed by both the federal and state constitutions.

* * * *

"Suppose, however, that Section [82a-704] does establish the protectability of vested rights. Some difficulty other than that discussed above would still remain.

"Recall, the only notice the purported vested-right user gets is the notice of the chief engineer's order of determination. If the chief engineer overlooks a vested-right user, obviously he makes no order and gives no notice. Since the appeal time dates from the posting and mailing of the notice, the appeal time has never run as to the user. The Kansas Supreme Court made this point in Artesian Valley Water Conservation Association et al. v. Division of Water Resources and Smrha. [174 Kan. 212, 255 P. 2d 1015 (1953).]

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"The chief engineer, supposedly, has determined all vested rights in the state. But as against any vested-right users he may have missed, the appeal time has not yet started to run. Keep in mind that the statute does not require the users to file claims of vested

(*Continued*)

vested right holders with respect to the operation or exercise of their vested rights."[115]

Reference by court in water rights action.—Part of California's well-developed

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(*Continued*)
rights. It places the entire burden upon the chief engineer." Kansas Water Resources Bd., *supra* at 92, 96, 97.

(In the cited case, the chief engineer had determined that a certain water user did not have a vested right but the court concluded that the notice of such order "was never completed in a statutory manner. The result is that Lockhart, the water user, has never been placed in a position where he must have appealed." 255 Pac. (2d) at 1017.)

Among other recommendations for amendments in the legislation, the Board included suggested detailed procedures, among others, for notices, hearings, and claim filings that might be incorporated in §82a-704. Kansas Water Resources Bd., *supra* at 98-100, 135-137. But no material changes in the statutory provisions described above appear to have been made in the 1957 amendments adopted by the legislature, except as described in note 115 *infra*.

[115] Kans. Laws 1957, ch. 539, §6, Stat. Ann. §82a-704 (1969).

From the former wording in §82a-704 that "The chief engineer shall then make an order determining and establishing the rights of all persons * * *" the words "and establishing" were deleted by the 1957 amendment. Laws 1957, ch. 539, §6. In addition, from the former wording of §82a-712 that "no common-law claimant without a determined vested right, or other person without a determined vested right * * * shall prevent, restrain, or enjoin an applicant from proceeding in accordance with the terms and conditions of his permit" the word "determined" was deleted by the 1957 amendment. *Id.* §18.

At the 1957 legislative session, Senate Bill No. 339 added at the end of amended §82a-704 the following paragraph: "The foregoing provisions hereof are for the purpose of providing an administrative procedure for the cataloguing of existing vested rights for the use, benefit, assistance, and information of the chief engineer." But this was not included in the final enactment of Laws 1957, ch. 539.

In view of some of the foregoing factors in this and the preceding footnote, the above proviso conceivably is intended to prevent the determinations of the Chief Engineer from constituting adjudications of any water rights. But another conceivable alternative effect perhaps intended by the above proviso is that while the relative rights of vested rights holders, *among themselves*, are not deemed to be adjudicated in this statutory proceeding, their vested rights are deemed to be adjudicated *as against the State and later applicants for appropriations*. In this regard, see Johnson, C.W., "Adjudication of Water Rights," 42 Tex. L. Rev. 121, 134 (1963); Note, "Water Rights—Finality of General Adjudication Proceedings in the Seventeen Western States," 1966 Utah L. Rev. 152, 160. See also Note, 1966 Utah L. Rev., *supra* at 172, regarding a similar proviso in Oklahoma legislation enacted in 1963. Okla. Stat. Ann. tit. 82, §6 (1970), repealed, Laws 1972, ch. 256, §33. Also recall, as mentioned above, that a determination shall be made of (1) the rights of vested rights holders and (2) the extent of their uses on the 1945 act's effective date. The proviso conceivably is intended to apply to the determination of the operation or exercise of their relative rights but not to the determined extent of their uses. See Clark, R.E., "The California Doctrine: Appropriative and Riparian Rights to Surface Water," in 5 "Waters and Water Rights" §430.6 (R. E. Clark ed. 1972); Note, 1966 Utah L. Rev., *supra* at 160.

In view of the foregoing and other conceivable factors and considerations, the intended effect of the proviso and the other, apparently related, 1957 amendments mentioned above is problematical.

court reference procedure for water cases was adopted by Kansas in 1957. In any suit involving a determination of water rights, to which the State is not a proper party, the court may order a reference to the Division of Water Resources or its Chief Engineer, as referee, to investigate and report any or all of the physical facts involved.[116] Such reports are to be considered as evidence of the physical facts found by the referee,[117] although the court must hear such further evidence as may be offered by any party in rebuttal.

In any suit brought in a Federal court for determination of water rights within or partly within the State, the Division or its Chief Engineer may accept a reference as master or referee for the Federal court.

Administration of Water Rights and Distribution of Water

A function of the Division of Water Resources, Kansas State Board of Agriculture, and its Chief Engineer is to aid in the administration of court decrees of adjudication of water rights, and to distribute the water among the parties entitled to it pursuant to the decree. The State officials may adjust headgates and regulate controlling works. Copies of such decrees must be sent to the Chief Engineer by the clerk of the court.[118]

It is also the function of the Chief Engineer to enforce and administer the laws pertaining to the beneficial use of water and to control, regulate, and distribute the State waters in accordance with rights of prior appropriation.[119] To implement this mandate, he may promulgate and enforce reasonable rules and regulations, require the installation of measuring devices and furnishing of records, and regulate all control works.[120]

Subject to approval of the State Board of Agriculture, the Chief Engineer may establish field offices and appoint water commissioners therefor. The water commissioners are representatives of the Chief Engineer and have responsibility in supervising the distribution of water according to the several rights and priorities involved.[121]

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[116] Kans. Stat. Ann. § 82a-725 (1969). The language, "the court may order a reference"—identical in both California [Cal. Water Code § 2000 (West 1971)] and Kansas statutes—was construed by the California Supreme Court as making ordering of the reference discretionary with the trial court, which is subject to no positive duty to refer a water problem to the State agency. *Allen* v. *California Water & Tel. Co.*, 29 Cal. (2d) 466, 489, 176 Pac. (2d) 8 (1946).

[117] The referee's report shall contain such findings of fact as may be required by the court's order of reference and such opinion upon the facts as deemed proper in view of the issues submitted. Kans. Stat. Ann. § 82a-725 (1969).

[118] *Id.* § § 82a-719 and -720.

[119] Such distribution presumably would be subject to decreed rights, discussed immediately above, and vested rights, discussed previously under "Determination of Conflicting Water Rights—Rights of water users on effective date of 1945 act."

[120] Kans. Stat. Ann. § § 82a-706 to -706c (1969).

[121] *Id.* § 82a-706e.

It is the duty of the Attorney General, upon request of the Chief Engineer, to bring suit in the name of the State to enjoin unlawful diversions, uses, and waste of water.[122]

Montana

Governmental Status

The Territory of Montana was established May 26, 1864.[1] The Enabling Act was approved February 22, 1889,[2] and Montana was admitted to statehood by proclamation of the President November 8, 1889.[3]

Early Water Uses

Montana shared with other northwestern regions the overflow of gold mining energy from California as the surface "diggings" in so many localities there were exploited to their capacity and gradually "played out," leaving the deeper, expensive work to those who could provide the necessary capital.[4] The Montana water law itself "had its origin in the customs of miners and others in California," and was developed in Montana primarily in the mining areas in the form of local customs and rules prior to any legislation on the subject.[5] The outstanding importance of mining in controversies over the use of water in Montana during the Territorial period is indicated by the preponderance of mining water rights cases then decided. After statehood was established, on the other hand, most of the water rights controversies that reached the supreme court related to irrigation.[6]

State Administrative Agency

Prior to 1973, Montana was unique among the coterminous Western States in having State agencies concerned with water but with extremely limited functions pertaining to the regulation of water rights. The State Engineer, upon the direction of the State Water Conservation Board, could initiate and participate in actions to adjudicate stream waters;[7] but the procedures for appropriating water included neither the State Engineer nor the Board, and neither had control over the exercise of water rights or distribution of water. The State Water Conservation Board, as well as its contractors and any other

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[122] *Id.* § 82a-706d.

[1] 13 Stat. 85 (1864).

[2] 25 Stat. 676 (1889). This act related likewise to the Territories of Washington and Dakota.

[3] 26 Stat. 1551 (1889).

[4] See Shinn, C. H., "Mining Camps, A Study in American Frontier Government" 276-280 (1948, originally published in 1885).

[5] See *Bailey* v. *Tintinger*, 45 Mont. 154, 166, 122 Pac. 575 (1912); *Maynard* v. *Watkins*, 55 Mont. 54, 55, 173 Pac. 551 (1918); *Stearns* v. *Benedick*, 126 Mont. 272, 274-275, 247 Pac. (2d) 656 (1952).

[6] Hutchins, W. A., "The Montana Law of Water Rights" 6-7 (1958).

[7] Mont. Rev. Codes Ann. § § 89-848 and -851 (1964).

owner of stored waters, could petition the court to have decreed stored waters distributed by commissioners,[8] but that was the extent of State administrative connection with the proceeding.

In 1965, the duties and authority of the State Engineer were transferred to the State Water Conservation Board[9] and in 1967, the State Water Conservation Board was replaced by the Montana Water Resources Board.[10] In 1971, the Montana Water Resources Board was abolished and its function transferred to the newly created Department and Board of Natural Resources and Conservation.[11]

With the enactment of the Montana Water Use Act in 1973, a permit system for acquiring water rights was established, under the supervision and control of the Department and Board of Natural Resources and Conservation. In addition, the Department and Board were given authority to determine water rights existing on the effective date of the Act.[12] The distribution of water, however, continues as an almost entirely judicial function.

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—The first Territorial legislative assembly of Montana passed an act to protect and regulate the irrigation of land.[13] Any holder of land adjacent to or near a stream was entitled to use the water thereof for irrigation and to a right of way if necessary over intervening property. Subsequent legislation recognized the doctrine of appropriation as applicable to all controversies over water rights for mining, manufacturing, agriculture, and other purposes.[14] Both Territorial and State legislation prescribed methods for the appropriation of water.[15]

In its first decision in a water rights controversy, the Montana Supreme Court recognized the appropriation doctrine with respect to a claim of right to use water for mining purposes.[16] The question was subsequently raised but not answered with respect to ranchers;[17] but it was decided affirmatively

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[8] *Id.* §§89-1001 to -1024.

[9] Mont. Laws 1965, ch. 280, §17.

[10] Mont. Laws 1967, ch. 158.

[11] Mont. Laws 1971, ch. 272, §1.

[12] Mont. Laws 1973, ch. 452, Rev. Codes Ann. §§89-870 to -889 (Supp. 1974).

[13] Bannack Stat., p. 367 (1865).

[14] Among other Territorial acts were Mont. Laws 1879, p. 52, and Laws 1885, p. 130.

[15] A chronological account of Territorial and State legislation on acquisition of water rights is contained in the Montana Supreme Court's opinion in *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 166-168, 201 Pac. 702 (1921). A historical discussion of the development of the appropriation doctrine in Montana, repudiation of the riparian doctrine, and unsuccessful attempts to obtain a centralized system of control of water rights is included in Dunbar, R. G., "The Search for a Stable Water Right in Montana," 28 Agricultural History 138-149 (1954).

[16] *Caruthers* v. *Pemberton*, 1 Mont. 111, 117 (1869).

[17] *Thorp* v. *Woolman*, 1 Mont. 168, 171 (1870).

in a later decision involving irrigation.[18] According to the supreme court, the doctrine of appropriation "was born of the necessities of this state and its people," and was intended to be permanent in character, exclusive in operation, and to fix the status of water rights in the jurisdiction.[19]

The 1972 Montana constitution provides, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[20] Another provision of the constitution, which also appeared in the previous Montana constitution, declares that the use of all water appropriated for sale, rental, distribution, or other beneficial uses, and the right of way over lands of others for necessary conduits and structures, as well as the sites for reservoirs necessary for collecting and storing the water, shall be held to be a public use.[21]

Pre-1973 procedure for appropriating water.—Montana had no centralized State administrative procedure for the acquisition of appropriative water rights. A procedure provided by statute governed the appropriation of water from *adjudicated* streams or other sources of water supply, and it had to be followed in appropriating waters of any adjudicated source; and a separate statutory procedure applying to *unadjudicated* streams and other sources apparently was optional with the intending appropriator. However, neither the State Water Resources Board nor the State Engineer had control in any case.

Pre-1973 procedure for appropriating unadjudicated water: Nonstatutory.—Originally "all appropriations were made pursuant to the rules and customs of the early settlers of California, which had been adopted in Montana territory and given the force of law, by recognition of the legislature * * * and the courts."[22] The acts of digging a ditch, tapping a stream, diverting water therefrom, and applying this water to a beneficial use constituted a valid appropriation of the water.[23]

With respect to *unadjudicated* water only, valid appropriations could be made where water actually was diverted and applied to beneficial use, even

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[18] *Gallagher* v. *Basey*, 1 Mont. 457, 460-462 (1872), affirmed, 87 U.S. 670, 681-682, 685-686 (1875). See *Atchison* v. *Peterson*, 1 Mont. 561, 569 (1872), affirmed, 87 U.S. 507, 510-516 (1874). The right to appropriate water for mining and other useful purposes "is certainly the settled rule in this state." *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 185, 50 Pac. 416 (1897).

[19] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 170, 201 Pac. 702 (1921). See *Bean* v. *Morris*, 221 U.S. 485, 487 (1911).

[20] Mont. Const. art. IX, § 3(3).

[21] Mont. Const. art. IX, § 3(2), formerly art. III, § 15.

[22] *Maynard* v. *Watkins*, 55 Mont. 54, 55, 173 Pac. 551 (1918).

[23] *Murray* v. *Tingley*, 20 Mont. 260, 268, 50 Pac. 723 (1897). See *Midkiff* v. *Kincheloe*, 127 Mont. 324, 328, 263 Pac. (2d) 976 (1953).

where there was no compliance with the statute which purported to govern such appropriations.[24] This statute was originally enacted in 1885.[25]

Prior to enactment of the 1885 law, it was the rule that an appropriation by one who prosecuted the work with reasonable diligence related back to the time of commencement of the work.[26] The priority of a nonstatutory appropriation of unadjudicated water made after such enactment, however, was fixed as of the date of completion rather than the date of initiating the appropriation.[27]

Pre-1973 procedure for appropriating unadjudicated water: Statutory.—A method of appropriating water was first prescribed by statute in 1885.[28] The intending appropriator was required to post a notice at the point of intended diversion, to file a notice in the county records and begin construction within prescribed periods of time, and to prosecute the work of appropriation diligently to completion. Failure to comply with the statutory requirements deprived the appropriator of the right of use of the water as against a subsequent claimant who complied therewith; but by compliance, the right of use related back to the date of posting notice, which was the first step in the procedure.[29]

Pre-1973 procedure for appropriating adjudicated water.—The procedure for making an appropriation of water from a source that has been adjudicated was provided in 1921.[30] An intending appropriator had to (a) employ a competent

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[24] *Vidal* v. *Kensler*, 100 Mont. 592, 594-595, 51 Pac. (2d) 235 (1935); *Clausen* v. *Armington*, 123 Mont. 1, 14, 212 Pac. (2d) 440 (1949). See also *Shammel* v. *Vogl*, 144 Mont. 354, 396 Pac. (2d) 103, 111-112 (1964).

[25] Mont. Rev. Codes Ann. §§89-810 to -814 (1964). See "Pre-1973 procedure for appropriating unadjudicated water: Statutory," *infra*.

[26] *Murray* v. *Tingley*, 20 Mont. 260, 268, 50 Pac. 723 (1897).

[27] *Anaconda Nat'l Bank* v. *Johnson*, 75 Mont. 401, 408-410, 244 Pac. 141 (1926); *Midkiff* v. *Kincheloe*, 127 Mont. 324, 328, 263 Pac. (2d) 976 (1953).

[28] Mont. Laws 1885, p. 130.

[29] Mont. Rev. Codes Ann. §§89-810 to -814 (1964).

It was the conclusion of the Montana Supreme Court that the 1885 law did not abolish the preexisting method of appropriating water by means of diversion and application to beneficial use. *Murray* v. *Tingley*, 20 Mont. 260, 268, 269, 50 Pac. 723 (1897). What the statute did was to provide an additional and alternative method under which evidence of water rights would be preserved and the doctrine of relation back regulated. That is, whereas the statutory method was not the exclusive procedure by which one may appropriate unadjudicated water, it was the exclusive procedure by which an intending appropriator could obtain the advantage of the doctrine of relation. *Musselshell Valley Farming & Livestock Co.* v. *Cooley*, 86 Mont. 276, 288, 283 Pac. 213 (1929); *Bailey* v. *Tintinger*, 45 Mont. 154, 171-172, 122 Pac. 575 (1912). See *Morris* v. *Bean*, 146 Fed. 423, 427 (C. C. D. Mont. 1906). In *Bailey* v. *Tintinger*, 45 Mont. at 170, the State supreme court named an additional purpose of the act of 1885—to prescribe the steps necessary to be taken to effect a complete appropriation of the water.

[30] Mont. Laws 1921, ch. 228, Rev. Stat. Ann. §§89-829 to -844 (1964).

(*Continued*)

engineer to make a survey of the proposed aqueduct, impounding dam or other work, or both; or (b) cause to be prepared an aerial photograph with drawing thereon showing this information, with appropriate descriptions. He had to file, with the court of the county in which the water was to be appropriated, a petition containing a declaration that the water right sought to be acquired would be subject to the terms of any adjudication decree theretofore rendered by a court of competent jurisdiction adjudicating the waters of such source of supply or any body of water to which the same may have been tributary. Parties who might have been affected were made defendants. On conclusion of the trial, the court could enter an interlocutory or permanent decree allowing the appropriation subject to the terms of all prior decrees. Failure to comply with the statutory provisions deprived the appropriator of the right to use water as against a subsequent appropriator mentioned in or bound by a decree of the court.[31]

According to the Montana Supreme Court, the statute was applicable equally to appropriations of so-called normal flow and to those of flood or excess waters in the stream.[32]

Unlike the act of 1907, the 1921 statute provided the exclusive method of appropriating water from an adjudicated stream or other source. It was the legislature's intention that there be substantial compliance with the statutory requirements.[33] One who thus appropriated adjudicated water was simply a junior appropriator, with the rights and disabilities incident to one whose water right thus decreed was subject to the superior rights adjudicated in the original decree.[34]

(*Continued*)

The 1921 procedure relating to *adjudicated* sources superseded that provided by an act passed in 1907. This earlier law, Mont. Laws 1907, ch. 185, superseded by Laws 1921, ch. 228, had provided that waters of adjudicated sources might be appropriated by taking prescribed steps which included posting of notice, prosecuting the work to completion with reasonable diligence, filing with the county court an application to have the ditch capacity determined, examination by an engineer, and order of the court after hearing any objections that had been filed. It was the view of the Montana Supreme Court that this procedure was not exclusive; that the legislature did not intend that one who failed to comply with the terms of the statute, but who in the absence of any conflicting adverse right nevertheless had actually impounded, diverted, and put the water to a beneficial use, should acquire no title thereby. *Donich* v. *Johnson*, 77 Mont. 229, 246, 250 Pac. 963 (1926). See *Anaconda Nat'l Bank* v. *Johnson,* 75 Mont. 401, 409, 244 Pac. 141 (1926).

[31] Water stored in a reservoir, pursuant to an appropriation which was subsequent to an adjudication of waters in a flowing stream, was not, when released into the stream from storage, to be considered a part of the natural flow of such stream. Mont. Rev. Codes Ann. §89-829 (1964).

[32] *Quigley* v. *McIntosh*, 88 Mont. 103, 107-108, 290 Pac. 266 (1930).

[33] *Anaconda Nat'l Bank* v. *Johnson*, 75 Mont. 401, 411, 244 Pac. 141 (1926); *Donich* v. *Johnson*, 77 Mont. 229, 246, 250 Pac. 963 (1926).

[34] *Quigley* v. *McIntosh*, 88 Mont. 103, 109, 290 Pac. 266 (1930).

By interlocutory decree awarding an appropriation of water of an adjudicated source, the court could prescribe the conditions under which the work necessary to the complete appropriation had to be done and the time within which it had to be completed. Upon full compliance, the court entered its decree establishing the appropriation and fixing the date of priority. This priority date, if the appropriator had been diligent in complying with the court order, was the date of filing the petition, but it could be fixed at a later time if the facts so warranted.[35]

Procedure for appropriating water: 1973 Montana Water Use Act.—In 1972, Montana adopted a new State constitution which, among other provisions relating to water rights, declared, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."[36] Pursuant to this provision, in 1973 the Montana Legislature adopted the Montana Water Use Act,[37] which substantially altered the existing provisions relating to appropriation and adjudication of water rights.[38]

Under this new legislation, "After the effective date of this act, a person[39] may not appropriate water[40] except as provided in this act. A person may only appropriate water for a beneficial use."[41] "Except as otherwise provided in subsection (4)[42] of this section, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."[43] The Department is the Department of Natural Resources and

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[35] Mont. Rev. Codes Ann. § 89-834 (1964).

[36] Mont. Const. art. IX, § 3(4).

[37] Mont. Rev. Codes Ann. § 89-865 *et seq.* (Supp. 1973), as amended.

[38] Mont. Rev. Codes Ann. § 89-801 *et seq.* (1964).

[39] "Person" is defined as "an individual, association, partnership, corporation, state agency, political subdivision, and the United States or any agency thereof." Mont. Rev. Codes Ann. § 89-867(11) (Supp. 1973).

[40] "Water" means "all water of the State, surface and subsurface, regardless of its character or manner of occurrence, including geothermal water." *Id.* § 89-867(1).

[41] *Id.* § 89-880(1).

"Beneficial use" is defined as "a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal power, and recreational uses; provided, however, that a use of water for slurry to export coal from Montana is not a beneficial use." Mont. Rev. Codes Ann. § 89-867(2) (Interim Supp. 1974).

[42] This subsection exempts, from the permit requirements, appropriations of ground water outside the boundaries of controlled ground water areas for which the withdrawal rate is less than 100 gallons per minute. Mont. Rev. Codes Ann. § 89-880(4) (Supp. 1973). Controlled ground water areas are discussed at notes 125-126 *infra.*

[43] Mont. Rev. Codes Ann. § 89-880(2) (Supp. 1973).

A person intending to appropriate water by means of a reservoir must also apply for a permit as prescribed by the Act. Mont. Rev. Codes Ann. § 89-889 (Supp. 1973).

(*Continued*)

Conservation. The legislation contains provisions for publishing notice of applications for permits and filing objections to applications. If the Department determines that an objection to an application states a valid objection, a public hearing is to be held. If no objection is filed, but the Department is of the opinion that the application should be approved in a modified form or upon terms, conditions or limitations, or that the application should be denied, the Department shall state the reasons therefor and notify the applicant that he *may* obtain a hearing. No application may be approved in a modified form or upon terms, conditions or limitations, or denied, unless the applicant is first given an *opportunity* to be heard.[44]

Upon completion of the appropriation, the permittee receives a certificate of water right. However, except as provided in the section of the Act relating to ground water,[45] no certificate of water right in a particular source may be issued prior to a general determination of existing rights in that source.[46]

Persons aggrieved by decisions of the Department are entitled to hearings before the Board of Natural Resources and Conservation.[47]

As between appropriators, first in time is first in right. The priority of an appropriation made under this Act, except for certain ground waters,[48] dates from the filing of an application for a permit.[49] Priority of appropriation perfected before the effective date of this Act shall be determined in accordance with the provisions relating to determinations of existing rights.[50]

(*Continued*)

Under the Montana Water Resources Act, the authority of the Department conferred by the Act "extends and applies to rights to the natural flow of the waters of this state which it may acquire, with the approval of the board [of natural resources and conservation], by condemnation, purchase, exchange, *appropriation* or agreement." Mont. Rev. Codes Ann. §89-125(1) (Interim Supp. 1974). (Emphasis added.)

[44] Mont. Rev. Codes Ann. §§89-881 to -884 (Supp. 1973). Various criteria for issuing permits, limitations on the issuance of permits, and terms and conditions which may be imposed in issuing permits are discussed later under "Restrictions and preferences in appropriation of water." Section 89-884 imposes time limitations on the Department's actions on applications.

[45] Mont. Rev. Codes Ann. §89-880(4) (Interim Supp. 1974). This is discussed at note 133 *infra.*

[46] Mont. Rev. Codes Ann. §89-888(3) (1973).

Determinations of existing rights are discussed later under "Determination of Conflicting Water Rights."

[47] *Id.* §89-8-100.

[48] See the discussion at note 133 *infra.*

[49] Mont. Rev. Codes Ann. §§89-891(1) and (2) (Supp. 1973).

A defective application for a permit does not lose priority because of those defects if it is correctly refiled within 30 days after its return to the applicant or within such further time as the Department may allow. Mont. Rev. Codes Ann. §89-880(2) (Interim Supp. 1974).

[50] Mont. Rev. Codes Ann. §89-891(3) (Supp. 1973).

Determinations of existing rights are discussed later under "Determination of Conflicting Water Rights."

Procedure for appropriating water: Some other aspects.—The 1972 Montana constitution provides, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[51] As previously noted (see "Early Water Uses"), mining, irrigation, and domestic uses of appropriated water had early recognition. Approval has been extended also to irrigation of pastureland and to use of water in a swimming pool and for propagation of fish.[52] The 1973 Montana Water Use Act defines beneficial use as "including, but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal power, and recreational uses * * *."[53]

The 1973 Montana Water Use Act provides that no person may appropriate water except as provided in the Act,[54] and defines person as "an individual, association, partnership, corporation, state agency, political subdivision, and the United States or any agency thereof."[55] Under prior legislation, the supreme court held that a corporation may make an appropriation of water in its own right.[56]

The validity of an appropriation made for one's own use apparently depends upon the holding of at least a possessory interest in land in connection with which the water is to be used, the situation being otherwise in the case of appropriations made for the sale or rental of water.[57] The Montana Supreme Court held that the validity of an appropriation depends upon rightful diversion by lawful means;[58] that a water right initiated in trespass is invalid.[59]

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[51] Mont. Const. art. IX, § 3(3).

The 1973 Montana Water Use Act also declares that "any use of water is a public use, and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses * * *." Mont. Rev. Codes Ann. § 89-866(1) (1964).

[52] *State ex rel. Silve* v. *District Ct.*, 105 Mont. 106, 112, 69 Pac. (2d) 972 (1937); *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 300-302, 62 Pac. (2d) 206 (1936).

In *Paradise Rainbows* v. *Fish & Game Comm'n*, 148 Mont. 412, 421 Pac. (2d) 717, 721 (1966), the Montana Supreme Court said, with respect to public fishing uses, "[U]nder the proper circumstances we feel that such a public interest should be recognized."

[53] Mont. Rev. Codes Ann. § 89-867(2) (Interim Supp. 1974). However, the definition specifically declares that the use of water for slurry (a mixture of water and insoluble matter) to export coal from Montana is not a beneficial use.

[54] Mont. Rev. Codes Ann. § 89-880(1) (Supp. 1973).

[55] *Id.* § 89-867(11).

[56] *Bailey* v. *Tintinger*, 45 Mont. 154, 177-178, 122 Pac. 575 (1912).

[57] Hutchins, *supra* note 6, at 16-17.

[58] *Warren* v. *Senecal*, 71 Mont. 210, 220, 228 Pac. 71 (1924).

[59] *Osnes Livestock Co.* v. *Warren*, 103 Mont. 284, 295, 62 Pac. (2d) 206 (1936). Where it can only be exercised by committing a trespass, it may not be asserted against the true owner of the land upon which the trespass is committed.

The State constitution declares that the sites necessary for collecting and storing water shall be held to be a public use.[60] And the statutes provide that any one appropriating water by means of a reservoir shall apply for a permit.[61] The supreme court has repeatedly recognized the right to appropriate water for storage purposes and has emphasized the public importance of such developments.[62]

Restrictions and preferences in appropriation of water.—The 1973 Montana Water Use Act contains specific criteria for the issuance of permits. (There formerly was no administrative permit system.) The Department of Natural Resources and Conservation shall issue a permit if:

(1) there are unappropriated waters in the source of supply;
(2) the rights of a prior appropriator will not be adversely affected;
(3) the proposed means of diversion or construction are adequate;
(4) the proposed use of water is a beneficial use;
(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.[63]

The Department may issue a permit for less water than the amount requested but in no case for more water than is requested or than can be beneficially used without waste; it may require the modification of plans and specifications for the appropriation or related diversion or construction; it may limit the time for commencement of the appropriation works, completion of construction and actual application to beneficial use; and it "may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators * * *."[64]

All permits issued are subject to existing rights and any final determinations of those rights.[65]

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[60] Mont. Const. art. IX, § 3(2).

[61] Mont. Rev. Codes Ann. § 89-889 (Supp. 1973).

[62] See *Richland County* v. *Anderson*, 129 Mont. 559, 564, 291 Pac. (2d) 267 (1955); *Farmers Union Oil Co.* v. *Anderson*, 129 Mont. 580, 583-584, 291 Pac. (2d) 604 (1955). For a discussion of the extent of storage water right, see *Federal Land Bank* v. *Morris*, 112 Mont. 445, 454-456, 116 Pac. (2d) 1007 (1941).

[63] Mont. Rev. Codes Ann. § 89-885 (Supp. 1973). Beneficial use is defined in note 41 *supra.*

[64] Mont. Rev. Codes Ann. § 89-886 (Supp. 1973). However, as noted previously, no application for a permit may be modified, made subject to terms, conditions, or limitations, or denied unless the applicant is first granted an *opportunity* to be heard. *Id.* § 89-884(2), discussed at note 44 *supra.*

[65] Mont. Rev. Codes Ann. § 89-886(1) (Supp. 1973).

"A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of

Permits may be revoked if the permittee fails to show sufficient cause why he has not complied with the requirements of the permit.[66]

As between appropriators, the first in time is the first in right. However, a prior appropriator may not prevent changes by subsequent appropriators in the condition of water occurrence (for example, increasing or decreasing streamflow or lowering a water table, artesian pressure, or water level) if the prior appropriator can reasonably exercise his water right under the changed condition.[67] Transfers of interest in appropriation rights shall be without loss of priority.[68]

Ordinarily, priority of appropriation confers superiority of right, without reference to the purpose of use of the water so long as it is beneficial.[69] However, the State of Montana and its agencies and political subdivisions and the United States and its agencies may apply to the Board of Natural Resources and Conservation to *reserve* water "for existing or future beneficial uses, or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates." Upon receiving an application, the Department proceeds in accordance with the notice and hearing requirements for permit applications. After the hearing, the Board decides whether or not to reserve the water. The Board may not order the reservation unless the applicant establishes (1) the purpose of and need for the reservation, (2) the amount of water needed, and (3) that the reservation is in the public interest.[70] No reservation shall be made which will affect rights in existence when the order reserving the water is adopted.[71]

After an order reserving waters has been adopted, the Department may reject applications to appropriate reserved waters or, with the approval of the Board, issue a permit subject to such terms and conditions as it deems necessary to protect the objectives of the reservation. The Board is required to periodically

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construction of diversion works, purchase of equipment to apply water, planting of crops, or other action, where the permit would have been denied or modified if the final decree had been available to the department." *Id.* §89-880(3).

Certificates of water rights, which are issued to the permittee upon completion of the appropriation in the particular source, may not be issued (except as provided in the section of the Act relating to ground water discussed at note 133 *infra*) prior to a determination of existing rights in the source in question. *Id.* §89-888(2).

Determinations of existing rights are discussed later under "Determination of Conflicting Water Rights."

[66] Mont. Rev. Codes Ann. §89-887 (Supp. 1973).

[67] *Id.* §89-891(1).

[68] *Id.* §89-893(1).

[69] See *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 159-160, 201 Pac. 702 (1921); *Basey* v. *Gallagher*, 87 U.S. 670, 682 (1875).

[70] If the purpose of the reservation requires the construction of a storage facility, the applicant must establish that the facility will be completed and the purpose accomplished with reasonable diligence in accordance with the plan.

[71] Mont. Rev. Codes Ann. § §89-890(1) - (3) and (5) (Supp. 1973).

(at least every 10 years) review reservations to insure that the objectives are being met. If the objectives are not being met, the Board may extend, revoke or modify the reservation.[72]

In 1974, the Montana Legislature found that existing appropriations, applications for permits, and widespread interest in making substantial appropriations in the Yellowstone River Basin were threatening to deplete the water supply to the "significant detriment" of existing and projected agricultural, municipal, recreational, wildlife and aquatic habitat, and other uses. The appropriations would foreclose the options of the people of the State to use the water for future beneficial purposes. Therefore, "pursuant to its mandate and authority under article IX of the Montana constitution," the legislature declared it to be the policy of the State that before proposed appropriations are acted upon, existing rights in the Yellowstone Basin are to be "accurately determined" and reservations of water within the Basin are to be established "as rapidly as possible" to protect and preserve existing and future beneficial purposes.[73]

Pursuant to this declaration of policy, the legislature declared that the Department of Natural Resources and Conservation may not grant or take any other action on an application[74] until 3 years have elapsed after the effective date of this legislation or a final determination of existing rights has been made in the source of supply.[75] A reservation established before an application for a permit is granted is a preferred use over the right to appropriate water pursuant to such permit.[76]

The Department may suspend action on applications which do not meet the definition of "application"[77] as used in the legislation if it determines, after public hearing, that the cumulative impact of granting those applications would be contrary to the purposes and policies noted above.[78]

The Department may apply for reservations and is to assist other State agencies and subdivisions in applying for reservations "as rapidly as possible."

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[72] *Id.* § § 89-890(4) and (6).

[73] Mont. Rev. Codes Ann. § 89-8-103 (Interim Supp. 1974).

[74] "Application" means an application under the Water Use Act to appropriate surface water within the Yellowstone basin for (1) a reservoir with a total planned capacity of 14,000 acre-feet and/or (2) a flow rate greater than 20 cubic feet per second. This term encompasses applications for approval to change the purpose of use under § 89-892. *Id.* § 89-8-104(3).

[75] *Id.* § 89-8-105(1).

This legislation applies to applications pending on and those filed after the effective date of the legislation; but it does not apply to applications to appropriate water for use by a utility facility for which a certificate of environmental compatability and public need has been granted. *Id.* § § 89-8-108 and 89-8-109.

[76] *Id.* § 89-8-105(2).

[77] See note 74 *supra.*

[78] Mont. Rev. Codes Ann. § 89-8-106 (Interim Supp. 1974). If actions are suspended, the provisions of § 89-8-105, discussed above, apply. *Id.*

"Particular emphasis shall be given to applications to reserve water for agricultural, municipal, and minimum flow purposes for the protection of existing rights and aquatic life."[79]

Notwithstanding any of the foregoing provisions, the Department may approve a change of use to agricultural, irrigation, domestic, and municipal uses if it determines that the change is not contrary to the purposes and policies of the legislation.[80]

Some aspects of the Montana appropriative right.—The water right is generally appurtenant to the land in connection with which it was acquired and is being used;[81] but this is not necessarily so,[82] the question being one of fact.[83] An appurtenant water right passes with a conveyance of the land unless expressly reserved, or it may be disposed of apart from the land, the intention of the parties being the controlling factor.[84]

The 1973 Montana Water Use Act provides that the right to use water under a permit or certificate of water right passes with a conveyance of the land unless specifically exempted.[85] "An appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, or sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands, without obtaining prior approval from the department [of natural resources and conservation]."[86] The Montana Supreme Court has said, "We have held repeatedly that water rights and ditch rights are separate and distinct property rights. One

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[79] *Id.* § 89-8-107.

[80] *Id.* § 89-8-110.

[81] *Leggat* v. *Carroll*, 30 Mont. 384, 387, 76 Pac. 805 (1904).

[82] *Maclay* v. *Missoula Irr. Dist.*, 90 Mont. 344, 353, 3 Pac. (2d) 286 (1931).

[83] *Yellowstone Valley Co.* v. *Associated Mortgage Inv., Inc.*, 88 Mont. 73, 84, 290 Pac. 255 (1930).

[84] *Lensing* v. *Day & Hansen Security Co.*, 67 Mont. 382, 384, 215 Pac. 999 (1923).

In *Spaeth* v. *Emmett*, 142 Mont. 231, 383 Pac. (2d) 811, 815-816 (1963), the court said, *inter alia*, "We hold that when an owner of a tract of land with an appurtenant water right grants a portion of the tract without any express division or reservation, the appurtenant water right is divided in respective amounts to each tract measured in proportion as the number of acres irrigated with the water right on the land conveyed bears to the total number of acres irrigated by the water.

"In the present case the district court divided the water as provided in the aforementioned rule. Such a conclusion was correct. But, appellant argues, the effect of the court's decision is to impress a servitude of a ditch on the land of appellant where none existed before. That result is not strange when the doctrine of easements by implication is considered. * * * We hold that respondents have a ditch easement across appellant's land for the purpose of conveying their portion of the unnamed creek water right. Such was the conclusion of the district court."

[85] Mont. Rev. Codes Ann. § 89-893(1) (Supp. 1973).

[86] Mont. Rev. Codes Ann. § 89-893(3) (Interim Supp. 1974). The procedures for Department approval in this provision are identical to those for changes in appropriation rights set out at note 103 *infra*.

may own a water right without a ditch right, or a ditch right without a water right."[87]

The diversion works of an appropriator must be reasonably efficient under the circumstances, but no requirement of absolute efficiency inures to the benefit of a subsequent appropriator.[88] The system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as a standard, even though a more economical method might be installed at a higher cost to the irrigator.[89]

The senior appropriator may use all the waters of a stream to the exclusion of the juniors, if validly appropriated, within the bounds of his needs and facilities.[90] But he is required to return to the stream, for the use of junior appropriators, all water in excess of his actual needs at any particular time.[91] The subsequent appropriator is entitled to a continuance of the stream conditions as they existed at the time he initiated his right.[92] In *Irion* v. *Hyde*, the court held that an upstream junior appropriator who claims that his diversion does not reduce or limit the receipt of water to which a downstream senior appropriator is entitled has the burden of showing affirmatively that under all conditions his diversion does not have this effect.[93] The result of the

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[87] *Connolly* v. *Harrel*, 102 Mont. 295, 300-301, 57 Pac. (2d) 781 (1936). "Ditch rights and water rights are two separate rights and in no sense synonomous." *McIntosh* v. *Graveley*, 159 Mont. 72, 495 Pac. (2d) 186, 191 (1972). In *Smith* v. *Krutar*, 153 Mont. 325, 457 Pac. (2d) 459, 462 (1969), the court said, "In this state a water right and a ditch right may exist as separate and independent species of property, and each is capable of several and distinct injuries. *Harrer* v. *North Pacific Ry.*, 147 Mont. 130, 410 P.2d 713 (1966). Standing alone, the ownership of a 1/10th interest in the ditch is not synonymous with a 1/10th interest in the water, nor is it sufficient to establish a water right in the defendants."

Regarding ditch rights, see also *Nixon* v. *Huttinga*, 163 Mont. 499, 518 Pac.(2d) 263 (1974); *Shammel* v. *Vogl*, 144 Mont. 354, 396 Pac. (2d) 103 (1964).

[88] *State ex rel. Crowley* v. *District Ct.*, 108 Mont. 89, 97-98, 88 Pac. (2d) 23 (1939); *Worden* v. *Alexander*, 108 Mont. 208, 215, 90 Pac. (2d) 160 (1939). An appropriator is bound to the exercise of reasonable care in constructing and maintaining his appliances. *Dern* v. *Tanner*, 60 Fed. (2d) 626, 628 (D. Mont. 1932).

[89] *Worden* v. *Alexander*, 108 Mont. 208, 215-216, 90 Pac. (2d) 160 (1939).

[90] *Meine* v. *Ferris*, 126 Mont. 210, 216, 247 Pac. (2d) 195 (1952).

[91] Mont. Rev. Codes Ann. § 89-805 (1964).

In *Gwynn* v. *City of Philipsburg*, 156 Mont. 194, 478 Pac. (2d) 855, 857 (1970, as amended 1971), the Montana Supreme Court said, "Whatever rights Philipsburg may have to maintain dams and store and use waters, be they flood waters or the natural flow of Fred Burr Creek, it is entitled to no more water than its necessity requires or its distribution system will carry; it is the duty of Philipsburg to permit the excess to flow into the stream for the use of downstream appropriations. *Whitcomb* v. *Helena Water Works*, 151 Mont. 443, 444 P.2d 301 (1968)."

[92] *Smith* v. *Duff*, 39 Mont. 382, 389-390, 102 Pac. 984 (1909).

[93] *Irion* v. *Hyde*, 110 Mont. 570, 581-584, 105 Pac. (2d) 666 (1940). Evidence to the effect that the water reaching the downstream prior appropriator would be of no benefit to him must be such as to warrant a judgment enabling the upstream appropriator to withhold the water. *Geary* v. *Harper*, 92 Mont. 242, 249, 12 Pac. (2d)

junior appropriator's actually making the required strong affirmative showing appears in two other cases decided by this court as follows:

When the evidence given by the upstream junior appropriator tends to show that the waters of stream *A* would not, even if uninterrupted, reach stream *B* on which senior headgates are located, this junior appropriator whose diversion is located on stream *A* is *prima facie* entitled to make use of the water if such use does not interfere with the use by senior appropriators of the natural flow in stream *B*. The burden then is upon the latter to show that, if uninterrupted, the waters of stream *A would* reach stream *B* by a defined channel either on the surface or in the ground, and that the junior's appropriation of it diminishes the volume of water flowing in stream *B*.[94]

Imposition of a system of rotation by a trial court was approved by the Montana Supreme Court under the circumstances of a 1901 case.[95]

In a recent case, the Montana Supreme Court said, "The primary right to the use of water in a stream is that of the appropriator of the natural flow, not the storage claimant."[96] In an earlier case, however, the court said "the laws of Montana that apply to the acquisition of running water equally apply to the storage and use of flood or waste water, and the doctrine of 'first in time, first in right' applies to both."[97] In the earlier case, the court expressed its approval of the principle of utilizing a reservoir to store water in any year for use in that or in succeeding years.[98] But in two recent cases it appears to have taken a more restrictive approach regarding the refilling of a reservoir or other storage of water during the irrigating season at the expense of irrigation appropriators of the natural streamflow.[99]

Under the 1973 Montana Water Use Act, anyone intending to appropriate water by means of a reservoir must apply for a permit as prescribed by the Act.[100] The effect of this Act on these opinions is problematical.

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276 (1932). "Persons who construct and maintain reservoirs to impound waters of an adjudicated stream have the burden of showing that they do not interfere with the rights of prior appropriation of water from the stream." *Whitcomb* v. *Helena Water Works Co.*, 151 Mont. 443, 444 Pac. (2d) 301, 303 (1968).

[94] *Ryan* v. *Quinlan*, 45 Mont. 521, 531-532, 124 Pac. 512 (1912); *Loyning* v. *Rankin*, 118 Mont. 235, 249, 165 Pac. (2d) 1006 (1946).

[95] *Anderson* v. *Cook*, 25 Mont. 330, 331-335, 338-339, 64 Pac. 873, 65 Pac. 113 (1901).

[96] *Gwynn* v. *City of Philipsburg*, 156 Mont. 194, 478 Pac. (2d) 855, 859 (1970, as amended in 1971); *Whitcomb* v. *Helena Water Works Co.*, 151 Mont. 443, 444 Pac. (2d) 301 (1968).

[97] *Federal Land Bank* v. *Morris*, 112 Mont. 445, 116 Pac. (2d) 1007, 1012 (1941). This case was not mentioned in either of the 1968 or 1970 opinions in the previous footnote.

[98] *Federal Land Bank* v. *Morris*, 112 Mont. 445, 454-456, 116 Pac. (2d) 1007 (1941).

[99] *Whitcomb* v. *Helena Water Works Co.*, 151 Mont. 443, 444 Pac. (2d) 301 (1968); *Gwynn* v. *City of Philipsburg*, 156 Mont. 194, 478 Pac. (2d) 855, 859 (1970), in which the court said, "The primary right to the use of water in a stream is that of the appropriator of the natural flow, not the storage claimant," as mentioned above.

[100] Mont. Rev. Codes Ann. § 89-889 (1973).

The water rights statute provides that stream channels may be used to convey appropriated waters if done without injury to prior appropriators. Reservoir water turned into a natural channel for use downstream shall not be considered a part of the natural flow of that stream.[101] Holders of rights in reservoirs from which, because of intervening obstacles, water cannot be conducted to their lands may discharge the stored water into the stream from which their lands may be irrigated, in exchange for equal quantities of natural flow, if this can be done without injury to prior appropriators.[102]

The 1973 Montana Water Use Act, as amended in 1974, provides:

> Changes in appropriation rights. (1) An appropriator may not change the place of diversion, place of use, purpose of use or place of storage without receiving prior approval of such change from the department.
>
> (2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with section 89-881. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of section 89-882(2), and hearings shall be held in accordance with section 89-883.[103]

Legislation previously provided that the holder of a right to use water could change the point of diversion if others would not be thereby injured, could extend the ditch or other aqueduct beyond the place where the first use of water was made, and could use the water for purposes other than those for which it was originally appropriated.[104]

The 1973 Montana Water Use Act discussed above contains the following provision:

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[101] Mont. Rev. Codes Ann. §89-891.1 (Interim Supp. 1974).

See *Meine* v. *Ferris*, 126 Mont. 210, 217, 247 Pac. (2d) 195 (1952); *Missoula Pub. Serv. Co.* v. *Bitter Root Irr. Dist.*, 80 Mont. 64, 68-69, 257 Pac. 1038 (1927); *Rock Creek Ditch & Flume Co.* v. *Miller*, 93 Mont. 248, 262, 17 Pac. (2d) 1074, 89 ALR 200 (1933). A natural depression may be utilized as a reservoir site if no one is injured thereby. *Perkins* v. *Kramer*, 121 Mont. 595, 599, 198 Pac. (2d) 475 (1948).

[102] Mont. Rev. Codes Ann. §89-806 (Interim Supp. 1974). For a recent case regarding this statute, see *Thompson* v. *Harvey*, 164 Mont. 133, 519 Pac. (2d) 963, 965 (1974).

For the circumstances of an early exchange, see *Middle Creek Ditch Co.* v. *Henry*, 15 Mont. 558, 560-565, 572, 39 Pac. 1054 (1895).

[103] Mont. Rev. Codes Ann. §89-892 (Supp. 1973 and Interim Supp. 1974).

[104] Mont. Rev. Codes Ann. §89-803 (1964).

Some recent Montana cases in which changes in exercise of water rights were involved include *Thompson* v. *Harvey*, 164 Mont. 133, 519 Pac. (2d) 963 (1974); *McIntosh* v. *Graveley*, 159 Mont. 72, 495 Pac. (2d) 186 (1972).

> Abandonment of appropriation right. (1) If an appropriator ceases to use all or a part of his appropriation right with the intention of wholly or partially abandoning the right, or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right shall, to that extent, be deemed considered abandoned and shall immediately expire.
>
> (2) If an appropriator ceases to use all or part of his appropriation right, or ceases using his appropriation right according to its terms and conditions, for a period of ten (10) successive years, and there was water available for his use, there shall be a prima facie presumption that the appropriator has abandoned his right in whole or for the part not used.
>
> (3) This section does not apply to existing rights until they have been determined in accordance with this act.[105]

Legislation previously provided simply that when an appropriator or his successor in interest "abandons and ceases to use the water" for some useful or beneficial purpose, the right ceased, and that abandonment of a water right was a question of fact, to be determined as other questions of fact.[106] The Montana Supreme Court indicated that this was to be determined from the facts and intention of the party alleged to have abandoned the right,[107] and that to constitute abandonment there must be a concurrence of act and intent—relinquishment of possession and intent not to resume it for a beneficial use.[108]

Prior to 1973, there was no provision for statutory forfeiture of a water right solely by reason of nonuse of the water for a prescribed period of years. However, the 1973 legislative provision quoted above provides that 10 years' nonuse creates a *presumption of abandonment*. Moreover, the part which reads, "or if he ceases using his appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions" (notwithstanding the characterization that it "shall, to that extent, be deemed abandoned and shall immediately expire") appears to comprise a limited form of *statutory forfeiture* inasmuch as it need *not* be shown that, by willfully violating the terms and conditions of his right, the appropriator *intended to abandon* all or any part of his water right.

The 1973 Montana Water Use Act discussed above provides that water may not be appropriated except as provided in the Act and that a right to appropriate water may not be acquired by "adverse use, adverse possession, prescription or estoppel."[109] The Montana Supreme Court had previously said, "That the right to the use of water for irrigation or other lawful purposes may be lost by one and acquired by another by prescription is settled

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[105] Mont. Rev. Codes Ann. § 89-894 (Supp. 1973).

[106] Mont. Rev. Codes Ann. § 89-802 (1964).

[107] *Federal Land Bank* v. *Morris*, 112 Mont. 445, 453, 116 Pac. (2d) 1007 (1941).

[108] *Thomas* v. *Ball*, 66 Mont. 161, 167, 213 Pac. 597 (1923). See also *Shammel* v. *Vogl*, 144 Mont. 354, 396 Pac. (2d) 103, 106 (1964).

[109] Mont. Rev. Codes Ann. § 89-880(1) (Supp. 1973).

beyond controversy in this jurisdiction."[110] The court said that " ' "in order to acquire a water right by adverse user or prescription, it is essential that the proof must show that the use has been (a) continuous for the statutory period * * *; (b) exclusive (uninterrupted, peaceable); (c) open (notorious): (d) under claim of right (color of title); (e) hostile and an invasion of another's rights which he has a chance to prevent." ' "[111]

The court also had previously indicated that an appropriator may be estopped from asserting his water right against parties whom he has misled, where there has been some degree of turpitude—such as misleading statements or acts, or concealment of facts by silence when there was a duty to speak—with the result that the other party was induced or led by the words, conduct, or silence of the appropriator to do things which he otherwise would not have done.[112]

In view of the constitutional declaration that the right of way over land of others for necessary water conduits and structures is a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings.[113]

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[110] *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 577, 227 Pac. 68 (1924).

[111] The court added, " 'To establish adverse user in Montana, case law has, although not in this precise manner, set down three prerequisites: (1) That the claimant used water at a time when plaintiff had need of it; (2) That he used it in such a substantial manner as to notify plaintiff that it was being deprived of water to which it was entitled; and (3) That during all of that period, plaintiff could have maintained an action against him for so using the water.' " *King* v. *Schultz*, 141 Mont. 94, 375 Pac. (2d) 108, 111 (1962), quoting *Havre Irr. Co.* v. *Majerus*, 132 Mont. 410, 318 Pac. (2d) 1076 (1957); accord, *Smith* v. *Krutar*, 153 Mont. 325, 457 Pac. (2d) 459, 461-462 (1969). See also *Firestone* v. *Bradshaw*, 157 Mont. 181, 483 Pac. (2d) 716, 719 (1971), wherein the court held that prescriptive rights were acquired with respect to one half (by equal turns of usage) of certain water rights.

[112] *Kramer* v. *Deer Lodge Farms Co.*, 116 Mont. 152, 174-175, 151 Pac. (2d) 483 (1944). In *Smith* v. *Krutar*, 153 Mont. 325, 457 Pac. (2d) 459, 463 (1969), the Montana Supreme Court said, "Generally speaking, estoppel arises when a party by his acts, conduct or acquiescence, has caused another in good faith to change his position for the worse. *Hustad* v. *Reed*, 133 Mont. 211, 223, 321 P.2d 1083 (1958). The following six elements have been held necessary in order for the doctrine of equitable estoppel to apply: (1) there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under circumstances that it is both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it, and (6) he must in fact act upon it in such a manner as to change his position for the worse."

[113] Mont. Const. art. IX, §3(2). *Prentice* v. *McKay*, 38 Mont. 114, 118, 98 Pac. 1081 (1909).

Repudiation of the Riparian Water-Use Doctrine

Although in 1921 the Montana Supreme Court completely repudiated the riparian doctrine of water use rights,[114] there was doubt for many years prior thereto as to whether or not this doctrine prevailed in this jurisdiction. As a matter of fact, the court did refer to riparian rights in a few decisions that began very early in the series of reported cases and continued to 1900, a result of which was to confuse rather than to clarify the riparian question.[115]

Finally in 1921, for the first time in the judicial history of Montana, the supreme court rendered a decision in a case which squarely presented for consideration a claim of riparian rights as against a claim of appropriative right. The case was *Mettler* v. *Ames Realty Company*.[116] The court reviewed the decisions it had rendered on the subject of riparian rights and stated that (while in various cases observations had been made upon some phase or other of the riparian doctrine), an examination of the facts would disclose that the question of riparian rights had not been involved in any of them and that the comment made upon the subject by the court in every instance was purely *obiter dictum*. Therefore, the court felt entirely at liberty to treat the matter as one of first impression in the jurisdiction. After reviewing the Territorial and State legislation on water rights and construing the public policy of the State indicated by such measures with respect to the subject under review, the court concluded "that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865; that it is unsuited to the conditions here."[117]

The unequivocal declaration in *Mettler* v. *Ames Realty Company* was sustained several years later in a case in which riparian rights were claimed

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[114] Other possible riparian rights, which may encompass more than just the right to use water, are mentioned in chapter 6 at notes 154-156. In 1925 the Montana court applied the common law right of fishery. *Herrin* v. *Sutherland*, 74 Mont. 587, 595-596, 241 Pac. 328 (1925). Riparian rights regarding accretions were discussed in *McCafferty* v. *Young*, 144 Mont. 385, 397 Pac. (2d) 96 (1964).

[115] See *Thorp* v. *Woolman*, 1 Mont. 168, 171-172 (1870); *Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 185, 50 Pac. 416 (1897); *Haggin* v. *Saile*, 23 Mont. 375, 381, 59 Pac. 154 (1899); *Smith* v. *Denniff*, 24 Mont. 20, 21-23, 60 Pac. 398 (1900). In *Smith* v. *Deniff* comments concerning the riparian doctrine were altogether *dicta* because they had nothing to do with the facts or issues involved.

In *Atchison* v. *Peterson*, 87 U.S. 507, 510-513 (1874), affirming 1 Mont. 561 (1872), the United States Supreme Court stated that among the miners in the Pacific Coast States and Territories, the doctrine of prior appropriation prevailed because "As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection."

[116] *Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 157-158, 165, 166, 201 Pac. 702 (1921).

[117] 61 Mont. at 170-171.

for domestic use and for watering livestock—"the so-called natural purposes."[118] The supreme court rejected this claim.

Ground Waters

Definite underground stream.—Subsurface water flowing in a reasonably ascertainable confined channel is subject to the same rules as water flowing in surface streams.[119] There is no presumption that any subsurface water in any form is tributary to any stream; one who asserts this to be a fact has the burden of proving his assertion.[120]

Subflow of surface stream.—The subsurface supply of a stream, whether it comes from tributary swamps or flows through the porous soil and rocks constituting the bed of the stream, is as much a part of the stream as is the surface flow and is subject to the same rules.[121]

Percolating ground waters.—Prior to the 1961 legislation discussed below, the Montana Supreme Court announced in *dicta* that percolating ground waters were subject to use by the overlying landowner, without malice or negligence.[122]

Legislative provisions.—In 1961, the legislature adopted a prior appropriation

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[118] *Wallace* v. *Goldberg*, 72 Mont. 234, 244, 231 Pac. 56 (1925).

[119] *Ryan* v. *Quinlan*, 45 Mont. 521, 531, 533-534, 124 Pac. 512 (1912). See *Hilger* v. *Sieben*, 38 Mont. 93, 94-99, 98 Pac. 881 (1909).

[120] In *Ryan* v. *Quinlan*, 45 Mont. 521, 534, 124 Pac. 512 (1912), the Montana Supreme Court indicated its belief that the stream tributary matter might be established by circumstantial evidence, but stated that the evidence must have so much of substance and probative value as would reasonably exclude the contrary hypothesis.

[121] *Smith* v. *Duff*, 39 Mont. 382, 390, 102 Pac. 984 (1909).

[122] *Ryan* v. *Quinlan*, 45 Mont. 521, 533, 124 Pac. 512 (1912). See Hutchins, W. A., "The Montana Law of Water Rights" (1958).

In a 1970 case regarding the pollution of an adjoining landowner's well, the court, *inter alia*, said that in *Perkins* v. *Kramer*, 148 Mont. 355, 362, 423 Pac. (2d) 587 (1966), involving seepage waters, it had cited the *Ryan* case, *supra*, for its quoted statement that " 'The fact that groundwater is not easily traced in its movement is the reason why this court has said: "The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams." ' " *Nelson* v. *C & C Plywood Corp.*, 154 Mont. 414, 465 Pac. (2d) 314, 321 (1970). But the court also quoted a statement in the 1966 *Perkins* case that: " 'Modern hydrological innovations have permitted more accurate tracing of groundwater movement. For this reason, we feel that traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists. The use of chemical dyes, chloride solutions, and radioisotopes to trace groundwater migration is well-established. More recent techniques include the use of electric analogs and computer analysis. These tracing methods require the drilling of test wells as well as geological analysis of the water-bearing structure.' " 465 Pac. (2d) at 321. Nevertheless, in the 1970 *Nelson* case, the court indicated that the Pennsylvania court in a 1963 case had retained its prior law including an early case relied on by the Montana Supreme Court in the *Ryan* case. 465 Pac. (2d) at 323-324.

law for ground water, which has been subsequently amended.[123] Under this act "ground water" means any fresh water under the surface of the land, including water under any surface body of water.[124]

The Department, on its own motion or on petition of one-fourth or 20 of the users of ground water (whichever is less) in a ground water area, may propose to the Board of Natural Resources and Conservation that an area of controlled ground water be designated or modified where: (1) ground water withdrawals are in excess of recharge in the area; (2) excessive withdrawals are likely to occur in the near future; or (3) significant disputes concerning ground water rights are in progress in the area.[125] If the Board finds that withdrawals in such an area exceed the safe yield, it shall order the aggregate withdrawal decreased so that it does not exceed the safe yield. Except for domestic use, such decrease shall conform to priority of rights.[126]

Any person claiming a right to withdraw ground waters, or the Department of Natural Resources and Conservation, may initiate a hearing by the Department to ascertain existing rights in the area involved.[127] At this hearing, the Department may modify or confirm the boundaries of the area, determine priority of rights, and define quantitatively the extent of all rights being there considered.[128]

Ground waters shall not be wasted without beneficial use. The Board shall require contaminating wells to be plugged or capped, all flowing wells to be equipped so that the flow can be stopped, and all wells to be constructed and maintained to avoid these difficulties. Instances are listed in which withdrawal or use of ground water is not to be construed as waste.[129]

Anyone wishing to appropriate ground water from a controlled area must request a permit to do so from the Department in accordance with the 1973 Montana Water Use Act, discussed earlier.[130] The Department may not grant such permit if the withdrawal would be beyond the capacity of the aquifer "to

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[123] Mont. Rev. Codes Ann. §89-2911 *et seq.* (1964), as amended.

[124] Mont. Rev. Codes Ann. §89-2911(a) (Interim Supp. 1974). This legislation replaced previous legislation of limited coverage enacted in 1957. Laws 1957, ch. 58.

[125] *Id.* §89-2914. "The department may appoint one or more ground water supervisors for each designated controlled area, and may appoint one or more ground water supervisors at large. Within their respective jurisdictions and under the direction of the department, the ground water supervisors and supervisors at large shall supervise the withdrawal of ground water and the carrying out of orders issued by the department." *Id.* §89-2932.

[126] *Id.* §89-2915.

[127] *Id.* §89-2916.

[128] *Id.* §89-2917.

[129] *Id.* §89-2926.

[130] See "Appropriation of Water of Watercourses–Procedures for appropriating water: Montana Water Use Act," *supra.*

See the discussion at note 67 *supra* with respect to priority in time as between appropriators, subject to the ability of subsequent appropriators to lower the water table, artesian pressure, or water level if the prior appropriator can still reasonably exercise his water right.

yield ground water within a reasonable or feasible pumping lift (in the case of pumping developments) or within a reasonable or feasible reduction of pressure (in case of artesian developments)."[131]

Under the 1973 Act, permits are apparently also required to appropriate ground water in areas outside the boundaries of a controlled ground water area. Specifically exempted are appropriations where the withdrawal rate is less than 100 gallons per minute.[132] Within 60 days of completion of such small wells, the appropriator shall notify the Department which "shall automatically issue a certificate of water right." The date of filing the notice of completion is the "date of priority of the right."[133]

Determination of Conflicting Water Rights

Pre-1973 determination of rights in stream water.—At the direction of the State Water Conservation Board, the State Engineer could bring an action to adjudicate the waters of any stream, including tributaries, in any county traversed by the stream. Any party could apply for the appointment of a referee or referees to take testimony. On direction of the Board or of the court, the State Engineer could take all steps essential to a proper understanding of the relative rights of the parties interested, including the making of hydrographic surveys, reports, maps, and plats, which were to be furnished to the judge or referee and which could be introduced as evidence. The referee could hold hearings and report to the court concerning findings of fact—but not conclusions of law—to which the parties could file objections or exceptions. The court could render judgment as if it had taken all testimony directly.[134]

Determination of existing rights under the 1973 Montana Water Use Act.—In 1972, Montana adopted a new constitution which, among other provisions relating to water rights, declared:

> All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
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> * * * *
>
> The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.[135]

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[131] Mont. Rev. Codes Ann. §89-2918 (Interim Supp. 1974).

[132] *Id.* §89-880(2), discussed at notes 42-43 *supra.*

[133] *Id.* §89-880(4).

[134] Mont. Rev. Codes Ann. §§89-848 to -855 (1964), repealed, Laws 1973, ch. 452, §46. When a river and its tributaries flowed in more than one county, the district court of any of the counties had jurisdiction to adjudicate the water rights of the entire watershed system. The first of these courts to acquire jurisdiction retained it for the purpose of disposing of the whole controversy. *State ex rel. Swanson* v. *District Ct.* 107 Mont. 203, 206-207, 82 Pac. (2d) 779 (1938). See *Whitcomb* v. *Murphy*, 94 Mont. 562, 566, 23 Pac. (2d) 980 (1933).

[135] Mont. Const. art. IX, §§3(1) and (4).

Pursuant to these provisions, in 1973 the Montana Legislature adopted the Montana Water Use Act which contained, among other provisions, provisions for determining existing rights.[136] The Act directs the Department of Natural Resources and Conservation to establish a centralized record system of all existing rights and to begin proceedings under the Act, "as soon as practicable," to determine existing rights.[137]

The Department is directed to make an order requiring all persons claiming an existing right within a specified area or from a specified source to file a declaration of existing right within 1 year following the effective date of the order.[138]

Within a reasonable time after gathering the necessary data,[139] the Department shall file a petition to determine existing rights in the district court of the district in which the source of area is located.[140] Within a reasonable time thereafter the district court shall issue a preliminary decree and send copies of the decree by certified mail to the Department and each person named in the petition.[141] The Department or any person named in the petition may object

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[136] "Existing right" means "a right to the use of water which would be protected under the law as it existed prior to the effective date of this act." Mont. Rev. Codes Ann. §89-867(4) (Supp. 1973).

[137] *Id.* §89-870(1).

The Department may select areas or sources where the need for determination is most urgent and begin proceedings in those areas first. *Id.* §89-870(2).

The data to be gathered by the Department to determine existing rights shall include, but is not limited to, court decrees adjudicating water rights; declarations of existing rights (required to be filed under other provisions of the Act); records of rights acquired under the ground water code; notices of appropriation and records of declarations and statements filed under other sections of the Montana Code; findings of water resource surveys made by the Department and its predecessors; and findings of investigations of the area or source involved made by the Department. *Id.* §89-871.

With respect to administrative findings of priorities to use ground waters, see the discussion at notes 127-128 *supra.*

[138] Mont. Rev. Codes Ann. §89-872(1) (Interim Supp. 1974).

Notice of the order shall be published in a newspaper of general circulation in the affected area and a copy of the order shall be served by certified mail upon each appropriator (or his successor in interest) within the area or from the sources who has requested a mailed notice or of whom the Department can readily obtain knowledge, and to each person owning or possessing lands bordering on the stream or source. *Id.*

The Department of Fish and Game may represent the public for the purpose of establishing public recreational uses in the determination; but this shall not be construed as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use. *Id.* §89-872(1)(a).

[139] Among other information the Department may require in the declaration is the date of appropriation, the date of first beneficial use, amount of water, purpose and place of use, place and means of diversion, time of year the water is diverted and used, and any other evidence upon which the existing right is based. Mont. Rev. Codes Ann. §89-872 (Supp. 1973).

[140] *Id.* §89-873.

[141] *Id.* §89-875.

to the preliminary decree and obtain a hearing thereon before the district court.[142]

On the basis of the preliminary decree and any hearing that may have been held, the court shall enter a final decree. If no request for a hearing was filed, the preliminary decree automatically becomes the final decree.[143]

The final decree shall include, among other things, the name of the owner of the right, the amount of water, the date of priority, the purpose and place of use, a description of the land to which the right is appurtenant, the source of the water, the place and means of diversion, and the approximate time of year the water will be used.[144]

> The final decree in each existing right determination is final and conclusive as to all existing rights in the source or area under consideration. After the final decree there shall be no existing rights to water in the area or source under consideration except as stated in the decree.[145]

On the basis of the final decree, the Department shall issue a certificate of water right to each person decreed an existing right.[146]

A person whose existing rights and priorities are determined in a final decree may appeal the determination only if (1) he requested a hearing and appeared and entered objections to the preliminary decree, or (2) his rights as determined in the preliminary decree were altered as the result of a hearing requested by another person at which he appeared.[147]

Administration of Water Rights and Distribution of Water

No State administrative authority has control over the exercise of water rights and distribution of water in Montana. As of the effective date of the 1973 Montana Water Use Act,[148] the district courts were directed to supervise the distribution of water among *all* appropriators, including the supervision of all water commissioners appointed prior to the effective date of the Act.[149]

If a water controversy arises with respect to a source of water in which existing rights have not been determined, the Department of Natural Resources and Conservation may, within a reasonable time, begin proceedings to determine existing rights in the source.[150] If the Department does not proceed with

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[142] *Id.* §89-876.
[143] *Id.* §89-877(1).
[144] *Id.* §89-877(4).
[145] *Id.* §89-877(5).
[146] *Id.* §89-879.
[147] *Id.* §89-878.
[148] See the discussion of this Act at notes 36-50, 63-80, and 135-147 *supra.*
[149] Mont. Rev. Codes Ann. §89-896(1) (Supp. 1973).
"The supervision shall be governed by the principle that first in time is first in right." *Id.*
[150] See notes 135-147 *supra*, regarding determination of existing rights.

a determination of existing rights, the district court shall settle *only* the controversy between the parties.[151]

If a controversy arises between appropriators from a source which has been the subject of a general determination of existing rights, the controversy shall be settled by the district court which issued the final decree. The settlement of the controversy may not alter existing rights and priorities established in the final decree.[152]

In controversies involving permits issued by the Department, the court may not amend or alter the rights or terms established in the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree.[153]

If the Department determines that a person is wasting water,[154] using water unlawfully, or preventing water from moving to a person having a prior right to use the water, the Department may petition the district court to (1) regulate the controlling works of the user to prevent the waste, unlawful use, or interference, or (2) order the person to cease and desist from his actions and take such steps as are necessary to remedy the situation.[155]

Upon application of the owners of at least 15 percent of water rights affected by an adjudication decree or decrees, it shall be the duty of the district judge, at his discretion, to appoint one or more commissioners to distribute the water to those entitled to receive it according to their rights as fixed by the decree and by any certificate and permits issued under the Montana Water Use Act. If the petitioners are unable to obtain applications of at least 15 percent of the owners, and they are unable to obtain the water to which they are entitled, the judge still may, in his discretion, appoint a water commissioner.[156]

When existing rights of all appropriators have been determined in a final decree issued under the Montana Water Use Act, the judge of the court which issued the decree shall, upon application of the Department of Natural Resources and Conservation, appoint a water commissioner to distribute the waters to the appropriators who are entitled to the waters from the source or in the area.[157]

Owners of stored waters, including the Department of Natural Resources

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[151] Mont. Rev. Codes Ann. §89-896(2) (Supp. 1973).

[152] *Id.* §89-896(3).

[153] *Id.*

[154] "Waste" is defined as "the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility, or the application of water to anything but a beneficial use." *Id.* §89-867(10). Beneficial use is defined in note 41 *supra.*

[155] *Id.* §89-897(1). The Department also may direct its attorney or request the Attorney General or county attorney to bring suit to enjoin the waste, unlawful use, or interference. *Id.* §82-897(2).

[156] *Id.* §89-1001(1).

[157] *Id.* §89-1001(2).

and Conservation and its contractors, may petition the court to provide for water-commissioner distribution of the waters.[158]

The court decree is the yardstick by which the water commissioner must proceed in measuring and distributing the water according to the rights fixed by it. He does not have complete and exclusive jurisdiction to control the stream as such. It is necessary to look to the controlling provisions of the decree for the authority of both the court in issuing instructions to the commissioner, and the commissioner in carrying them out.[159]

Nebraska

Governmental Status

The Territory of Nebraska was established May 30, 1854,[1] and Nebraska was admitted to the Union March 1, 1867.[2]

Early Uses of Water

"It is to be remembered," said the Nebraska Supreme Court, "that Nebraska was first settled along the eastern borders and in its river valleys. These lands were not arid lands, nor, indeed, may the entire state be properly designated as an arid state."[3]

Shortly after the turn of the century, the court observed that irrigation was then very new in the State, as the semiarid portions did not begin to be settled until about 1880.[4] One witness in the instant case said that in 1880 and 1881 it was usual for every man in northwestern Nebraska to take what water he could; others testified that no one then respected any other's rights in water. While there was some testimony of a custom of respecting prior appropriations, the weight of the evidence was to the effect that there were then very few settlers and that all took what water was at hand, without regulation or custom of any sort. However, the supreme court remarked in another case that, as a matter of public knowledge, after the passage of the irrigation laws of 1877 and 1889 many irrigation enterprises were commenced in the western part of the State by both private individuals and corporations.[5] These interests became so extensive and irrigation of such economic importance that in 1895 new and

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[158] *Id.* §89-1001(3). See Mont. Rev. Codes Ann. §§89-1002 to -1016 (1964) for detailed provisions regarding the commissioners' duties and responsibilities.

[159] *Allen* v. *Wampler*, 143 Mont. 486, 392 Pac. (2d) 82, 84-86 (1964); *Quigley* v. *McIntosh*, 110 Mont. 495, 499-500, 510-511, 103 Pac. (2d) 1067 (1940); *State ex rel. Reeder* v. *District Ct.*, 100 Mont. 376, 382, 47 Pac. (2d) 653 (1935).

[1] 10 Stat. 277 (1854).

[2] 14 Stat. 820 (1867).

[3] *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 365, 268 N.W. 334 (1966). See *Drainage Dist. No. 1 of Lincoln County* v. *Suburban Irr. Dist.*, 139 Nebr. 460, 467-468, 298 N.W. 131 (1941).

[4] *Meng* v. *Coffee*, 67 Nebr. 500, 518-520, 93 N.W. 713 (1903).

[5] *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 146, 100 N.W. 286 (1904).

comprehensive laws were enacted creating a complete and harmonious system for the acquisition of appropriative water rights, determination of respective rights, and orderly administration and distribution of waters.

State Administrative Agency

The water rights statute provides, "The Department of Water Resources is given jurisdiction over all matters pertaining to water rights for irrigation, power or other useful purposes, and drainage, except as such jurisdiction is specifically limited by statute."[6]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—A statute enacted in 1877 authorized the acquisition of rights of way by corporations organized for construction and operation of canals for irrigation or water power purposes, or both, and declared canals constructed for such purposes to be works of internal improvement.[7] This was replaced in 1889 by a statute which specifically authorized the appropriation of water, provided procedures therefor, and took cognizance of the preexistence of appropriative water rights.[8] The forerunner of the current water appropriation statute was enacted in 1895.[9] A comprehensive measure, it was the first in Nebraska to provide administrative machinery for making appropriations of water, and it superseded all previous legislation relating to this function.

Late in the 19th century the Nebraska Supreme Court took note of the water legislation of 1877 and 1889 with respect to various issues;[10] and a decision rendered in 1902 involved rights obtained under the statutes and the relative rights of appropriators.[11] Then a year later, in its third opinion in the leading case of *Crawford Company* v. *Hathaway*, the court thoroughly considered both statutes, as well as the 1895 act then in force.[12] The brief 1877 act was held to be an implied recognition of the necessity of appropriating water for irrigation in the semiarid portions of the State, and was intended to provide effective means for appropriating and utilizing water therefor. The act of 1889 especially recognized rights acquired by prior appropriation and treated

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[6] Nebr. Rev. Stat. §46-209 (1974).

[7] Nebr. Laws 1877, p. 168.

[8] Nebr. Laws 1889, ch. 68.

[9] Nebr. Laws 1895, ch. 69.

[10] 1889 act: *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 805-807, 64 N.W. 239 (1895); *Paxton & Hershey Irrigating Canal & Land Co.* v. *Farmers' & Merchants' Irr. & Land Co.*, 45 Nebr. 884, 893-901, 64 N.W. 343 (1895). Both acts: *Cummings* v. *Hyatt*, 54 Nebr. 35, 40-42, 74 N.W. 411 (1898).

[11] *Farmers' & Merchants' Irr. Co.* v. *Cozad Irr. Co.*, 65 Nebr. 3, 90 N.W. 951 (1902).

[12] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 343-350, 357-358, 362, 364, 93 N.W. 781 (1903). For previous opinions, see *Crawford Co.* v. *Hathaway*, 60 Nebr. 754, 84 N.W. 271 (1900), on rehearing, 61 Nebr. 317, 85 N.W. 303 (1901).

them as it would any other vested property right. The 1895 law preserved all rights acquired by appropriation prior to its passage.[13]

The court held that the sections of the statute of 1895 conferring upon the State administrative agency authority to ascertain and determine the amount of past appropriations and to allow further appropriations are not unconstitutional as conferring upon such agency the exercise of judicial functions—when as a matter of fact they are of a quasi-judicial character—but that on the contrary they are a valid exercise of the legislative power.[14]

In 1966, the Nebraska Supreme Court reexamined the interrelationship between the 1889 appropriation statute and the 1895 statute. The court held that the references to riparian rights in the 1889 statute were declaratory, and the remaining provisions of that statute were not successful in substituting the prior appropriation doctrine for the riparian doctrine. The court indicated, among other things, that a riparian right to use a watercourse "may be superior" to a competing appropriative right if the riparian land passed into private ownership from the public domain *prior* to April 4, 1895—the effective date of the irrigation act of 1895—but that if the riparian land passed into private ownership *after* that date, a competing appropriative right "outranks the riparian right under the facts of the present case."[15] This is discussed in more detail later under "Interrelationships of the Dual Systems."[16]

Procedure for appropriating water.—There was no statutory procedure for making appropriations of water in Nebraska prior to enactment of the 1889 law. The appropriation was completed by claiming the right to water, constructing works with which to divert it, diverting and applying the water to some useful purpose, and defending and substantiating the claim when challenged.[17]

The steps in the first procedure provided in 1889[18] were posting a notice at the point of intended diversion; recording a copy of the notice in the county clerk's office; commencing construction of the diversion and conveyance works; prosecuting the work diligently and uninterruptedly to completion unless temporarily interrupted by rain or snow; and conducting the water to the place of intended use. Evidently the act of 1889 was considered as providing an exclusive procedure for making appropriations while it was in effect, for the Nebraska Supreme Court has stated, "If the plaintiff desired

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[13] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 362-364, 93 N.W. 781 (1903), overruled on different matters by *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W.(2d) 738 (1966).

[14] 67 Nebr. at 365-368.

[15] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W.(2d) 738, 742-743 (1966).

[16] This includes, at notes 128-129 *infra*, a discussion of a 1969 case which appears to have added some uncertainty regarding the status of domestic use of water.

[17] *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 143-144, 149 N.W. 363 (1914).

[18] Nebr. Laws 1889, ch. 68.

to increase its appropriation after the act of 1889 [original work having been completed prior thereto], it would be required to comply with that act."[19]

The extant method—first provided by law in 1895—is the exclusive procedure for making an appropriation of water.[20] The first step to be taken by the intending appropriator is filing an application with the Department of Water Resources. On approval of an application, it is endorsed and returned to the applicant, who is thereupon authorized to proceed with the work and to take the measures necessary to perfect the appropriation, which must be done "vigorously, diligently, and uninterruptedly * * * unless temporarily interrupted by some unavoidable and natural cause." Reasonable extensions of time for completion of works, application of water to beneficial use, or other requirements fixed in the approval of an application may be granted on petition to the Department and showing of reasonable cause, subject to a direct appeal to the Nebraska Supreme Court.[21]

The unappropriated water of every natural stream in the State is declared to be the property of the public and dedicated to use of the people of the State, subject to appropriation as provided in the statute.[22] The statutes also refer to appropriation of "any of the public waters of the State;"[23] to the "waters of any natural lake or reservoir;"[24] and to "running water flowing in any river or stream or down any canyon or ravine."[25] The supreme court

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[19] *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 144, 149 N.W. 363 (1914).

[20] After the act of 1895 (Laws 1895, ch. 69) went into effect, all water in the streams of the State to which vested appropriative rights had not attached could be set apart to individuals only by obtaining permits from the State under the procedure provided in the statute. *Enterprise Irr. Dist.* v. *Tri-State Land Co.*, 92 Nebr. 121, 147-148, 138 N.W. 171 (1912). See also *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 154, 100 N.W. 286 (1904); *Kersenbrock* v. *Boyes*, 95 Nebr. 407, 409-411, 145 N.W. 837 (1914).

[21] Nebr. Rev. Stat. §§46-233 to -240 (1974).

Provisions for extensions for reasonable lengths of time were added to the statute by Nebr. Laws 1957, ch. 198, following a decision by the supreme court in *North Loup River Pub. Power & Irr. Dist.* v. *Loup River Pub. Power Dist.*, 162 Nebr. 22, 26-33, 74 N.W.(2d) 863 (1956), that the Department had authority to grant extension of time for construction of a project where temporarily interrupted by some unavoidable and natural cause, but no statutory power to extend the time in which the terms, conditions, and limitations of the Department's grant of an appropriation by approving the application must be met. Its promulgated rules providing for such extensions were held to be of no force and effect.

[22] Nebr. Rev. Stat. §46-202 (1974). See also Nebr. Const. art. XV, §5.

[23] Nebr. Rev. Stat. §46-233 (1974).

[24] *Id.* §46-240.

[25] *Id.* §46-259.

The 1889 statute authorized the appropriation of water flowing in a stream, canyon, or ravine. Nebr. Laws 1889, ch. 68. There was a proviso in this 1889 authorization to the effect that as to streams not exceeding 50 feet in width (later reduced to 20 feet), the rights of riparian owners were not affected by the provisions of the act. This is

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held that the expressed purpose of the legislature was to limit the right of appropriation for irrigation to the waters of *natural* streams, which excluded strictly artificial creations such as drainage ditches.[26]

The priority of an appropriation dates from the filing of the application in the office of the Department of Water Resources.[27] Purposes of use of water specifically named are irrigation, agriculture, domestic, manufacturing, and power, in addition to beneficial use and useful purposes generally.[28] Intending appropriators include "The United States of America and every person."[29] Agricultural appropriators of less than the statutory limit of direct flow may make such additional appropriations within the statutory limit as may be necessary for crop production in the practice of good husbandry, the priority of which shall date from the date of application therefor.[30]

No application to appropriate water is exclusive with respect to any of the lands included therein until the owner or owners formally consent thereto. No appropriation made or canal constructed before the water is applied and the appropriation perfected or before consent is filed prevents other appropriations from being allowed and other canals constructed to irrigate the same lands.[31]

Special provisions apply to appropriations for storage. Applications are made in the same manner and under the same rules and regulations as those for direct use of the water. On approval, the applicant may impound water not otherwise appropriated and any appropriated water not needed for immediate use; but he may not impound water while it is required in ditches for direct irrigation or for reservoirs holding senior rights. Any person proposing to apply to beneficial use the stored water files an application with the Department. The owner of the reservoir has the preferred right to make such application for a period of 6 months from the time set for completion of the reservoir. Other applicants must acquire appropriate interests in the reservoir.[32] A reservoir constructed for the purpose of holding back and raising water to a higher level in order to effectuate an appropriation is not to be considered a storage reservoir, but must be described in an

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noted later under "Riparian Doctrine." There is no limiting provision in the present statute, §46-259.

[26] *Drainage Dist. No. 1 of Lincoln County* v. *Suburban Irr. Dist.*, 139 Nebr. 460, 468-471, 298 N.W. 131 (1941).

[27] Nebr. Rev. Stat. §46-205 (1974).

[28] *Id.* §46-201, -204, -209, and -234.

[29] *Id.* §46-233.

The 1889 law authorized appropriations by any person or persons, company or corporation organized under the laws of Nebraska. Nebr. Laws 1889, ch. 68.

[30] Nebr. Rev. Stat. §46-240.01 (1974).

With respect to the statutory limits, see §46-231, discussed at note 162 *infra.*

[31] *Id.* §46-234.

[32] *Id.* §§46-241 and -242.

application to appropriate flowing water when such water is to be so raised.[33] The supreme court has held that the granting of an appropriation, including the right to construct a diversion dam, carries with it the incidental right to impound unappropriated water behind the dam in order to effectuate its diversion, subject to the rights of other appropriators.[34]

Special provisions also relate to appropriations of water for the development of water power.[35] The State constitution declares that the use of water for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as prescribed by law.[36] The water rights statute includes a requirement that the applicant for a water power appropriation shall enter into a contract with the State, through the Department, for leasing the water from the State for not longer than 50 years, subject to renewal for an additional 50 years. On the expiration of any water power lease the value of improvements made thereunder by any lessee is appraised by the Department, subject to the right of appeal to the district court, the value of improvements as finally determined to be paid by any subsequent lessee to the lessee owning them.[37]

Any interested party who is dissatisfied with any decision or order of the Department may institute proceedings in the Nebraska Supreme Court to reverse, vacate, or modify the action complained of.[38]

Restrictions and preferences in appropriation of water.—There is a constitutional declaration (1) that the right to appropriate unappropriated waters of natural streams for beneficial use shall never be denied except when demanded by the public interest; and (2) that priority of appropriation gives the better right as between users of the water for the same purpose, but when the water supply is not enough for all, domestic users have preference over all others and agriculture has preference over manufacturing; but (3) that no inferior right may be acquired by a superior right without just compensation.[39]

As originally enacted, and still extant,[40] a similar water rights statute does not contain the exception respecting denial of appropriations "when demanded by the public interest," nor the final proviso forbidding acquisition of an inferior right by the holder of a superior right without just compensation.[41] Other statutory provisions also include similar preferences for

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[33] *Id.* §46-243.

[34] *Platte Valley Irr. Dist.* v. *Tilley*, 142 Nebr. 122, 128-129, 5 N.W.(2d) 252 (1942).

[35] Nebr. Rev. Stat. §§46-234 and -238 (1974).

[36] Nebr. Const. art. XV, §7.

[37] Nebr. Rev. Stat. §46-234 (1974).

[38] *Id.* §46-210.

[39] Nebr. Const. art. XV, §6.

Section 4 of art. XV provides, "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."

[40] Nebr. Laws 1895, ch. 69, §43, Rev. Stat. §46-204 (1974).

[41] However, in *Loup River Pub. Power Dist.* v. *North Loup River Pub. Power & Irr. Dist.*, (*Continued*)

agricultural over water power uses, which include provisions for the condemnation of water power uses by irrigation divisions of public power and irrigation districts.[42]

Before the constitution added this limiting proviso, the Nebraska Supreme Court held that the purpose of the statutory preference was to protect the riparian owner in the use of water for drinking, cooking, and stockwatering, and that it did not extend to the furnishing of water to a village for general municipal purposes, nor for flushing sewers at a military post.[43]

Vested rights of completed appropriations cannot be destroyed without compensation.[44] The framers of the State constitution, said the supreme court, clearly intended to provide that water previously appropriated for power purposes may be taken and appropriated for irrigation use upon payment of just compensation—not that water appropriated for power could thereafter be arbitrarily appropriated for irrigation without such compensation.[45]

If there is no unappropriated water in the proposed source of supply, or if a prior appropriation has been perfected to water the same land proposed to

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142 Nebr. 141, 5 N.W. (2d) 240, 248 (1942), the court noted, "Section 6 of article XV of the [Nebraska] Constitution, fixing a priority of uses for which public waters may be appropriated, is a self-executing provision and the courts, in the absence of a statutory method, would be obliged to provide the means for enforcing its provisions."

[42] Nebr. Rev. Stat. § §70-667 (Supp. 1974) and 70-668 to -672 (1971).

In a 1962 case, involving an appeal in a proceeding initiated by Hickman, junior appropriator, against the Loup River Public Power District, the court said, *inter alia*, "The Statutes of this state give a preferential use to waters for agricultural (irrigation) purposes over a use for power purposes. Section 70-668, R.R.S. 1943. They also provide that no inferior right to the use of waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. Section 70-669, R.R.S. 1943. It is further provided by section 70-672, R.R.S. 1943, that where the owner of a superior right seeks to acquire water being used for power purposes, and compensation to be paid cannot be agreed upon, the procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724, R.R.S. 1943. We point out that Hickman has not attempted to condemn any of the waters appropriated by Loup District. Neither has he agreed with Loup District on the amount of compensation to be paid in lieu of condemnation." *Hickman* v. *Loup River Pub. Power Dist.*, 173 Nebr. 428, 113 N.W. (2d) 617, 623 (1962). The court did not mention or discuss its earlier opinion in *Vetter v. Broadhurst,* discussed at note 76 *infra,* in which it had held, with respect to a statute regarding condemnation of rights of way, that the right of eminent domain cannot be exercised for purely private purposes, such as by an individual for the irrigation of his own land.

[43] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 371-372, 93 N.W. 781 (1903), overruled on different matters by *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966).

[44] *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 146, 149 N.W. 363 (1914).

[45] *Loup River Pub. Power Dist.* v. *North Loup River Pub. Power & Irr. Dist.*, 142 Nebr. 141, 152-153, 5 N.W. (2d) 240 (1942).

be watered by the applicant, the Department may refuse the application.[46] The Department's approval, if granted, is conditioned upon a decision that the appropriation, when perfected, will not be detrimental to the public welfare; and approval may be given for a shorter period of time for perfecting the appropriation, or for a smaller amount of water or area of land than applied for.[47] With respect to this function, the Nebraska Supreme Court has held that the State has such a proprietary interest in the waters of its streams and in their beneficial use that it may transfer a qualified ownership or right of use thereof, and that in doing so it may impose such limitations and conditions as its public policy demands.[48] Without doubt it has granted to the State administrative agency the power and duty to determine such questions and to impose such conditions. If the public welfare demands it, the court concluded, the State agency "may grant a qualified and limited right of appropriation and in the beneficial use of the water so appropriated."

Some aspects of the Nebraska appropriative right.—The residue of unappropriated water in a stream is subject to appropriation by others, but without interference with prior rights.[49] A senior appropriator is entitled to water as against an upstream junior appropriator so long as water in usable quantities can be delivered to him; but he is not entitled to a flow of unusable water. So long as prior rights are not infringed, juniors may use available water within the limitations of their appropriations. These complicated factual situations are to be determined by the State administrative agency, whose findings are final unless unreasonable and arbitrary.[50]

The water rights statute provides that one who appropriates water from a public stream and returns it thereto may take out the same quantity of water, less a reasonable deduction for losses in transit to be determined by the Department, but not to the prejudice of a prior appropriator.[51] Another section authorizes conveyance of water into or along a natural stream and withdrawal of the water minus determined losses "without regard to any prior appropriation of water from such stream," but requires the prior written consent of a majority of the continguous residents and landowners and imposes liability for damages from any overflow to which this contributes.[52]

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[46] Nebr. Rev. Stat. §46-234 (1974).

[47] *Id.* §46-235.

[48] *Kirk* v. *State Board of Irr.*, 90 Nebr. 627, 631-632, 134 N.W. 167 (1912).

A statutory limit on the permissible use of direct streamflow for irrigation, in Nebr. Rev. Stat. §46-231 (1974), is discussed at note 162 *infra.*

[49] *Fairbury* v. *Fairbury Mill & Elevator Co.*, 123 Nebr. 588, 592, 243 N.W. 774 (1932).

[50] *State ex rel. Cary* v. *Cochran*, 138 Nebr. 163, 172-174, 292 N.W. 239 (1940). See *Robinson* v. *Dawson County Irr. Co.*, 142 Nebr. 811, 816-817, 8 N.W. (2d) 179 (1943); *Platte Valley Irr. Dist.* v. *Tilley*, 142 Nebr. 122, 130-131, 5 N.W. (2d) 252 (1942).

[51] Nebr. Rev. Stat. §46-241(2) (1974).

[52] *Id.* §46-252. See *Hagadone* v. *Dawson County Irr. Co.*, 136 Nebr. 258, 265, 285 N.W. 600 (1939).

There are two sections in the water rights statute relating to the return of unused water to the stream, which bear directly upon the question of diverting water out of the watershed in which it originates. One section, originally a part of the 1889 law, provides that appropriated water shall not be turned into any stream other than that from which diverted unless such stream exceeds in width 100 feet, in which event not more than 75 percent of the regular flow shall be taken.[53] Another, enacted in 1919, directs that unused water from an irrigation ditch be returned with as little waste as possible to the stream from which taken, or to the Missouri River.[54]

The Nebraska Supreme Court construed these two sections together as necessarily limiting location of canals "to within the watershed of the stream that furnishes the source of supply." It was held that under the established policy of the State, water for irrigation and power purposes taken from the Platte River or its tributaries may not be lawfully diverted over and beyond the southern watershed of the stream and applied to lands situated outside of the river basin.[55] The Nebraska Department of Water Resources subsequently approved an application to appropriate water from the Snake River, a tributary of Niobrara River, and to transport it out of the Snake watershed and into that of the Niobrara for irrigation purposes. In affirming this order, the supreme court distinguished the facts in the earlier case, where there was an admitted attempt to transport water to lands wholly outside the Platte River valley basin, and here, where to all intents and purposes the Snake and Niobrara comprised one watershed and basin. All unused waters would be returned to the Niobrara, where they would have naturally flowed, and thence to the Missouri River, never out of the overall watershed. Under the circumstances of this case, the statutes were not in conflict.[56]

An 1895 statute included a provision the extant version of which requires an application for a permit to appropriate water, if for irrigation purposes, to include "a description of the land to be irrigated thereby and the amount thereof * * *."[57] In 1904, the Nebraska Supreme Court declared that by enacting this statute the State adopted a policy "by which the right to use the water shall not be granted separate from the land to which it is to be applied,

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[53] Nebr. Rev. Stat. §46-206 (1974).

[54] *Id.* §46-265, discussed in *Ainsworth Irr. Dist.* v. *Bejot*, 170 Nebr. 257, 102 N.W. (2d) 416, 428-429 (1960).

[55] *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 369-370, 268 N.W. 334 (1936).

[56] *Ainsworth Irr. Dist.* v. *Bejot*, 170 Nebr. 257, 102 N.W. (2d) 416 (1960). In addition, the evidence showed that in various stretches the Snake River exceeded 100 feet in width and that less than 50 percent of the flow would be taken.

The earlier *Osterman* case was also distinguished in a 1966 case involving ground water, discussed in note 137 *infra.*

[57] Nebr. Laws 1895, ch. 69, Rev. Stat. §46-233 (1974).

and that the right to use the water should attach to the land, and, when the land is sold, be sold with it * * *."[58]

A statute enacted in 1889 provided that one entitled to use water "may change the place of diversion if others are not injured by such change and may extend the ditch, flume or aqueduct by which the diversion is made to places beyond that where the first use was made." As amended in 1911, the statute provided that an owner of a ditch, storage reservoir, or other water appropriation device "may change the point of diversion, or the line of any flume, ditch or aqueduct if others are not injured thereby," with approval of the State administrative agency. The extant version is similar in wording although the words "if others are not injured thereby" have been omitted.[59]

A decision of the Nebraska Supreme Court was rendered in 1905 while the 1889 legislative authorization to extend the ditch beyond the first place of the use was still in effect. The supreme court held that the statute was merely declaratory of the law governing changes in place of use as it had previously existed, but that the declaration must be construed together with the act of 1895 with the result that such changes were now under State administrative control.[60] Six years later, in 1911, the legislature in amending the 1889 statute expressly added such a requirement regarding State administrative permission. However, in the same amendment it withdrew its express authorization to extend the conduit to new places of use. Conceivably, so far as the matter of changes in locational use is concerned, the present authority to change the *point of diversion* and the *line of a ditch* could be broadly interpreted—with complete change in places of use, if the State administrator approved. However, why should the legislature adopt what would be a needlessly roundabout and cryptic way of authorizing changes in place of use? The legislature's explicit action in 1911 in withdrawing express authorization to

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[58] *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 138-139, 100 N.W. 286 (1904). The court at the outset mentioned as a feature of such a doctrine "that the right to the use of water should never be separated from the land to which it is to be applied." 72 Nebr. at 138.

Orders of the Nebraska Department of Water Resources approving petitions to change points of diversion have specifically stated that the right to make such change does not carry with it any right to irrigate lands not entitled to water under the appropriation at the original point of diversion, as was stated in a letter to the author from Dan S. Jones, Jr., Director of the Department, dated September 5, 1963.

[59] Nebr. Laws 1889, ch. 68, §5; Laws 1911, S.F. 263. The extant version, Nebr. Rev. Stat. §46-250 (1974), reads: "The owner of any ditch, storage reservoir, storage capacity, or other device for appropriating water may, upon petition to the Department of Water Resources, and upon its approval, change the point at which the water under any water appropriation of record is diverted from a natural stream or reservoir, *change the line of any flume, ditch, or aqueduct*, or change a storage site; *Provided*, that no reclamation district or power appropriator may change the established return flow point without the approval of the Department of Water Resources." (Emphasis added.)

[60] *Farmers' & Merchants' Irr. Co.* v. *Gothenburg Water Power & Irr. Co.*, 73 Nebr. 223, 227-228, 102 N.W. 487 (1905).

extend the conduit to new places of use is significant. It is reasonable to assume that in consonance therewith, the legislative intent was to authorize desirable changes in conduit line that would *not* involve changes in locational use.

Another statute was enacted in 1895 that pertained to irrigation districts. It included a provision, the extant version of which reads, "It is hereby expressly provided that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied * * *."[61] In a case decided in 1951, the Nebraska Supreme Court observed, "While it is true that prior to the Irrigation Act of 1895 a freedom to change the location of the use apparently existed, no such right now exists except by permission" of the State administrative agency. Such requirement, said the court, does not divest the right; it is a valid exercise of the police power of the State in regulation of its public waters.[62] The literal language of the quoted opinion may indicate acceptance of the rule that the right to change the place of use with the State agency's permission still exists. However, the court went on to say that any such right in the case of canal company service was always qualified by lack of power in the company to deprive landowners of their dedicated use of water without their express consent. The statutory procedure for bringing lands within an irrigation district for the purpose of sharing its appropriation of water—which is the exclusive procedure for so doing—was not followed in this case. Thus, it was held, outside landowners had acquired no right to use district water, despite any use that they had in fact been making of the water for many years.[63] Moreover, in this opinion the court cited a 1941 opinion by the Federal Circuit Court of Appeals, Eighth Circuit. In that opinion, the court said:

> By act of the Nebraska legislature, all appropriations for irrigation purposes made since 1895 are inseparably appurtenant to specific land, and so follow the land to which the water was intended to be and has been applied.[64] Appropriative rights acquired prior to 1895, however, were not necessarily required to be attached to specific land, and so could, generally speaking, be transferred or assigned for use on other property. * * * But any change in the locational use of previously appropriated waters could, after 1895, only be made "under the permission and subject to the administrative control of the state irrigation authorities."[65]

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[61] Nebr. Laws 1895, ch. 70, §9, p. 275, Rev. Stat. §46-122 (1974).

[62] *State* v. *Birdwood Irr. Dist.*, 154 Nebr. 52, 62-63, 46 N.W. (2d) 884 (1951). The court apparently was referring to this 1895 act regarding irrigation districts.

[63] 154 Nebr. at 63.

[64] Citing Nebr. Comp. St. 1929, §46-109, forerunner of Rev. Stat. §46-122 (1974) which is the extant version of the provision of the act of 1895 regarding irrigation districts described above (Laws 1895, ch. 70, §9, p. 276).

[65] *United States* v. *Tilley*, 124 Fed. (2d) 850, 856-857 (8th Cir. 1941), citing in the latter regard the 1905 decision of the Nebraska Supreme Court discussed at note 60 *supra*.

Unlike the quoted statement from this 1941 Federal case, the Nebraska Supreme Court in its 1951 decision did not expressly limit its quoted language regarding permissible changes in locational use to appropriative rights acquired prior to 1895. But the appropriative right in dispute had in fact been acquired (in 1893) prior to 1895.[66] Moreover, although the statement in the 1951 opinion regarding permissible changes in locational use of appropriated water was woven into the judicial argument, it was not necessary to the actual decision. In the last analysis, the decision rested on the points that the purpose of an irrigation district is to furnish water to lands within its boundaries; that no one can gain a right to use district waters merely by using them for irrigation purposes for a period of time; that the statutory procedure for bringing outside lands within an irrigation district and its water rights is exclusive; and that in the instant case such procedure had not been followed.

An appropriative water right may be lost to the holder by abandonment—relinquishment of the right by its owner without any regard to future possession by himself or anyone else, but with the intention to forsake or desert the right.[67]

The water rights statute provides that when an appropriator or his successor in interest ceases to use the water appropriated for some beneficial or useful purpose, the right ceases. It further provides a procedure under which the Department of Water Resources, subject to appeal to the supreme court, declares forfeitures of any water appropriation not put to beneficial use, or ceased to be so used for more than 3 years.[68] The constitutionality of this

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[66] *State* v. *Birdwood Irr. Dist.*, 154 Nebr. 52, 54, 46 N.W. (2d) 884 (1951).

In an earlier case, *Farmers' & Merchants' Irr. Co.* v. *Gothenburg Water Power & Irr. Co.*, 73 Nebr. 223, 227-228, 102 N.W. 487 (1905), discussed at note 60 *supra*, the court spoke of the "irrigation law of 1895." It appears to have been referring entirely or largely to the 1895 statute mentioned earlier at note 57 (which was similarly so described in *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 138-139, 100 N.W. 286 (1904), *supra* note 58). It perhaps also had in mind this provision of the 1895 act pertaining to irrigation districts. But at any rate, as in the 1951 Nebraska case, the water appropriations in dispute were made prior to 1895. As mentioned in note 65 *supra*, this case was cited in the 1941 Federal case which expressly distinquished appropriative rights acquired before 1895. It also was cited, in addition to the 1941 Federal case, in the 1951 Nebraska case.

[67] *State* v. *Nielsen*, 163 Nebr. 372, 381, 79 N.W. (2d) 721 (1956); *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 154-156, 100 N.W. 286 (1904).

[68] Nebr. Rev. Stat. §§46-229 to -229.05 (1974). Section 46-229.03 was amended in 1973 so as to provide that the notice of hearing shall call upon all persons interested in such water appropriation to show cause why *all or part of* the same should not be canceled and annulled, and that if no one appears at the hearing such appropriation *or unused part thereof* shall be declared forfeited and annulled. Laws 1973, LB 186, §§5 and 6.

The Nebraska Supreme Court appears to have indicated in a 1956 case that this statute does not affect the question of the *perfection* of an appropriative right based on an application since the 1911 enactment. *North Loup River Pub. Power & Irr. Dist.* v. *Loup River Pub. Power Dist.*, 162 Nebr. 22, 26-28, 74 N.W. (2d) 863 (1956). ("The

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statute was upheld by the Nebraska Supreme Court.[69] The procedure was validly applied to applications to appropriate water made before the enactment as well as after it.[70]

In addition to this statutory procedure for forfeiture of water rights, the Nebraska Supreme Court has recognized another method of forfeiture—nonuse for a time equal to the statutory limitation upon actions to recover the possession of real property (10 years).[71]

A prescriptive water right may be acquired against one appropriator by another by his adverse use of water for the statutory period of limitations applicable to adverse possession of real property (10 years).[72] However, a

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granting of the application * * * is a conditional right which becomes a perfected and completed appropriation only when the works are completed and the waters put to a beneficial use in compliance with the conditions and limitations of the grant." 162 Nebr. at 28.) The court said: "[W]e take note of the fact that the irrigation law of this state was substantially changed in 1895 in that the department was then charged with the duty of adjudicating the rights of appropriators. Laws 1895, c. 69, §16, p. 248. It is evident, also, that there were numerous applications not perfected and many appropriations which had been abandoned that required legislative attention. The Legislature in 1911 directed the department to proceed to adjudicate all rights of appropriators which had not been adjudicated, and directed the department to forfeit and annul all appropriation rights where it appeared that any water appropriation had not been used for some beneficial or useful purpose, or having been so used at one time had ceased to be used for such purpose for more than 3 years. Laws 1911, c. 153, §17, p. 503. We do not construe this to mean that the statute requires that an appropriator is necessarily limited to such period of 3 years in putting appropriated waters to beneficial use under a new application. We think the time in which such waters must be put to a beneficial use must be determined from the terms, conditions, and limitations of the adjudicated appropriation right." 162 Nebr. at 27-28. [Regarding extant provisions concerning the perfection of water appropriations, see Nebr. Rev. Stat. §46-238 (1974).] For some subsequent discussions of the statute, see *State* v. *Neilsen*, 163 Nebr. 372, 380-387, 79 N.W. (2d) 721 (1956); *Hickman* v. *Loup River Pub. Power Dist.*, 176 Nebr. 416, 126 N.W. (2d) 404, 407 (1964).

[69] *State* v. *Birdwood Irr. Dist.*, 154 Nebr. 52, 56-57, 46 N.W. (2d) 884 (1951); *Dawson County Irr. Co.* v. *McMullen*, 120 Nebr. 245, 247-251, 231 N.W. 840 (1930).

[70] *Kersenbrock* v. *Boyes*, 95 Nebr. 407, 409-411, 145 N.W. 837 (1914); *State* v. *Birdwood Irr. Dist.*, 154 Nebr. 52, 46 N.W. (2d) 884, 888 (1951).

[71] *State* v. *Nielsen*, 163 Nebr. 372, 381-382, 79 N.W. (2d) 721 (1956); *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 156, 100 N.W. 286 (1904). The pertinent statute of limitations is Nebr. Rev. Stat. §25-202 (1964).

[72] See *Maranville Ditch Co.* v. *Kilpatrick Bros. Co.*, 100 Nebr. 371, 372, 160 N.W. 81 (1916); *Kilpatrick Bros. Co.* v. *Frenchman Valley Irr. Dist.*, 101 Nebr. 155, 156, 162 N.W. 422 (1917). The pertinent statute of limitations is Nebr. Rev. Stat. §25-202 (1964).

In a case concerning a prescriptive right to discharge surplus irrigation waters into a creek, the Nebraska Supreme Court indicated that in such a case, as well as in the case of adverse possession of land, there must be continuous and uninterrupted, open, exclusive, and notorious adverse use under claim of right for the statutory period. *Kuhlmann* v. *Platte Valley Irr. Dist.*, 166 Nebr. 493, 89 N.W. (2d) 768, 780-781

prescriptive right is not looked on with favor by the law, and it is essential that all elements necessary to give title concur, of which proof must be clear, convincing, and satisfactory.[73]

In some controversies over water rights, the doctrines of estoppel and laches have been applied.[74]

The legislature has declared that "all persons" have statutory authority to condemn rights of way over and through the lands of others for ditches, dams, and other necessary works for the storage and conveyance of water for irrigation, water power, and other beneficial uses.[75] However, the Nebraska Supreme Court has held that the right of eminent domain cannot be exercised for purely private purposes, such as by an individual for the irrigation of his own land.[76] The decision of the United States Supreme Court in *Clark* v. *Nash*[77] was distinguished as limited by the highest Court itself to the

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(1958). See also *Oliver* v. *Thomas*, 173 Nebr. 36, 112 N.W. (2d) 525, 528 (1961), regarding adverse possession of real estate, to which the same statute of limitations (§25-202) has been applied. *Mentzer* v. *Dolen*, 178 Nebr. 42, 131 N.W. (2d) 671, 674 (1964). The necessary elements for an appropriator to acquire a prescriptive right against another would appear to be similar.

Recall, however, as discussed at note 72 *supra*, that the court has indicated that mere nonuse for the time (10 years) equal to the statutory limitation (§25-202), which is applicable to possession of real property, may result in a forfeiture of an appropriative right.

[73] *Kuhlmann* v. *Platte Valley Irr. Dist.*, 166 Nebr. 493, 512-515, 89 N.W. (2d) 768 (1958). See also *Worm* v. *Crowell*, 165 Nebr. 713, 721-723, 87 N.W. (2d) 384 (1958). So long as the water supply is sufficient for all who have rights to its use, there is no adverse use; hence no right to divert and dissipate an entire stream can be acquired by making such use thereof as will still leave water for a rightful user. *Meng* v. *Coffee*, 67 Nebr. 500, 520-521, 93 N.W. 713 (1903). The nature and extent of an easement arising by prescription are determinable by the use actually made of the property during the running of the statutory period. *Paloucek* v. *Adams*, 153 Nebr. 744, 746, 45 N.W. (2d) 895 (1951).

[74] *State* v. *Nielsen*, 163 Nebr. 372, 387-389, 79 N.W. (2d) 721 (1956); *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 807-809, 64 N.W. 239 (1895); *Enterprise Irr. Dist.* v. *Tri-State Land Co.*, 92 Nebr. 121, 156-160, 138 N.W. 171 (1912). Estoppel was denied in *McCook Irr. & Water Power Co.* v. *Crews*, 70 Nebr. 109, 115, 127, 102 N.W. 249 (1905); *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 142-145, 149 N.W. 363 (1914).

[75] Nebr. Rev. Stat. §§46-246 to -248 (1974).

The right to occupy State lands and to obtain rights of way over highways without compensation is granted to those who wish to construct the water control works provided for in §§46-244 to -250. *Id.* §46-251.

[76] *Vetter* v. *Broadhurst*, 100 Nebr. 356, 360-363, 160 N.W. 109 (1916), cited with approval in *Onstott* v. *Airdale Ranch & Cattle Co.*, 129 Nebr. 54, 58-59, 260 N.W. 556 (1935).

See also *Burger* v. *City of Beatrice*, 181 Nebr. 213, 147 N.W. (2d) 784, 790-795 (1967), regarding condemnation by a city for ground water wells to supply public versus private uses.

[77] *Clark* v. *Nash*, 198 U.S. 361, 367-370 (1905), affirming 27 Utah 158, 75 Pac. 371 (1904).

circumstances of that case, having reference to the natural conditions of an arid State such as Utah under which the condemnation of a right of way by an individual for the use of his own land was held to be a public use and its exercise within the legislative power of the State. The Nebraska court pointed out the vast difference between the physical configuration and climatic conditions of Utah and of Nebraska, and held that under local conditions the right of eminent domain rests upon the right to control rates by the public. The statutory sections in question were not declared null and void *in toto*, for their unquestioned application to irrigation districts and public service companies was conceded. What the court intended to declare was that the statutes could not, with due regard to the right of private property, be applied to circumstances in which a merely private interest is subserved.

Riparian Doctrine

The riparian doctrine is a part of the water law of Nebraska but its practical importance in relation to that of the appropriation doctrine was substantially reduced early in the 20th century as a result of decisions of the Nebraska Supreme Court. This is discussed later under "Interrelationships of the Dual Systems."

Recognition of the riparian doctrine.—The existence of the riparian doctrine, as modified by the irrigation statutes, was recognized in several decisions rendered by the supreme court late in the last century.[78] The opinions in two decisions rendered in 1903, on the same day, thoroughly considered the law of riparian rights and held it applicable to every part of the State except as altered or supplemented by legislation.[79]

As previously noted under "Early Uses of Water," the Nebraska Supreme Court in 1936 called attention to the fact that the first settlements in the State were along the eastern borders and in the river valleys, which were not arid lands.[80] Accordingly, in 1855, the First General Assembly adopted so much of the common law of England as was applicable, and not inconsistent with the United States Constitution, Nebraska Organic Act, or Territorial laws.[81] The supreme court then redeclared the principle expounded in the early cases to the effect that the common law rules, except as altered by statute, were in force in every part of the State.

Accrual, nature, and extent of the riparian right.—The riparian right was held

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[78] *Eidemiller Ice Co.* v. *Guthrie*, 42 Nebr. 238, 253, 60 N.W. 717 (1894); *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 806, 64 N.W. 239 (1895); *Plattsmouth Water Co.* v. *Smith*, 57 Nebr. 579, 584, 78 N.W. 275 (1899); *Slattery* v. *Harley*, 58 Nebr. 575, 576-577, 79 N.W. 151 (1899).

[79] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 339, 342, 93 N.W. 781 (1903), overruled on different matters by *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966); *Meng* v. *Coffee*, 67 Nebr. 500, 511-512, 93 N.W. 713 (1903).

[80] *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 365-366, 268 N.W. 334 (1936).

[81] Nebr. Laws 1855, p. 328. The extant version is Nebr. Rev. Stat. §49-101 (1974).

to be a common law right applicable alike to all owners of land adjacent to a stream.[82] The basis of the riparian doctrine, and an indispensable requisite of it, is actual contact of land and water; proximity or closeness short of contact is unavailing.[83]

The riparian landowner acquires title to his usufructuary interest in water flowing by or through his land when he acquires the land to which it is an incident.[84] The extent of a riparian holding apparently was formerly limited so as not to exceed the area acquired by a single entry or purchase from the Government;[85] but this was later disapproved as being arbitrary as between riparians. "The area or size of the parcel is immaterial insofar as its character as riparian land is concerned."[86]

In the frequently cited case of *Crawford Company* v. *Hathaway*, the court stressed the property nature of the riparian right and held that the owner could not be divested of his title except by some procedure common to property rights generally. He cannot be deprived of the right against his will, except for public use and upon payment of due compensation; but the law of eminent domain can apply.[87] Furthermore, the right may also be separated from the

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[82] *Southern Nebr. Power Co.* v. *Taylor*, 109 Nebr. 683, 686-687, 192 N.W. 317 (1923).

[83] *Stratbucker* v. *Junge*, 153 Nebr. 885, 889, 46 N.W. (2d) 486 (1951).

The court referred to its statement in *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 93 N.W. 781, 790 (1903), and to *McGinley* v. *Platte Valley Pub. Power & Irr. Dist.*, 132 Nebr. 292, 271 N.W. 864 (1937), in which the statement was repeated that "Land, to be riparian, must have the stream flowing over it or along its borders * * *." In *Wasserburger* v. *Coffee*, 180 Nebr. 149, 141 N.W. (2d) 738, 744 (1966), the court said, *inter alia*, regarding riparian land, "The parcel must include a part of the bed of a watercourse or lake * * *." This statement is inconsistent with the quoted statement from the *Crawford* case. In Nebraska, riparian landowners ordinarily do own some part of the bed but there may be some instances where this is not the case. See the discussion at notes 100-104 *infra*, regarding navigable streams and lakes. Suggested ramifications of this matter are presented in Comment, "The Dual-System of Water Rights in Nebraska," 48 Nebr. L. Rev. 488, 492-494 (1969); Fisher, R. J., Harnsberger, R. S., & Oeltjan, J. C., "Rights to Nebraska Streamflows: An Historical Overview With Recommendations," 52 Nebr. L. Rev. 313, 319-320 (1973).

[84] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 357, 93 N.W. 781 (1903).

[85] 67 Nebr. at 354-356; *McGinley* v. *Platte Valley Pub. Power & Irr. Dist.*, 132 Nebr. 292, 297, 271 N.W. 864 (1937). This is discussed in chapter 10 at notes 269-270.

[86] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 153-155, 141 N.W. (2d) 738 (1966), modified, with direction to the trial court to amplify the findings to determine whether one plaintiff was inadvertently excluded from the decree, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

However, as against appropriative rights, as discussed at note 127 *infra*, the riparian right ordinarily attaches "to the smallest tract [of land] held in one claim of title leading from the owner on April 4, 1895 [the effective date of the irrigation act of 1895], to the present owner;" and "if the tract, or part of it, later lost its riparian status as a result of severance, the nonriparian land cannot regain the riparian status." 141 N.W. (2d) at 745. But this apparently does not apply as between persons asserting riparian rights. This is discussed in chapter 10 at notes 262-264 and 277-278.

[87] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 346-347, 349, 93 N.W. 781 (1903).

land by grant or prescription. So an upper riparian owner who diverts, in excess of his reasonable use and enjoyment, water that would otherwise flow downstream to a lower owner, makes an adverse use of such excess and may acquire a prescriptive right thereto.[88] But in the very nature of things, said the court, there can be no such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners. The water that actually comes down to the lower owner would come in any case; and there is nothing adverse to anyone, in merely receiving it, that could be said to give a prescriptive right entitling him to prevent reasonable use of the water by the upper owner.[89]

In *Crawford Company* v. *Hathaway*, the court made many further observations regarding the nature of the riparian right. Some of them follow:

The riparian owner has a right to the flow of water passing through or by his land. This is a property right, inseparably annexed to the soil and passing with it, not as an easement or appurtenance, but as a corporeal hereditament, part and parcel of the land. It is property of which the owner cannot be divested except by some lawful method which would apply alike to all species of real property and appurtenances.[90]

The riparian owner does not have an absolute and exclusive right to all the streamflow in its natural state, but only the right to the benefit, advantage, and use of the water flowing past his land so far as it is consistent with a like right in all other riparian owners.[91] Nor does the law recognize a riparian right in the *corpus* of the flowing water; it is a usufructuary property interest only in the water as it passes along. The riparian right is limited to a reasonable use of the flowing stream, subject to a like right belonging to all other riparian proprietors, none of whom may materially damage other proprietors either upstream or downstream.[92]

The primary riparian right to use water is for domestic purposes. But if the right is applied to the irrigation of riparian land (the riparian cannot use his right on nonriparian land) the elements of reasonableness and equality of right among riparian owners come into play.[93]

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[88] 67 Nebr. at 374-375. Only a continuous and adverse user of water, for the period of limitation, in addition to what upper riparian owners are entitled to will give them the right to take such excess as against lower proprietors. *Meng* v. *Coffee*, 67 Nebr. 500, 520-521, 93 N.W. 713 (1903), decided on the same day as *Crawford Co.* v. *Hathaway*.

[89] 67 Nebr. at 374-375.

With respect to prescriptive rights to overflow lands upstream, see *Kiwanis Club Foundation, Inc. of Lincoln* v. *Yost*, 179 Nebr. 598, 139 N.W. (2d) 359 (1966). The court said, *inter alia*, "The owner of a dam and the prescriptive right to overflow the land of upper riparian owners may abandon his rights, and may also return the river to its natural state by removing or destroying the dam." 139 N.W. (2d) at 361.

[90] 67 Nebr. at 340-341, 346-349.

[91] 67 Nebr. at 373.

[92] 67 Nebr. at 351-353.

[93] 67 Nebr. at 353.

Questions arising between riparians and appropriators as discussed in *Crawford Company* v. *Hathaway* are noted later under "Interrelationships of the Dual Systems."

Several decades after the decision in *Crawford Company* v. *Hathaway* was rendered, the Nebraska Supreme Court in the *Osterman* case had occasion to consider some important phases of the riparian land and water relationship.[94] In discussing one phase, the court reiterated the principle that common law rules as to the rights and duties of riparian owners were in force in every part of the State, except as altered by statute. One of these rules was that the use of water by riparian proprietors must be reasonable with regard to the rights of the other riparians. This necessarily implied, said the court, that the common law right to use water was limited strictly to riparian lands, which meant that at common law there was in general no right to transport water out of the watershed.[95]

Riparian waters.—The water rights statute of 1889 authorizing the appropriation of water flowing in a stream, canyon, or ravine contained a proviso that with respect to all streams not more than 50 feet in width, the rights of riparian owners were not affected by the provisions of the act. The proviso was amended in 1893 to reduce the exception from 50 to 20 feet.[96] The Nebraska Supreme Court held that as the riparian right is property, and when vested can be destroyed or impaired only in the public interest upon full compensation under the laws relating to eminent domain, this proviso was a clear invasion of private rights and was within the prohibition of the constitution.[97] It is not a

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[94] *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 365-366, 268 N.W. 334 (1936).

[95] 268 N.W. at 339-340. The court said that C.S. 1929, §46-620, which is now §46-265, discussed at notes 54-56 *supra*, "necessarily limits the location of the [irrigation] canals to within the watershed of the stream that furnishes the source of supply." 268 N.W. at 340. The court said that the statute's words "or to the Missouri River" "can have no application to the issue to be determined in the instant case." *Id.*

But in a 1966 case, the court, in distinguishing the *Osterman* case, held that where no damage was done by a transwatershed diversion of percolating ground waters for municipal use, such diversion was reasonable in keeping with the American rule of reasonable use that the court apparently adopted regarding such waters. *In re Metropolitan Util. Dist. of Omaha*, 179 Nebr. 783, 140 N.W. (2d) 626, 637 (1966), discussed at notes 136-137 *infra*.

It is problematical whether or not *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966), modified, 144 N.W. (2d) 209 (1966), would apply to the *Osterman* case on this point.

In *Wasserburger*, the court decided questions concerning the definition of riparian land, as discussed at note 86 *supra*, but it did not expressly discuss the watershed limitation question nor the *Osterman* case in this regard. 141 N.W. (2d) at 744-745. This perhaps was because all the lands in dispute apparently were considered to be within the watershed. 141 N.W. (2d) at 741-742.

[96] Nebr. Laws 1889, ch. 68, §1, Laws 1893, ch. 40.

[97] *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 807, 64 N.W.

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part of the present law. The section was expressly repealed in the comprehensive water administration act of 1895.[98] The substance of this section—but without the proviso respecting rights of riparian owners—was reenacted in the 1919 revision of the water rights law, and it is still on the statute books.[99]

Although the stream involved in *Crawford Company* v. *Hathaway* was a narrow one, ordinarily flowing but a small volume of water, the court considered the relationship of the riparian doctrine to streams along the banks of which meander lines had been run by the Government in its survey of the public lands and ventured the opinion that riparian rights probably would not attach to the waters of such rivers.[100] However, final determination was left to be decided in a proper case upon fair presentation of the subject and after opportunity for thorough investigation.

Several decades later, in the *Osterman* case, the court pointed out that the subject matter of *Crawford Company* v. *Hathaway* in no manner presented or involved the question of a meandered stream; and that the court in that case had frankly acknowledged that its comments on this question were not necessary to the decision therein, that it was making no final determination of this question, and that it must not be understood as being committed to any proposition not expressly decided.[101] The holding on this question in the *Osterman* case apparently was that, although the river had been meandered by the government surveyors, abutting land owners along the river who obtained title from the Government prior to 1889 also acquired title to its bed, which entitled them to the rights of riparian landowners and to the use of the waters flowing in the stream.[102]

(*Continued*)
239 (1895), approved in *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 341-342, 93 N.W. 781 (1903).

[98] Nebr. Laws 1895, ch. 69, §68.

[99] Nebr. Laws 1919, ch. 190, p. 850, Rev. Stat. §46-259 (1974).

[100] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 350-351, 93 N.W. 781 (1903), overruled on different matters by *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738 (1966). These larger meandered streams, the court believed, might be classed as interstate rivers—navigable streams—the waters of which would be held by the State in trust for the people and not subject to riparian claims by owners of contiguous lands. Compare the court's handling, in *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 804-805, 64 N.W. 239 (1895), of a contention that as the original surveys meander along the Republican River, and as the adjoining lands were conveyed by patents which do not include the bed of that stream, the title thereto remained in the Federal Government and, in short, the Republican is, in legal effect, a navigable river. The court held the Republican River to be not navigable within the more widely accepted definition of navigability in law as synonymous with navigability in fact.

[101] *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 362-364, 268 N.W. 334 (1936), referring to *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 375, 93 N.W. 781 (1903).

[102] 268 N.W. at 336-338, relying in large part upon *McBride* v. *Whitaker*, 65 Nebr. 137, 90 N.W. 966 (1902), and its affirmance in 197 U.S. 510 (1904).

In a subsequent case the court said, "The state does not hold title to the river beds in Nebraska. * * * Such river beds are as effectually the subject of private ownership as other property, except that, in the case of navigable streams, there is an easement for public navigation."[103] A Nebraska statute declares that the beds and waters of lakes that were meandered by government survey are the property of the State for the benefit of the public, but this declaration shall not be construed "as claiming title in the State of Nebraska to any lake or stream or that portion of a lake or stream, located upon lands, patents to which have been issued by the United States to private individuals or persons."[104]

Apparently the question of riparian rights in navigable streams has not been squarely decided by the Nebraska Supreme Court.

A holding in *Crawford Company* v. *Hathaway* that has not been questioned in later decisions of the court was that the riparian owner was entitled at most to only the ordinary and natural flow of the stream, or so much as necessary for his riparian uses, and could not claim, as against an appropriator, the flow of the storm or floodwaters passing down the stream in times of freshets.[105]

Purpose of use of water.—Late in the 19th century, the Nebraska Supreme Court expressed itself as satisfied on both reason and precedent that on a nonnavigable stream "the riparian owner has the right to use all the water which it is necessary for him to employ for any purpose" and to cut and remove the ice on the stream, provided he does not decrease the streamflow below what was required to successfully operate a lower mill.[106]

The right to irrigate the riparian owner's land has been acknowledged in various cases.[107] Other specific uses of riparian water that appear in the cases are domestic[108] and power uses, which the supreme court said was a common law right applicable to all riparian owners alike.[109]

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[103] *Thies* v. *Platt Valley Pub. Power & Irr. Dist.*, 137 Nebr. 344, 346, 289 N.W. 386 (1939).

In an earlier case the court had indicated that title in the case of navigable streams is in the riparian proprietor to the thread of the stream, subject to the navigation easement. *Kinkead* v. *Turgeon*, 74 Nebr. 573, 580, 583-591, 104 N.W. 1061 (1905), 109 N.W. 744, 745-748 (1906).

See also *Krumwiede* v. *Rose*, 177 Nebr. 570, 129 N.W. (2d) 491, 496 (1964); *Summerville* v. *Scotts Bluff County*, 182 Nebr. 311, 154 N.W. (2d) 517, 521 (1967).

[104] Nebr. Rev. Stat. §37-411 (1974).

[105] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 373-374, 93 N.W. 781 (1903).

[106] *Eidemiller Ice Co.* v. *Guthrie*, 42 Nebr. 238, 253, 60 N.W. 717 (1894).

[107] Right of reasonable use for irrigation by riparian landowners: *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 353, 93 N.W. 781 (1903); *Meng* v. *Coffee*, 67 Nebr. 500, 512-516, 93 N.W. 713 (1903); *McCook Irr. & Water Power Co.* v. *Crews*, 70 Nebr. 109, 118, 102 N.W. 249 (1905). See *Slattery* v. *Harley*, 58 Nebr. 575, 577, 79 N.W. 151 (1899).

[108] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 353, 371-372, 93 N.W. 781 (1903).

[109] *Southern Nebr. Power Co.* v. *Taylor*, 109 Nebr. 683, 686-687, 192 N.W. 317 (1923).

A Nebraska city that was making a noninterfering use of water was treated as an ordinary riparian owner. The question of riparian status of a municipality was not discussed in the court's opinion.[110]

Interrelationships of the Dual Systems

An 1877 statute regarding irrigation and 1889 and 1895 legislation regarding water appropriation are mentioned above under "Appropriation of Water of Watercourses—Recognition of doctrine of prior appropriation."

In the earliest cases in which the riparian-appropriation relationship question was considered, the Nebraska Supreme Court adopted the principle that the common law rule with respect to private riparian proprietors prevailed except as modified by statute.[111]

The opinion in the third decision in *Crawford Company* v. *Hathaway* discussed at considerable length principles underlying the relative rights of riparian landowners and appropriators on the same stream.[112] The common law riparian doctrine was held to be not inapplicable to conditions prevailing in the whole or in any part of the State, simply because irrigation was necessary in some parts thereof. The right of irrigation was one of the elements of

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[110] *Fairbury* v. *Fairbury Mill & Elevator Co.*, 123 Nebr. 588, 592-593, 243 N.W. 774 (1932). In this case, a city and a mill were both owners of riparian land, the only city use of the water being for cooling its turbine engines used in connection with the municipal light and water plant, after which the water was returned to the stream. The Nebraska Supreme Court observed that while both parties were riparian landowners, both seemed in this litigation to be relying more on appropriation to beneficial use than on their rights as riparian owners. However, considering their rights as riparian owners, it was held that the city's use was reasonable and not an interference with any use which the downstream mill owner desired to make as a riparian proprietor. In other words, the city was treated as an ordinary riparian owner. Nothing in the court's opinion suggests any question as to the riparian status of a municipality. Under the circumstances of this case, with the city making a noninterfering use of the water, there was perhaps no occasion for that question to arise.

[111] *Eidemiller Ice Co.* v. *Guthrie*, 42 Nebr. 238, 253, 60 N.W. 717 (1894); *Clark* v. *Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Nebr. 798, 806-808, 64 N.W. 239 (1895); *Slattery* v. *Harley*, 58 Nebr. 575, 577, 79 N.W. 151 (1899).

The court's opinion in the *Clark* case declared that at common law every riparian proprietor was entitled to the natural streamflow undiminished in quantity and unpolluted in quality, but with the right to a reasonable use by all for the ordinary purposes of life, any unlawful diversion being an actionable wrong. Assuming that the 1889 legislature intended to exclude riparian proprietors from the use of streams of more than a specified width, the court declared this to be a clear invasion of private property rights and hence unlawful. Questions arising under the statutes were not before the court in *Slattery* v. *Harley* and were not discussed; but the court held that riparian landowners who wished to justify the right to irrigate must plead and prove the aridity of their lands and the necessity of irrigating them.

[112] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 93 N.W. 781 (1903). See also the previous decisions in the same controversy reported in 60 Nebr. 754, 84 N.W. 271 (1900), and 61 Nebr. 317, 85 N.W. 303 (1901). See also *Meng* v. *Coffee*, 67 Nebr. 500, 93 N.W. 713 (1903). Regarding floodwaters, see discussion at note 105, *supra*.

property belonging to the riparian owner, along with the use of the water for domestic and water power purposes.[113] Early irrigation legislation did not attempt to abolish the common law rule or to deprive riparians of rights when once vested, but distinctly recognized them and provided for their condemnation in construction of irrigation works of internal improvement. The act of 1895 was valid when so construed as not to interfere with vested property rights of riparian proprietors.[114]

In the *Crawford* case, the court concluded that the two systems of water rights—riparian and appropriation—could and do exist concurrently in the State. They are not necessarily so in conflict that one must give way when the other comes into existence, but they supplement each other. The court indicated that preference between conflicting claimants should be determined by the time when either right accrues—the riparian when title is taken to the land, and the appropriation when title to the right vests by diversion of the water and application to beneficial use—the answer depending on the circumstances of each case.[115] The act of 1889 abrogated the common law riparian rule as to lands thereafter passing to private ownership and substituted the doctrine of prior appropriation, which had prevailed by custom in the State before there was any statute providing for the appropriation of water. This legislation did not and could not have the effect of abolishing riparian rights which had already accrued; it only prevented the acquisition of such rights in the future. The law of 1895 continued in force the 1889 act only insofar as it abrogated the common law rule for the future. Hence since the effective date of the 1889 act, rights acquired in the streamflows of the State are to be tested and determined by the doctrine of prior appropriation. It was competent for the legislature to do this.[116] In the light of acts of Congress and of the Nebraska Legislature, and of connected historical facts, the court found the conclusion irresistible that every appropriator of water who applies it to beneficial use acquires a vested right therein, which gives him a superior title to the use of the water over the riparian proprietor whose right was subsequently acquired, or who lost his once acquired right by either grant or prescription.[117]

However, in 1966, in *Wasserburger* v. *Coffee*, the Nebraska Supreme Court reexamined the interrelationship and relative rights of riparian landowners and appropriators in the same stream.[118] The court concluded that the references to riparian rights in the 1889 statute were declaratory, and the remaining provisions of that statute were not successful in substituting the prior appropriation doctrine for the riparian doctrine. The court indicated that a

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[113] 67 Nebr. at 336-341.
[114] 67 Nebr. at 341-350.
[115] 67 Nebr. at 356-357.
[116] 67 Nebr. at 357-359.
[117] 67 Nebr. at 364.
[118] *Wasserburger* v. *Coffee*, 180 Nebr. 147, 161-164, 141 N.W. (2d) 738 (1966), modified in other respects, 180 Nebr. 569, 144 N.W. (2d) 209 (1966).

riparian right to use a watercourse "may be superior" to a competing appropriative right if the riparian land passed into private ownership from the public domain *prior* to April 4, 1895, the effective date of the Nebraska irrigation act of 1895,[119] and provided the riparian land has not subsequently lost its riparian status by severence.[120] But the court concluded that an appropriator may be liable for injury to a recognized riparian right "if, but only if, the harmful appropriation is unreasonable in respect to the [riparian] proprietor."[121] The court set forth the following criteria for determining such reasonableness (as well as criteria for determining the appropriateness of an injunction, discussed below):[122]

> An appropriator who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's interest in the use of the waters, is liable to the proprietor in an action for damages if, but only if, the harmful appropriation is unreasonable in respect to the proprietor. The appropriation is unreasonable unless its utility outweighs the gravity of the harm. Compare Restatement, Torts, ss. 851, 852, pp. 353, 358.
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> In evaluation of the utility of the appropriation causing intentional harm to a riparian proprietor, the following factors are to be considered: (1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3) the impracticability of preventing or avoiding the harm. Compare Restatement, Torts, s. 853, p. 361.
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> In evaluation of the gravity of intentional harm to a riparian proprietor through the appropriator's use of the waters, the following factors are important: (1) The extent of harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm. Compare Restatement, Torts, s. 854, p. 369.[123]

The court said in regard to these general criteria, "Facts are so important that in the absence of legislation a viable system ought to be evolved by the process of inclusion and exclusion, case by case. Here the conflicting claims are claims of private right to uses for purposes of livestock water and of irrigation. We

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[119] This act is discussed at note 9 *et seq. supra.*

[120] 141 N.W. (2d) at 742, 743, 745.

The court noted that a few of the land patents in dispute "had been initiated by entries filed prior to March 27, 1889. All other patents were initiated after April 4, 1895," the effective date of the 1895 act. 141 N.W. (2d) at 742, modified in other respects, 180 Nebr. 569, 144 N.W. (2d) 209 (1966), in which the court again spoke of the dates that entries were filed. The question of the effect, if any, of any settlement prior to the filing of an entry was not expressly considered, as discussed in chapter 10, note 89.

[121] 141 N.W. (2d) at 745.

[122] See the discussion at notes 132-133 *infra.*

[123] 141 N.W. (2d) at 745-746.

limit our broad outline of a system to the specific facts before us."[124] The court concluded, "On the facts of this case the riparian right is superior. Plaintiffs' [riparians] need for livestock water is greater than defendants' [appropriators] need for irrigation, and the difference is not neutralized by time priorities."[125] The court indicated that if the riparian land passed into private ownership *after* the effective date of the 1895 act, a competing appropriative right "outranks the riparian right under the facts of the present case."[126] A "Syllabus by the Court" stated in part:

> A right to the use of waters under the doctrine of prior appropriation is superior to a competitive riparian right in land which was part of the public domain prior to April 4, 1895, the effective date of the irrigation act of 1895.
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> * * * *
>
> In respect to competing water claims by an appropriator and by a riparian proprietor, land is considered riparian if by common law standards it was such immediately prior to April 4, 1895, and if it has not since lost its riparian status by severance.[127]

In a 1969 case, *Brummond* v. *Vogel*, the court cited the 1966 *Wasseburger* case in support of the statement that "Plaintiff does not plead nor prove facts

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[124] 141 N.W. (2d) at 745.

The court preceded these statements with the following observation: "An incompatibility of riparian rights and appropriative rights is undoubtable. The common law test of reasonable use places little emphasis upon the time when the use was initiated. * * * Under the appropriation doctrine, priority in time gives the better right between users for the same purpose. The flexibility of the one test opposes the rigidity of the other.

"We cannot synthesize the two doctrines in one decision." *Id.*

[125] 141 N.W. (2d) at 747.

Some of the permits of the defendant appropriators bore adjudicated dates prior to the time any of the plaintiff riparians' lands had passed into private ownership from the public domain. This apparently raised the question of the relative status of appropriative and riparian rights where both were initiated prior to the effective date of the 1895 statute and where the appropriative right was earlier in time. In this regard, the court said, "Under the 1895 statute the board of irrigation fixed the priority dates of appropriators who had acquired rights earlier than the effective date of the statute. The board determined appropriative priorities but not riparian rights. * * * The adjudication established the time when the appropriations had been initiated, but time is only one of the elements to be considered in the adjustment of the competing rights.

"[As stated above, on] the facts of this case the riparian right is superior. Plaintiffs' need for livestock water is greater than defendants' need for irrigation, and the difference is not neutralized by time priorities." *Id.*

[126] 141 N.W. (2d) at 742.

[127] 141 N.W. (2d) at 740. In this regard, see also the discussion at note 120 *supra*. The court indicated that the riparian right ordinarily attaches, as between competing appropriative and riparian rights, to "the smallest tract [of land] held in one chain of title leading from the owner on April 4, 1895, to the present owner." 141 N.W. (2d) at 745. (But this apparently does not apply as between competing riparian rights. See note 86 *supra*.)

entitling him to vested riparian rights under the common law which might precede April 4, 1895, the effective date of the irrigation act of 1895, which is the cut-off date for the acquisition of riparian rights and the invoking of the law of priority * * *."[128] But this case appears to have added some uncertainty regarding the status of domestic use of water.[129]

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[128] *Brummond* v. *Vogel*, 184 Nebr. 415, 168 N.W. (2d) 24, 27 (1969).

[129] 19 Nebr. State Bar J. 63, 64-69 (1970) includes a report of the Special Committee on Water Resources regarding the alleged uncertainty created by this case and some suggested alternative interpretations of it. The report includes a dissenting view of one of the committee members.

In this case the court said, *inter alia*: "The factual situation presented in this case involves a further application of competing water claims by an upstream appropriator with one who is a downstream domestic user under the guidelines detailed in *Wasserburger* v. *Coffee*, 180 Neb. 149, 141 N.W. (2d) 738.

"The evidence in this case is undisputed that plaintiff and his immediate predecessors have for many years watered their cattle from the water that came from West Creek which flowed through or on their pasture land. Plaintiff does not plead nor prove facts entitling him to vested riparian rights under the common law which might precede April 4, 1895, the effective date of the irrigation act of 1895, which is the cut-off date for the acquisition of riparian rights and the invoking of the law of priority of application giving the better right as between those using the water for the same or different purposes, and preferring domestic use over other uses in cases of insufficient water. Ss. 46-203 and 46-204, R.R.S. 1943; Wasserburger v. Coffee, *supra*. Plaintiff concedes that he has never applied for nor secured any water rights from the Department of Water Resources. The defendants are upstream appropriators having applied for and received on August 24, 1967, their priority of appropriation for storage of water for watering livestock and erosion control purposes. We hold that the defendants have the right to have a reasonable use of the waters of West Creek for domestic purposes which includes the watering of their stock even though this may result in the diminution of the water supply arising from a reduced water flow being available for domestic purposes for the plaintiff downstream user. However the intended purpose of the defendants in constructing the dam to fill the pond is not primarily for domestic purposes. The plaintiff testified to an account in the newspaper that it was to serve as a fish pond which would be primarily for recreational purposes, whicle [sic] the defendants' application for authority recites that it is for domestic and soil erosion control purposes, the latter being agricultural in nature.

"Article XV, sections 4 to 6, Constitution of Nebraska, incorporates a portion of the irrigation act of 1895 and particularly what is now section 46-204, R.R.S. 1943, in providing as follows:' * * * "Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the waters for domestic purposes shall have preference over those claiming it for any other purpose * * *." ' Wasserburger v. Coffee, *supra*.

"Exhibit 11 is the certificate of the Department of Water Resources approving the defendants' application to impound the waters of this tributary to Pleasant Run Creek, but it expressly recites as a condition: 'That the prior rights of all persons who, by compliance with the laws of the State of Nebraska, have acquired a right to the use of the waters in this stream must not be interfered with by the issuance of this permit.' We hold that the right of plaintiff to use water from this stream for domestic purposes is superior to the defendants' right to construct a dam to have a reservoir for either

In an early case, the Nebraska Supreme Court had held that an appropriator might restrain upstream riparians–who had not diverted water until after the appropriative right had vested–from now diverting an injurious quantity from the stream, leaving the riparians to an action to recover damages if any had been sustained.[130] In another early case, on general demurrer, it was held that a lower riparian owner could not enjoin continued use of water by an upstream appropriator who had lawfully acquired an appropriative right, constructed works, and put the water to beneficial use, but must rely upon his action to recover such damages, if any, as he might sustain thereby.[131] But in the 1966 *Wasserburger* case, the court changed its former rule that riparians could only maintain an action to recover damages against an appropriator.[132] The court

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agricultural or recreational purposes, and the fact that defendants may also use it for domestic purposes will not justify any unreasonable diminution of water resulting in harm to plaintiff.

"The correlative rights of the parties to the use of the water in West Creek having been determined, we turn to the remaining issue of fact as to whether the construction of the proposed dam will result in an unreasonable shortage of water for plaintiff to his damage." 168 N.W. (2d) at 27-28. The court held that "the plaintiff has not met his required burden of proof." Hence, the trial court's denial of his request for an injunction was affirmed. 168 N.W. (2d) at 28-29. The trial court also had denied the plaintiff's motion for a new trial but the supreme court modified the order of dismissal so as to permit the future litigation of one disputed issue, noting, *inter alia*, that "Plaintiff is entitled to protection from any interference by the defendants as to the uninterrupted flow of water through [the outlet] pipe which is provided for in the plans of the proposed dam, as well as any silting or other obstruction in the functional operations for the conducting of water through the various outlets of the dam." 168 N.W. (2d) at 29.

Among other confusing aspects of this case, the court (after indicating [as stated in the above quotation from its opinion] that the plaintiff downstream domestic user did "not plead nor prove facts entitling him to vested riparian rights * * * which might precede April 4, 1895," and that he "has never applied for nor secured any water rights from the Department of Water Resources") did not clearly indicate the basis or nature of the plaintiff's right. Nor did the court indicate that Article XV, section 6 of the Nebraska constitution, to which it referred, apparently applies particularly to competing appropriative rights and includes a proviso that no inferior right shall be acquired by a superior right without just compensation. In this regard, see the discussion at note 39 *supra*, and see Fischer, R. J., Harnsberger, R. S., and Oeltjen, J. C., "Rights to Nebraska Streamflows: An Historical Overview with Recommendations," 52 Nebr. L. Rev. 313, 329 (1973).

[130] *McCook Irr. & Water Power Co.* v. *Crews*, 70 Nebr. 109, 115, 96 N.W. 996 (1903), 102 N.W. 249 (1905).

[131] *Cline* v. *Stock*, 71 Nebr. 70, 79, 98 N.W. 454 (1904), 102 N.W. 265 (1905). This and the *McCook* case, cited in the preceding note, are discussed in more detail in chapter 13 under "Remedies for Infringement–Injunction or Damages or Both–Some State Riparian-Appropriation Situations–Nebraska."These two cases were decided soon after the decision in *Crawford Co.* v. *Hathaway*, discussed at note 112 *et seq.supra.*

[132] With respect to the two early cases discussed above, the court said, "We think [these] cases have been misread. The appropriative rights [in these cases] seem to have been

(*Continued*)

held that a lower riparian could enjoin an upstream appropriator, depending upon a balancing of the interests involved and the appropriateness of injunctive relief. The factors to be considered in determining the appropriateness of an injunction constitute a comparative appraisal of all elements of the case, including: (a) the character of the interest to be protected; (b) the public interest; (c) the relative adequacy to the plaintiff of injunctive relief and other remedies; and (d) the relative hardship likely to result to the defendant if the injunction is granted and to the plaintiff if the injunction is denied.[133]

Ground Waters

Court decisions.—There have been relatively few Nebraska Supreme Court cases decided on the subject of ground water.

Olson v. *City of Wahoo*, decided in 1933, arose between owners of land in a basin—a plaintiff who had an excavation in a gravel bed and a defendant city which pumped water for domestic use. The defendant city had begun pumping the water prior to plaintiff's purchase of land. In a dry year, the city replaced its pumps with a large one and plaintiff's water level dropped. On appeal, the Nebraska Supreme Court stated that there is a distinction between rules affecting defined underground streams and percolating waters, and that in this case it was doubtful if the water flowed in a defined underground stream. The court said:

> The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning.[134]

(*Continued*)
asserted by irrigation companies offering a public service. The court attached significance to the public benefit, to the appropriation project completed in good faith and at great cost, and to the tardy initiation of the riparian use. If the court went too far, the limitations themselves have remained. We reject the startling proposition [urged by the defendant appropriators] that equity sends every riparian proprietor packing. Defendants are private appropriators—not champions of the public interest. * * * The remedy rests on other considerations." *Wasserburger* v. *Coffee*, 180 Nebr. 147, 141 N.W. (2d) 738, 747 (1966).

[133] 141 N.W. (2d) at 745-747. The court concluded that the defendant appropriators should be enjoined for injuring a recognized riparian right where the harmful use was unreasonable with respect to the riparian proprietor. While the riparian was granted an injunction in this case, the riparian right was not an unused right.

For a critical discussion of this case, see Comment, "The Dual-System of Water Rights in Nebraska," 48 Nebr. L. Rev. 488, 497-498 (1969).

[134] *Olson* v. *City of Wahoo*, 124 Nebr. 802, 248 N.W. 304 (1933).

Inasmuch as the plaintiff had failed to show to the court's satisfaction that the loss of water in his gravel pit was due to the defendant's pumping, judgment for the defendant was sustained.

In the *Olson* case, the court apparently adopted the American rule of reasonable use, with the factor of proportional distribution in the event of shortage. However, judgment for the defendant city could have been sustained under either rule—absolute ownership regardless of injury to others, or ownership subject to the qualification of not inflicting injury on owners of other overlying lands.

Whether or not it was necessary to adopt one rule or the other in the *Olson* case, the Nebraska court has considered that it has adopted the American rule. In a 1936 case, the court stated, "We are committed to the rule: 'The owner of land is entitled to appropriate subterranean waters found under his land, but his use thereof must be reasonable, and not injurious to others who have substantial rights in such waters,' " citing the *Olson* case.[135]

In a more recent case,[136] the court affirmed the rule of reasonable use. In addition, the court held that where no damage was done by a transwatershed diversion of percolating ground waters for municipal use, such diversion was reasonable in keeping with the American rule.[137]

Statutes.—The Nebraska statutes define ground water as "that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land."[138]

The Nebraska Legislature has declared that the conservation and beneficial use of ground water are essential and that "Complete information as to the

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[135] *Osterman* v. *Central Nebr. Pub. Power & Irr. Dist.*, 131 Nebr. 356, 268 N.W. 334 (1936).

[136] *In re Metropolitan Util. Dist. of Omaha*, 179 Nebr. 783, 140 N.W. (2d) 626 (1966).

[137] The court added: "It is argued that the *Osterman* case [discussed at notes 55 and 94-95 *supra*], by analogy, sustains a contrary holding. We do not think that this is so. That case involved a division of the natural flow of the Platte River into the watersheds of the Republican and Blue Rivers. The taking of the water there involved would damage the rights of lower appropriators on a river already over-appropriated. In the instant case, M.U.D. is a riparian landowner. No water is taken directly from the river. There are no appropriators or riparian owners who are injured by the taking between the well field and the mouth of the Platte River some 5 miles east. In any event, the Osterman case was decided on a statute first enacted in 1889 which prohibited transportation of water beyond the watershed. There is authority that one not damaged cannot raise the question of a diversion of ground water beyond the watershed. But we choose to decide the question on the ground of reasonable use and all the factors that enter into such a consideration, including the reasonableness of a watershed diversion, thus preserving the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use. Under the record in this case and the applications of the declared law in this case, we can find no basis for holding the diversion from the well field to be unlawful. Under the evidence in this case the transwatershed diversion was reasonable, for a public purpose, beneficial, not against public policy, and in the public interest." 140 N.W. at 637.

[138] Nebr. Rev. Stat. §46-635 (1974).

occurrence and use of ground water in the state is essential to the development of a sound ground water policy."[139] Consequently, the legislature has required the registration of all wells (except those used for domestic purposes[140] and wells of municipal suppliers[141]) and the regulation of well drillers.[142]

Domestic use of ground water is given a preference over all other uses; agricultural uses are given a preference over manufacturing or industrial uses.[143]

Brief provisions regarding artesian waters prohibit the waste of these waters and provide a penalty if waste occurs.[144]

The legislature has declared that the pumping of water for irrigation purposes from pits located within 50 feet of any natural stream bank may have a direct effect on the surface flow of such stream and requires a permit for pumping from such pits. In acting on such a permit application, the Director of Water Resources shall take into account the effect such pumping may have on the amount of water in the stream and its ability to meet the requirements of appropriators from the stream.[145]

The statutes provide for a minimum spacing of 600 feet between irrigation wells,[146] except that special permits for the location of such wells within less than this minimum space may be granted by the Director of Water Resources.[147] In acting on such special permit applications, the Director shall consider the size, shape, and irrigation needs of the property for which the

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[139] *Id.* §46-601.

[140] Domestic use of ground water means "all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations." *Id.* §46-613.

[141] Cities, villages, and municipal corporations supplying water to cities and villages may avail themselves of the provisions of §§46-638 to -650 relating to permits for (1) locating, developing, and maintaining ground water supplies and transporting water into the area to be served by the city, village, or municipal corporation, and (2) continuing existing use of ground water and transportation of ground water into the area served by the city, village, or municipal corporation.

[142] *Id.* §§46-601 to -607.

[143] *Id.* §46-613.

With respect to preference provisions regarding surface watercourses, see the discussion at notes 39-43 *supra.*

[144] Nebr. Rev. Stat. §§46-281 and -282 (1968).

[145] *Id.* §§46-636 and -637.

[146] But this does not apply to the location of more than one irrigation well by a landowner on his own farm, so long as each such well is at least 600 feet from another irrigation well on a neighboring farm under separate ownership. Nor does this apply to wells used for irrigation of no more than 2 acres of lawns and gardens for family use or profit, or wells used solely for domestic, culinary, or stock use on a ranch or farm.

Any irrigation well which replaces an irrigation well drilled prior to September 20, 1957, and which is less than 600 ft. from another irrigation well, shall be drilled within 50 ft. of the old well.

[147] *Id.* §§46-608 to -612.

permit is sought, the known ground water supply, and the effect on such supply and the surrounding land.[148]

Similarly, a minimum spacing requirement of 1,000 feet is specified between irrigation or industrial wells and municipal wells, except that a special permit may be granted by the Director for the location of wells within less than this minimum space.[149] In acting on such special permit applications, he shall consider the facts offered as justification, the known ground water supply, and such other pertinent information as may be available.[150]

The statutes also provided for the creation of ground water conservation districts,[151] the boards of directors of which are authorized to gather and disseminate information concerning ground water, and adopt rules and regulations for the proper conservation of ground water within the district.[152] However, no new ground water conservation districts could be created after June 30, 1972. Districts not completed by July 1, 1972, shall be null and void. All such districts validly created before July 1, 1972, shall continue to function under the provisions of sections 46-614 to 46-634.[153]

In 1969, the Nebraska Legislature provided for the creation of natural resource districts for purposes of consolidating the functions previously performed by various special purpose districts and boards; and it "encouraged" other special purpose districts, including ground water conservation districts, to cooperate with and, where appropriate, to merge with natural resource districts.[154] The legislation declares that the purposes of the natural resource districts shall be to develop and execute, under this legislation, plans, facilities, works, and programs relating to, among other things, "development, management, utilization and conservation of ground water and surface water * * *."[155] Included among the numerous powers granted to these districts are the powers to (1) acquire and dispose of water rights;[156] (2) acquire, construct, operate and maintain ground water storage areas; and (3) promulgate and administer regulations relating to ground water.[157]

Whenever the board of directors of a natural resource district determines that regulations are necessary to ensure the proper conservation of ground water within the district, it shall consult with the State Department of Water Resources, the Conservation and Survey Division of the University of Nebraska, the Nebraska Soil and Water Conservation Commission and ground

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[148] *Id.* §46-610(2).
[149] *Id.* §§46-651 to -655.
[150] *Id.* §46-653.
[151] *Id.* §§46-614 to -634.
[152] *Id.* §46-629.
[153] *Id.* §46-614.01.
[154] Nebr. Rev. Stat. §2-3201 (1970).
[155] *Id.* §2-3229.
[156] *Id.* §2-3233.
[157] *Id.* §§2-3238 and -3237.

water users within the district. Regulations may be adopted only after (1) a public hearing; (2) a determination by the board of directors following the hearing that such regulations will be in the interest of public health, safety, and welfare and in harmony with the State water plan developed by the Nebraska Soil and Water Conservation Commission; and (3) a referendum in which only the owners of existing wells within the district shall be eligible to vote. If a majority of the votes cast are in favor of the regulations, such regulations shall be deemed in effect.[158]

Determination of Conflicting Water Rights

The Nebraska statutory procedure for determining conflicting water rights—originally enacted as a part of the water administrative statute of 1895—was based upon the Wyoming system, under which the administrative determination of water rights is final *unless* appealed to the courts; but the statutory provisions of Nebraska were and are much more brief. Furthermore, the Wyoming water administrative agency was provided for by the original State constitution, which was not the case in Nebraska.[159]

Statutory provisions.—The water rights statute of Nebraska provides that the Department of Water Resources shall make proper arrangements for the determination of priority of right to use the public waters of the State[160] and shall determine the same, the method of determining priority and amount of appropriation to be fixed by the Department.[161]

As each claim is finally adjudicated, the Department makes and enters of record an order determining and establishing the several priorities of right, the amount of each appropriation, and the character of use pertaining to each. Enlargements of appropriations are determined in like manner. Limitations—which do not apply to storage waters—are that no allotment from natural streamflow for irrigation shall exceed 1 cubic foot per second for each 70 acres of land, nor 3 acre-feet per acre during the calendar year, nor shall it exceed "the least amount of water that experience may hereafter indicate is necessary, in the exercise of good husbandry, for the production of crops." However, should it develop that the aforesaid statutory rate of withdrawal of water, in case of an appropriation to irrigate an area of 40 acres or less, is so small as to make proper distribution and application of the water impossible, then as much as the appropriator can use without waste may be allotted for a limited time so fixed as to give each appropriator his just share without violating prior rights.[162]

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[158] *Id.*

[159] See *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 365-366, 93 N.W. 781 (1903).

[160] "Public waters" apparently includes waters of natural streams. See Nebr. Rev. Stat. §46-202 (1974), discussed at note 22 *supra.*

[161] Nebr. Rev. Stat. §46-226 (1974).

The Department "may refuse to allow any water to be used by claimants until their rights have been determined and made of record." *Id.* §46-209.

[162] *Id.* §§46-230 and -231. The original provision for issuing to each appropriator a

Appeal from the order of determination of rights may be taken to the Nebraska Supreme Court within 1 month.[163]

Judicial construction.—In *Crawford Company* v. *Hathaway*, the Nebraska Supreme Court considered a contention that the statutory sections vesting the State administrative agency with authority to determine the priority and amount of private appropriations—as well as allowance of further appropriations—were unconstitutional as conferring judicial powers upon a tribunal not authorized by the State constitution to exercise such powers.[164] The duties of the agency, it was held, are supervisory and administrative, not judicial, even though they be of a quasi-judicial character. It was the court's considered opinion that these sections were not constitutionally obnoxious on the objections raised by counsel, and that the authority to make the water rights determinations was a valid exercise of the legislative power.

Questions as to adequacy of administrative authority to determine rights acquired prior to enactment of the 1895 law, and of the finality of such determinations, inevitably arose. They led the court to consider the whole course of local legislation on the subject and the experiences of other States thereon. In *Farmers' Irrigation District* v. *Frank*,[165] the court pointed out that the 1895 legislation, in creating the State Board of Irrigation, made it the duty of the Board at its first meeting to make proper arrangements for the determination of water rights priorities, beginning on streams most used for irrigation, and continuing as rapidly as practicable until all claims for appropriation then on record should have been adjudicated. By that time, many persons and corporations had acquired vested appropriative rights for irrigation. It was not the intention of the legislature, the court stated, to create confusion and to stir up strife and litigation over water rights theretofore acquired. It was manifest that among the main inducements to passage of the 1895 law were the features requiring adjudication of priorities of appropriation on the streams of the State up to such time, and the creation of a State Board whose records would evidence these priorities in such a public manner that no one might be misled, but by which others desiring to appropriate water could learn the exact status of water titles on each stream. And, said the court, "It would seem that an adjudication made by the state board of irrigation upon a matter properly before it, and within the scope of its powers and duties, is final, unless appealed from the district court."[166]

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certificate showing the priority and details of his adjudicated right (§ 46-232) was repealed by Nebr. Laws 1955, ch. 183.

The statutory limitation on water use was held inapplicable to water rights vested in 1889 before the 1895 appropriation act, which, however, was said to be subject to the general requirement of beneficial use. *Enterprise Irr. Dist.* v. *Willis*, 135 Nebr. 827, 284 N.W. 326, 329-331 (1939).

[163] Nebr. Rev. Stat. § 46-210 (1974).

[164] *Crawford Co.* v. *Hathaway*, 67 Nebr. 325, 365-371, 93 N.W. 781 (1903).

[165] *Farmers' Irr. Dist.* v. *Frank*, 72 Nebr. 136, 145-154, 100 N.W. 286 (1904).

[166] 72 Nebr. at 152.

Several years later the supreme court was asked to reexamine the foregoing doctrine expounded in the *Farmers' Irrigation District* case on the ground that it was entirely erroneous and based upon a misconception of the State Board's powers and duties.[167] In undertaking such review, the court stressed the importance of a thorough consideration of this and related questions—important not only to the parties actually before the court, but to every owner of irrigated land in the State. If the challenge of the Board's authority to adjudicate priorities of appropriation under the 1895 act were upheld, then more than a thousand adjudications of prior claims made by the Board since the time of its first organization—a period of more than 16 years—would be absolutely void. So the propositions were again considered at length and in detail, and the conclusions reached in *Crawford Company* v. *Hathaway* as to constitutionality, scope of administrative power with respect to adjudications of preexisting appropriations, and finality of the administrative determinations unless appealed to the courts, were unequivocally approved.

Establishment of these fundamental principles was apparently taken for granted.[168] It is true that in several later court opinions there appeared some unnecessary statements which, taken literally and out of context, might be misconstrued.[169] However, these errors undoubtedly were simply a result of careless phraseology; for the supreme court's considered statements, over the years, with respect to the Department's statutory power to make original adjudication of water rights have evinced unqualified judicial approval.[170]

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[167] *Enterprise Irr. Dist.* v. *Tri-State Land Co.*, 92 Nebr. 121, 139-151, 138 N.W. 171 (1912). In *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 145-146, 149 N.W. 363 (1914), the supreme court said, "Under the statute of 1895 any appropriator might have his claim adjudicated by the state board. In such a proceeding all appropriators in the same water division should be made parties. No appropriator who has neglected to have his claim adjudicated, or has failed to make other appropriators in the same water division parties thereto, can obtain any rights as against other appropriators whose rights have not been so adjudicated."

[168] Compare *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.*, 97 Nebr. 139, 145-146, 149 N.W. 363 (1914).

[169] "The quasi-judicial powers conferred upon the department [of water resources] have application *only* to the granting and cancellation of appropriation rights and priorities." [Emphasis supplied.] *State ex rel. Cary* v. *Cochran*, 138 Nebr. 163, 168-169, 292 N.W. 239 (1940). This statement was repeated in opinions in several later cases, in none of which was the Department's statutory authority to adjudicate existing appropriative rights in issue. In *Plunkett* v. *Parsons*, 143 Nebr. 535, 540-541, 10 N.W. (2d) 469 (1943), the court not only repeated the statement, but went on to say that the legislative grant of jurisdiction does not include the power to adjudicate vested rights, which in this case were rights that accrued prior to enactment of the 1895 law; yet the issue here was, not whether the Department might make an *original* adjudication of such rights, but whether it had power to make a *further* adjudication of rights already lawfully and finally adjudicated.

[170] The Department has no power to make a further adjudication of a right already lawfully and finally adjudicated. *Plunkett* v. *Parsons*, 143 Nebr. 535, 540-541, 10 N.W. (2d) 469 (1943). But it is well settled by decisions of the supreme court that the

Administration of Water Rights and Distribution of Water

As stated earlier under "State Administrative Agency," the Department of Water Resources has jurisdiction over all matters pertaining to water rights for useful purposes. In addition to the granting and cancellation of appropriation rights and priorities and to the adjudication of water rights, the Department has supervisory control over the distribution of water of the State in accordance with rights of prior appropriation.[171]

The Nebraska Legislature has divided the State into two water divisions, each of which crosses the entire State from west to east. Specifically, water division no. 1 consists of all lands drained by the Platte rivers and their tributaries lying west of the mouth of the Loup River, and other lands south of the Platte and South Platte watered by streams not tributary thereto; and water division no. 2 consists of all lands watered from the Loup, White, Niobrara, and Elkhorn rivers and other lands not included in any other division.[172] The Department of Water Resources divides each water division into subdivisions conforming to the division lines of watersheds, and further divides each subdivision into water districts.[173]

Provision is made for one or more division engineers, and for a water commissioner for each water district. Acting for and under the direction of the Department, the division engineer has immediate direction and control of the acts of the water commissioners, and has the duty of seeing that the laws relative to the distribution of water are executed in accordance with rights of priority of appropriation. The water commissioner performs such duties as are assigned to him by the Department.[174]

Nevada

Governmental Status

All the area within the present State of Nevada except that south of the 37th parallel was included in the Territory of Utah, which was established September 9, 1850.[1] The separate Territory of Nevada was created March 2, 1861,[2] and Nevada was admitted to the Union as a State by proclamation of the President October 31, 1864.[3]

Department has valid statutory authority to adjudicate appropriative rights and priorities, and that in the absence of an appeal its orders are final and binding upon the parties. *Parsons* v. *Wasserburger*, 148 Nebr. 239, 241-244, 27 N.W. (2d) 190 (1947).

[171] Nebr. Rev. Stat. § 46-219 (1974).

[172] *Id.* § §46-215 to -217.

[173] *Id.* § 46-222.

[174] *Id.* § § 46-218, -219, -223, and -224.

[1] 9 Stat. 453 (1850).

[2] 12 Stat. 209 (1861).

[3] 13 Stat. 749 (1864).

Early Uses of Water

Irrigation in Nevada began about 1849, as an incident to the early development of mining. Lands along stream channels were irrigated from ditches constructed to furnish water to ore-reduction mills. Owing to the limited market for agricultural products, irrigation was supplementary to the mining industry until about 1860, but expanded during the following decade. Beginning about 1870, the livestock industry became increasingly important and furnished a growing market for forage crops produced under irrigation. It was not until the 20th century that the larger projects were begun.[4]

State Administrative Agency

All State functions pertaining to appropriation of water, adjudication of rights, and distribution of water are vested in the State Engineer,[5] who is the executive head of the Division of Water Resources within the State Department of Conservation and Natural Resources.[6] The State Engineer is appointed by and is responsible to the Director of the Department of Conservation and Natural Resources; he performs such duties as are prescribed by law and by the Director.[7]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—The appropriation doctrine was recognized and applied by the Nevada Supreme Court in its first reported decision in a controversy over water rights, rendered in a case in which the parties relied solely on prior actual appropriation of the water.[8] During the two following decades the rule of priority of appropriation was consistently recognized and applied where the parties based their rights upon appropriation and not on "an ownership in the soil."[9] And beginning in 1885, the

[4] Nevada State Engr., Bien. Rep. 1929-1930, p. 15. Conditions surrounding the earliest uses of water for agricultural purposes in Carson Valley in the early 1850's are described graphically by Judge Thomas P. Hawley in his opinion in *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 100-103 (C.C. D. Nev. 1897), based not only on the record in the case, but also on his own experiences as one of those who crossed the plains to this area in 1852. The earliest settlers were squatters on the public domain, raising cattle which roamed at large and taking advantage of stream water for agricultural purposes chiefly by means of its overflow. The water flowed in various sloughs and spread over the lowlands at high water; and cuts were made through the riverbanks to let the water out when the stream was not flowing bank-full. In general, there were no specific appropriations of the water and but few genuine ditches and substantial diversions. The population at that time was highly transient.

[5] Nev. Rev. Stat. §§ 532.010 to .220 (Supp. 1973).

[6] *Id.* § 232.010.

[7] *Id.* §§ 532.020 and .110.

[8] *Lobdell* v. *Simpson*, 2 Nev. 274, 278-279, 90 Am. Dec. 537 (1866).

[9] *Ophir Silver Min. Co.* v. *Carpenter*, 4 Nev. 534, 543-544 (1869); *Covington* v. *Becker*, 5 Nev. 281, 282-283 (1869); *Proctor* v. *Jennings*, 6 Nev. 83, 87 (1870); *Barnes* v. *Sabron*, 10 Nev. 217, 233 (1875).

appropriation doctrine has been recognized exclusively with reference to rights to use water of surface streams regardless of riparian claims incident to land only. See the later discussion under "Riparian Water-Use Doctrine: Recognition and Repudiation." The supreme court observed in 1940 that "we find the doctrine of appropriation the settled law of this state."[10]

Procedure for appropriating water.—The Nevada Supreme Court expressed its opinion in 1875 that there was no statute of the State that recognized the right of prior appropriation of water for irrigation purposes.[11] Much later the court said that the greater portion of water rights pertaining to Nevada streams had been acquired before the enactment of any statute prescribing a method of appropriation, and that such rights had been recognized uniformly by the courts as vested under the common law of the State.[12] Such nonstatutory appropriations were made by actually diverting the water from the stream, with intent to apply the water to a beneficial use, followed by an application to such use within a reasonable time.[13]

The first legislative assembly of Utah Territory passed an act giving county courts control of all water privileges not previously granted by the legislature; this act remained in force while Nevada was a part of that Territory.[14] There were no statutory laws of the Territory of Nevada concerning water rights, although several statutes contained references to irrigation.[15] An early State law provided for county records of certificates of intention to construct or maintain ditches or flumes.[16] An act passed in 1889 and repealed 4 years later provided for the distribution of water under court decrees by water commissioners, for recording statements of existing claims, for issuance by courts of water-rights certificates, and for judicial determination of priorities of water rights.[17]

In 1899, provision was made for appropriating water solely upon application to the county commissioners and county surveyors in counties electing to follow the procedure.[18] The office of State Engineer was created in 1903, but he was not vested with jurisdiction over the acquisition of water rights until 1905.[19] There was a repeal and reenactment in 1907, and another in 1913.[20] The present law is based upon the 1913 enactment as amended and enlarged from time to time and as codified in the Revised Statutes. The courts have

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[10] *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940).
[11] *Barnes* v. *Sabron*, 10 Nev. 217, 232 (1875).
[12] *Ormsby County* v. *Kearney*, 37 Nev. 314, 352, 142 Pac. 803 (1914).
[13] *Application of Filippini*, 66 Nev. 17, 22, 202 Pac. (2d) 535 (1949); *Walsh* v. *Wallace*, 26 Nev. 299, 327, 67 Pac. 914 (1902).
[14] Terr. Utah Laws, § 39 (1852).
[15] Nev. Laws 1864, ch. 31, Laws 1864-1865, ch. 100.
[16] Nev. Laws 1866, ch. 100.
[17] Nev. Laws 1889, ch. 113, repealed, Laws 1893, ch. 127.
[18] Nev. Laws 1899, ch. 97.
[19] Nev. Laws 1903, ch. 4, Laws 1905, ch. 46.
[20] Nev. Laws 1907, ch. 18, Laws 1913, ch. 140.

sustained the constitutionality of both the general appropriation statute[21] and the supplemental stockwatering act of 1925, noted later.[22]

Before performing any work in connection with a proposed appropriation, the intending appropriator must make an application to the State Engineer for a permit. A notice of application is published, and any interested party may file a protest and obtain a hearing on it before the State Engineer. The holder of an approved application, or permit, is required to perform certain acts and to make certain reports. After he completes proof of beneficial use, the State Engineer issues a certificate to evidence his appropriation.[23] The expressed intention of the legislature is that this procedure is the exclusive method for making an appropriation of stream water in Nevada. The statute provides that water may be appropriated for beneficial use as provided therein *and not otherwise.*[24] It provides further that no prescriptive right can be acquired to use any water to which a forfeited right had attached, or to any public water either appropriated or unappropriated, but that any right to appropriate any such water shall be initiated by first applying to the State Engineer for a permit to appropriate the same as provided in the statute *and not otherwise.*[25]

The water rights statute provides that the water of all sources of supply within the boundaries of the State belongs to the public and, subject to existing rights, may be appropriated for beneficial use.[26]

The statute does not purport to list all uses of water for which appropriative rights may be acquired, but it specifies certain information that must be included in appropriations for certain uses–irrigation, power, municipal, mining, stockwatering, and storage.[27] Moreover, it recognizes recreational purposes as beneficial uses of water.[28] Additional purposes that have been recognized in Nevada by the Federal courts include culinary and domestic, mining, and milling connected with mining.[29] Use of water for irrigating pasture and wild hay is a beneficial purpose.[30]

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[21] *Humboldt Lovelock Irr. Light & Power Co.* v. *Smith*, 25 Fed. Supp. 571, 575 (D. Nev. 1938).

[22] *In re Calvo*, 50 Nev. 125, 131-141, 253 Pac. 671 (1927).

[23] Nev. Rev. Stat. §§533.325 to .435 (Supp. 1973).

[24] *Id.* §533.030.

[25] *Id.* §533.060.

[26] *Id.* §§533.025 and .030.

Beneficial use of water is declared to be a public use. *Id.* §533.050.

[27] *Id.* §533.340.

[28] *Id.* §533.030.

[29] *Silver Peak Mines* v. *Valcalda*, 79 Fed. 886, 890 (C.C.D. Nev. 1897); *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 98-99, 113 (C.C.D. Nev. 1897). In the *Union Mill* case, the court stated that there was no superiority as between water rights for irrigation and those for mining and milling. 81 Fed. at 99.

[30] *Vineyard Land & Stock Co.* v. *Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 33 (9th Cir. 1917); *Pacific Live Stock Co.* v. *Read*, 5 Fed. (2d) 466, 468 (9th Cir. 1925).

Where, however, water was used to irrigate native grasses on uncultivated "sagebrush land," and the irrigation did not "serve largely to promote their growth," the water use

Special provisions supplement the general water rights statute with respect to rights for the watering of livestock, particularly range livestock. Subject to the protection of subsisting rights at watering places that utilize substantially all the readily available public range, livestock water rights may be acquired under the general procedure in which, however, a sufficient measure of the quantity of water is specification of the number and kinds of animals to be watered.[31] This legislation obviously contemplates use of water in place, with no requirement that it be diverted from the spring or stream channel.

Water may be appropriated by any corporation authorized to do business in the State; or by any person, United States citizen, or legally declared intended citizen, over 21 years of age.[32] "Person" is defined as including a corporation, an association, the United States, and the State, as well as a natural person.[33]

The Nevada Supreme Court emphasized that no right is created by the mere diversion of water from a public watercourse. When the act of diverting the water is coupled with the act of applying it to a beneficial purpose, then the appropriation is accomplished and completed.[34]

In Nevada, construction work ordinarily must begin within 1 year from the date of the permit; it must be completed within 5 years, and application of water to beneficial use must be completed within 10 years. However, the State Engineer may grant extensions, on good cause shown.[35]

The principle of gradual or progressive development is also recognized. That is, the appropriator is not limited to the quantity of water or the acreage of land irrigated in the first year or so of his development, but he may develop his project gradually, within his reasonable means, if reasonable diligence is exercised. The object at the time of initiating the appropriation must be considered in connection with its actual extent.[36]

The principle of "relation back" of the date of priority to the first step taken to obtain the right was established early in the judicial history of water rights in Nevada. If the work of constructing facilities and diverting and using water is prosecuted with reasonable diligence, the date of priority of the right relates back to the time when the first step was taken to obtain

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was held not to be beneficial. *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 21-22 (9th Cir. 1917).

[31] Nev. Laws 1925, ch. 201, Rev. Stat. §§533.485 to .510 (Supp. 1973).

[32] Nev. Rev. Stat. §533.325 (Supp. 1973).

[33] *Id.* §533.010.

[34] *Prosole* v. *Steamboat Canal Co.*, 37 Nev. 154, 160, 161, 140 Pac. 720, 144 Pac. 744 (1914); *Walsh* v. *Wallace,* 26 Nev. 299, 327, 67 Pac. 914 (1902).

[35] Nev. Rev. Stat. §533.380 (1973).

See also §533.410, construed in *State Engineer* v. *American Nat'l Ins. Co.*, 88 Nev. 424, 498 Pac. (2d) 1329 (1972), in which the supreme court indicated that the statutory directives in §533.410 did not affect the power of the district court to grant equitable relief to a permittee when warranted.

[36] *Barnes* v. *Sabron*, 10 Nev. 217, 239-240, 244 (1875); *Rickey Land & Cattle Co.* v. *Miller & Lux*, 152 Fed. 11, 18 (9th Cir. 1907).

the right.[37] If, however, the work is not prosecuted with reasonable diligence, then the priority of the right does not relate back, but generally dates from the time when the work is completed or the appropriation fully perfected.

In appropriating water under the current statutory procedure, the first step is filing an application in the office of the State Engineer. Although the statute does not state expressly that such date shall constitute the date of priority of an appropriation of stream water made in strict compliance with the statutory procedure, it is clearly implied.[38]

The water rights statute provides that "Water may be stored for a beneficial purpose".[39] In determining how much water may be stored for subsequent irrigation use, reservoir losses are to be taken into consideration, in addition to the factors prescribed for direct irrigation rights.[40] Applications for reservoir permits are subject to the general procedure provided for acquisition of appropriative rights, except that here two classes of permits are involved—primary and secondary. The primary permit gives permission to construct a reservoir and to impound water therein. The secondary permit is applied for by the person or persons who propose to apply to a beneficial use the water stored in the reservoir; applicants must show evidence of agreement with the reservoir owner for a permanent and sufficient interest in the impounding. The final certificate of appropriation refers to the works described in both permits.[41]

Any person aggrieved by any order or decision of the State Engineer, acting in person or through his subordinates, relating to acquisition of appropriative rights or distribution of water may appeal to a district court; proceedings must be commenced within 30 days following rendition of the order or decision.[42]

Restrictions on the right to appropriate water.—Beneficial use is the basis, the measure, and the limit of the right to the use of water;[43] no one may divert or

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[37] *Ophir Silver Min. Co.* v. *Carpenter*, 4 Nev. 534, 543-544 (1869).

[38] The State Engineer is required to endorse on an application the date of its receipt and to keep a record of the same; and a defective application returned for correction and refiled in proper form within the prescribed time does not lose its "priority of filing" on account of such defects. Nev. Rev. Stat. §533.355 (Supp. 1973). The practice of the State Engineer has been to regard the date of filing the application in his office as the date of priority of the completed appropriation. State Engineer's Office, "Water for Nevada" 13 (1974).

Furthermore, as discussed at note 112 *infra*, the ground water statute of 1939 states explicitly that the date of priority of an appropriation of ground water as specified under that statute is the date of filing the application in proper form in the office of the State Engineer pursuant to the general water law. Nev. Rev. Stat. §534.080 (Supp. 1973). There is no valid reason for assuming that the legislature intended to discriminate in this matter.

[39] Nev. Rev. Stat. §533.055 (Supp. 1973).

[40] *Id.* §533.070. See "Restrictions on the right to appropriate water," *infra.*

[41] Nev. Rev. Stat. §533.440 (Supp. 1973).

[42] *Id.* §533.450.

[43] *Id.* §533.035.

use water unless it is required for a beneficial purpose.[44] The appropriative right itself is limited to as much water as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch.[45] The Nevada Supreme Court has held that "no one can appropriate for irrigation purposes more water than he can put to a beneficial use."[46]

An application for a proposed appropriation that conforms to all the requirements of the statute must be approved unless there is no unappropriated water in the proposed source, or if the proposed use conflicts with existing rights, or if it threatens to prove detrimental to the public interest.[47] An application to appropriate waters of the Colorado River held in trust by the Division of Colorado River Resources of the Nevada Department of Conservation and Natural Resources must also have the approval of that Division.[48]

The State Engineer may limit the permit to a lesser quantity of water than that applied for, and to shorter periods of time for completing the work and perfecting the appropriation. But for good cause shown, he may allow extensions of time for beginning construction and completing the necessary ensuing steps.[49]

The statute prescribes certain standards governing the quantity of water to be allowed in a permit for direct irrigation, or in one for storage for later irrigation uses. The State Engineer must consider the local irrigation requirements: the duty of water as theretofore established by court decree or by experimental work in or near the area; and the growing season, type of culture, and reasonable losses of water in transit. He may likewise consider other pertinent data. And in case of storage water, reservoir evaporation losses should be considered.[50]

Some aspects of the Nevada appropriative right.—The statute provides that all water used in Nevada for beneficial purposes shall remain appurtenant to the place of use, subject to change under prescribed conditions. One condition relates to change in place of use, noted later in this subtopic. Another excepts water companies that have appropriated water for diversion and transmission to private consumers at an annual charge.[51] The proposition

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[44] *Id.* §533.045.

[45] *Id.* §533.060(1).

[46] *Steptoe Live Stock Co.* v. *Gulley*, 53 Nev. 163, 172, 295 Pac. 772 (1931). It is recognized as a practical matter that the necessary quantity of water varies with the seasons. *Gotelli* v. *Cardelli*, 26 Nev. 382, 386, 69 Pac. 8 (1902).

[47] Nev. Rev. Stat. § §533.370(1) and (4) (pp. 18509-18510) (Supp. 1973).

[48] *Id.* §533.370(6) (p. 18510), referring to §538.171, which provides that the Administrator of the Division may hold in trust rights and interests in waters of the Colorado River accruing to the State under Federal legislation, interstate compacts, treaties, or otherwise.

[49] Nev. Rev. Stat. § §533.380(2) and (3) (Supp. 1973).

[50] *Id.* §533.070.

[51] *Id.* §533.040.

that the appropriative right is an appurtenance to the realty in connection with which the use of water is made has had judicial recognition.[52] In a 1956 case, the Nevada Supreme Court stated that the law of Nevada is settled beyond dispute that despite the lack of legislative expression prior to 1903, appurtenance of water to the land upon which it is used has been the law since the time when waters were first rightfully appropriated to beneficial use in the jurisdiction. It took no legislation, said the court, to establish the doctrine of appurtenance in arid Nevada.[53]

Likewise, shares in a mutual irrigation company are appurtenant to the land of the shareholder, and pass upon conveyance of the land and appurtenant water rights, even though the stock is not mentioned or the certificates formally transferred.[54]

The rule that practices in exercising appropriative rights must be reasonably efficient applies to works for diversion and conveyance of water to the place of use, as well as to application of water to land.[55] But whether the water is taken from the stream by means of a ditch, flume, pipe, or any other artificial method is immaterial.[56] However, to constitute a valid appropriation of water of a flowing stream there must be an actual diversion; cutting wild grass produced by stream overflow will not found a right of appropriation.[57] This requirement does not apply to an appropriation for watering livestock in natural watering places formed by natural depressions.[58] The stock watering act of 1925 (noted earlier under "Procedure for appropriating water") relates to particular watering places, at which the quantity of water appropriated is measured by the number and kind of animals; and it obviously contemplates use of the water in place, with no question about diverting it from the stream.

The appropriator first in time has the better right.[59] But although all later

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[52] *Prosole* v. *Steamboat Canal Co.*, 37 Nev. 154, 161, 164, 140 Pac. 720, 144 Pac. 744 (1914).

[53] *Zolezzi* v. *Jackson*, 72 Nev. 150, 153-154, 297 Pac. (2d) 1081 (1956).

[54] *Pacific States Savings & Loan Corp.* v. *Schmitt*, 103 Fed. (2d) 1002, 1004-1005 (9th Cir. 1939). The court conceded that for certain purposes shares of this character are personal property and that their independent transfer may operate as a severance of the appurtenant water rights or ditch rights which they evidence.

[55] *Kent* v. *Smith*, 62 Nev. 30, 39, 140 Pac. (2d) 357 (1943); *Doherty* v. *Pratt*, 34 Nev. 343, 348, 124 Pac. 574 (1912).

If waste by seepage and evaporation can be prevented by draining swamps and depressions, or by substituting improved methods of conveying water for inefficient methods, then, said the Nevada Supreme Court, such desired improvement should be made at the expense of a junior appropriator who desires to utilize the water thus saved. *Tonkin* v. *Winzell*, 27 Nev. 88, 99-100, 73 Pac. 593 (1903).

[56] *Miller & Lux* v. *Rickey*, 127 Fed. 573, 584 (C.C.D. Nev. 1904).

[57] *Walsh* v. *Wallace*, 26 Nev. 299, 327-328, 67 Pac. 914 (1902); *Anderson Land & Stock Co.* v. *McConnell*, 188 Fed. 818, 822 (C.C.D. Nev. 1910).

[58] *Steptoe Live Stock Co.* v. *Gulley*, 53 Nev. 163, 171-173, 295 Pac. 772 (1931).

[59] *Vineyard Land & Stock Co.* v. *Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, 34 (9th Cir. 1917). This rule of priority in time as the basis of a prior right applies likewise

claims are inferior, the senior holder is limited to rights he was enjoying at the time subsequent rights attached. Hence, although the subsequent appropriator acquires only what has not been secured by those prior in time, what he does obtain is as absolute and free from interference as are the rights of his seniors.[60] It follows that the first appropriator cannot enlarge his original appropriation beyond his *bona fide* intent at that time, nor can he make any change in the stream channel, to the injury of the later ones.[61] An actual enlargement constitutes a new appropriation.

If under natural conditions enough water will reach the headgate of the prior appropriator to be of use to him, he is entitled to have the water flow there.[62] But if the quantity of water that would reach this downstream appropriator is too small to be of any substantial benefit, then upstream junior appropriators are not precluded from making use of such quantities as they can divert within their own appropriative rights.[63]

The water rights statute authorizes water users to rotate the use of water to which they may be collectively entitled. Likewise, a single water user who has lands to which water rights of different priorities attach may rotate the use of the aggregate water supply, when this can be done without injury to lands enjoying earlier priorities, to the end that each user may have an irrigation head of at least 2 cubic feet per second.[64]

Stored water may be turned into any natural channel or watercourse and claimed for beneficial use below, subject to existing uses, due allowance for losses to be determined by the State Engineer.[65] Other sections of the statutes authorize commingling and reclamation of stored water,[66] State regulation of such use of the stream,[67] and installation of measuring devices for water of an on-channel reservoir, or one located away from a natural stream channel but which requires use of it.[68]

In the section of the water rights statute pertaining to appurtenance of

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as among consumers supplied by a commercial irrigation company or other agency, where the appropriation is made by and through such agency. *Prosole* v. *Steamboat Canal Co.*, 37 Nev. 154, 165-166, 140 Pac. 720, 144 Pac. 744 (1914). And the preferential right continues so long as the consumer pays the reasonable charges of the company and conforms to its reasonable regulations. *Reno Power, Light & Water Co.* v. *Public Serv. Comm'n*, 300 Fed. 645, 648-649 (D. Nev. 1921).

[60] *Proctor* v. *Jennings*, 6 Nev. 83, 87-88, 3 Am. Rep. 240 (1870).

[61] *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 106 (C.C.D. Nev. 1897).

[62] *Tonkin* v. *Winzell*, 27 Nev. 88, 96-97, 99-100, 73 Pac. 593 (1903).

[63] *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 119 (C.C.D. Nev. 1897).

[64] Nev. Rev. Stat. §533.075 (Supp. 1973).

Rotation questions were involved in two Federal cases affecting water users in Nevada. *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 121 (C.C.D. Nev. 1897); *Anderson* v. *Bassman*, 140 Fed. 14, 21-24, 28, 29 (C.C.N.D. Cal. 1905).

[65] Nev. Rev. Stat. §533.055 (Supp. 1973).

[66] *Id.* §533.525.

[67] *Id.* §533.445.

[68] *Id.* §536.010. See *Schulz* v. *Sweeney*, 19 Nev. 359, 361-362, 11 Pac. 253 (1886).

appropriated water to place of use, there is a proviso that if for any reason it should become impracticable to use the water beneficially or economically at the place to which it is appurtenant, the right may be severed from such place and simultaneously transferred therefrom, in the manner provided in the statutes, and become appurtenant to another place or places of use without losing priority of right.[69] Procedure for making changes in place of diversion, manner of use, or place of use of water already appropriated is included in the procedural sections governing the acquisition of appropriative rights through the State Engineer's office. The first step is applying to the State Engineer for a permit to make the change; the last is issuing of a certificate authorizing the change.[70]

The State Engineer's duties with respect to approval and rejection of applications for changes in exercise of water rights are the same as those governing applications to appropriate water. The Nevada Supreme Court pointed out that in the statute there is a positive admonition to the State Engineer not to permit a change if the proposal tends to impair the value of existing rights or to be otherwise detrimental to the public welfare.[71] The right to make changes in exercise of appropriative rights has been long recognized by the courts, provided in all cases that the change works no injury to other rights.[72] And the rule with respect to changing the point of diversion—if it can be done without injury to others—applies also to the means used in making the diversion.[73]

An appropriative water right may be lost in the following ways:

(1) Abandonment. This is a voluntary matter, a question of intent, to be evidenced by overt acts. Although mere lapse of time does not of itself constitute an abandonment, in determining questions of intent courts may take into consideration nonuse of water and other pertinent circumstances.[74] The abandoned waters revert to the State and become subject to further appropriation.[75]

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[69] Nev. Rev. Stat. §533.040 (Supp. 1973).

As noted at the beginning of this subtopic, these provisions do not apply to cases in which water companies have appropriated water for sale to consumers.

[70] *Id.* §§533.325 to .435. See particularly §§533.325, .345, and .425.

[71] *Kent* v. *Smith*, 62 Nev. 30, 39-40, 140 Pac. (2d) 357 (1943).

[72] *Smith* v. *Logan*, 18 Nev. 149, 154, 1 Pac. 678 (1883); *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 115 (C.C.D. Nev. 1897); *Miller & Lux* v. *Rickey*, 127 Fed. 573, 584 (C.C.D. Nev. 1904); *Twaddle* v. *Winters*, 29 Nev. 88, 103, 85 Pac. 280 (1906), 89 Pac. 289 (1907); *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9, 28 (9th Cir. 1917).

[73] *Miller & Lux* v. *Rickey*, 127 Fed. 573, 584 (C.C.D. Nev. 1904).

[74] See *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2d) 311 (1940); *Anderson Land & Stock Co.* v. *McConnell*, 188 Fed. 818, 823 (C.C.D. Nev. 1910); *Valcalda* v. *Silver Peak Mines*, 86 Fed. 90, 95 (9th Cir. 1898); *Schulz* v. *Sweeny*, 19 Nev. 359, 361, 11 Pac. 253 (1886); *Franktown Creek Irr. Co.* v. *Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1072 (1961).

[75] *Franktown Creek Irr. Co.* v. *Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1072 (1961).

(2) Statutory forfeiture. The water rights statute provides that failure during any 5 successive years to use water for the purpose for which it was appropriated results in abandonment of the right, whereupon all rights and privileges appurtenant thereto are forfeited and the water is again subject to appropriation.[76] In the *Manse Spring* case, the Nevada Supreme Court approved application of this provision to rights acquired under the water rights statute.[77] It may be noted that the provision in question speaks of both "abandonment" and "forfeiture," although the two terms generally are entirely different in their operation. In the *Manse Spring* case the supreme court devoted considerable attention to fundamental distinctions between loss of a water right by intentional abandonment and loss by involuntary statutory forfeiture.

In 1949, the Nevada Supreme Court considered it settled that a right to use water might be acquired by adverse use prior to enactment of the State water law, being not prepared to overrule a previous holding to that effect nor to read into the water statute something that it did not find stated there even by implication.[78] However, the decision was made reluctantly, by a vote of 2 to 1; and the attention of the legislature, then in session, was specifically called by the court opinion to this problem.[79] The legislature promptly amended the water statute to include a proviso, following the provision for appropriation of water to which forfeited rights had previously attached, that: "No prescriptive right to the use of such water or any of the public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time whatsoever, but any such right to appropriate any of such water shall be initiated by first making application to the state engineer for a permit to appropriate the same as provided in this chapter and not otherwise."[80]

In a 1961 case, the court indicated that to establish a water-use right by prescription before 1949 "the use and enjoyment must have been uninterrupted, adverse, under a claim of right, and with the knowledge of" the holder of the water right, and "Such use must have been for a period of at least five years."[81]

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[76] Nev. Rev. Stat. § 533.060(2) (Supp. 1973).

[77] *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 287-288, 289-291, 108 Pac. (2d) 311 (1940).

In *Franktown Creek Irr. Co.* v. *Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1072 (1961), the court said, "The water right having vested in Marlette's predecessor before 1913, it is necessary to establish the owner's intention to abandon and relinquish such right before an abandonment can be found."

[78] *Application of Filippini*, 66 Nev. 17, 26-29, 202 Pac. (2d) 535 (1949), citing *Authors* v. *Bryant*, 22 Nev. 242, 38 Pac. 439 (1894).

[79] 66 Nev. at 27-29.

[80] Nev. Rev. Stat. § 533.060(3) (Supp. 1973).

[81] *Franktown Creek Irr. Co.* v. *Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1071 (1961).

(*Continued*)

A Federal court, in a 1905 case, held that a plea of equitable estoppel (as well as title by prescription) must fail where the facts showed that down to a certain year the parties' adverse use of water to the injury of other parties was resisted and interrupted by physical force, and that in the following year an action was commenced in the courts to obtain relief.[82]

The water rights statute declares that the beneficial use of water is a public use and authorizes any person to exercise the power of eminent domain to condemn lands and other property or rights required for construction, use, and maintenance of works for lawful diversion, conveyance, and storage of water.[83] For purposes of the statute, "person" includes a corporation, an association, the United States, and the State, as well as a natural person.[84]

Riparian Water-Use Doctrine: Recognition and Repudiation

Applicability of the riparian doctrine to use of water under some circumstances was recognized in several decisions rendered by the Nevada Supreme Court prior to 1885. The riparian rule was repudiated in that year and has been completely superseded by the doctrine of prior appropriation.

Early recognition.—In its first reported decision on water rights law, the Nevada Supreme Court discussed rights of a riparian proprietor, but made no decision upon them since they were not involved in that case.[85] The riparian doctrine was also discussed but not applied to the facts in two later cases.[86] Then in 1872, in *Vansickle* v. *Haines*, the Nevada Supreme Court held that the common law was the law of Nevada and must prevail in all cases in which the right to water was based upon absolute ownership of the soil.[87]

(*Continued*)

For other cases involving prescription in relation to appropriative rights, see *Vansickle* v. *Haines*, 7 Nev. 249, 256, 283-284 (1872); *Winter* v. *Winter*, 8 Nev. 129, 135 (1872); *Barnes* v. *Sabron*, 10 Nev. 217, 247 (1875); *Dick* v. *Bird*, 14 Nev. 161, 166 (1879); *Brown* v. *Ashley*, 16 Nev. 311, 315-317 (1881); *Smith* v. *Logan*, 18 Nev. 149, 154-155, 1 Pac. 678 (1883); *Boynton* v. *Longley*, 19 Nev. 69, 76-77, 6 Pac. 437 (1885); *Robison* v. *Mathis*, 49 Nev. 35, 43, 234 Pac. 690 (1925).

[82] *Anderson* v. *Bassman*, 140 Fed. 14, 25 (C.C.N.D. Cal. 1905).

[83] Nev. Rev. Stat. §533.050 (Supp. 1973).

[84] *Id.* §533.010.

See also §37.010 which provides that eminent domain may be exercised *inter alia* with respect to the acquisition of water rights for the use of the inhabitants of any county or incorporated city or town. See *Carson City* v. *Lompa*, 88 Nev. 541, 501 Pac. (2d) 662 (1972).

[85] *Lobdell* v. *Simpson*, 2 Nev. 274, 277, 278 (1866).

[86] *Ophir Silver Min. Co.* v. *Carpenter*, 4 Nev. 534, 543 (1869); *Covington* v. *Becker*, 5 Nev. 281, 282-283 (1869).

[87] *Vansickle* v. *Haines*, 7 Nev. 249, 256, 257, 260-261, 265, 285 (1872). See also *Union Mill & Min. Co.* v. *Ferris*, 24 Fed. Cas. 594, 597-598, 601-602 (No. 14,371) (C.C. Nev. 1872); *Dalton* v. *Bowker*, 8 Nev. 190, 201 (1873); *Lake* v. *Tolles*, 8 Nev. 285, 291 (1873). Compare *Barnes* v. *Sabron*, 10 Nev. 217, 233 (1875).

The court's thesis in *Vansickle* v. *Haines* was that running water was primarily an incident to or part of the soil over which it naturally flowed; that the right of the riparian proprietor was a right incident to his ownership of land to have the stream water flow in its natural course and condition, subject only to certain uses by other riparian proprietors; and that a patent issued by the United States before the Act of 1866[88] was enacted conveyed to the patentee not only the land, but the stream naturally flowing through it. It was conceded that probably all titles acquired from the United States since July 1866 were obtained subject to rights then existing.

Repudiation.—After recognizing the riparian water-use doctrine for 13 years, the Nevada Supreme Court in 1885 reversed its stand in the case of *Jones* v. *Adams*.[89] The court concluded that the riparian doctrine as applied in Pacific Coast jurisdictions did not serve the requirements of either mining or agriculture; and that the 9th section of the Act of Congress of 1866 was not intended to introduce a new system or to evince a new policy, but that it recognized and confirmed a system already well established. Hence, although plaintiff acquired title to lands on both sides of the watercourse in question in 1865, the case was not determined by common law riparian principles. In rendering this decision, the court specifically overruled *Vansickle* v. *Haines* insofar as that decision was in conflict with the views expressed in the instant case.

A few years later the supreme court had occasion to approve its decision in *Jones* v. *Adams*;[90] and several decades afterward the court stated that although *Vansickle* v. *Haines* had held that the doctrine of riparian rights prevailed, that rule never was fully accepted and was finally unequivocally overruled in the *Reno Smelting* case.[91] Repudiation of the riparian water-use doctrine has been reiterated in a number of other decisions of both State and Federal courts.[92]

The decision in *Vansickle* v. *Haines* was unpopular, not only in Nevada, but in various other Western jurisdictions as well. In his 1911 publication on Western water rights, Wiel said that Justice Garber, who concurred reluctantly

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[88] 14 Stat. 253, §9 (1866).

[89] *Jones* v. *Adams*, 19 Nev. 78, 84-88, 6 Pac. 442 (1885).

[90] *Reno Smelting, Mill. & Reduction Works* v. *Stevenson*, 20 Nev. 269, 275-276, 280, 282, 21 Pac. 317 (1889). Compare *Jerrett* v. *Mahan*, 20 Nev. 89, 98, 17 Pac. 12 (1888).

[91] *Steptoe Live Stock Co.* v. *Gulley*, 53 Nev. 163, 171-172, 295 Pac. 772 (1931).

[92] *Walsh* v. *Wallace*, 26 Nev. 299, 327, 67 Pac. 914 (1902); *Anderson* v. *Bassman*, 140 Fed. 14, 21-22 (C.C.N.D. Cal. 1905); *Anderson Land & Stock Co.* v. *McConnell*, 188 Fed. 818, 822 (C.C.D. Nev. 1910); *In re Humboldt River*, 49 Nev. 357, 361-362, 246 Pac. 692 (1926); *United States* v. *Walker River Irr. Dist.*, 11 Fed. Supp. 158, 165 (D. Nev. 1935); *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 286, 108 Pac. (2d) 311 (1940); *Ronnow* v. *Delmue*, 23 Nev. 29, 34, 41 Pac. 1074 (1895).

The doctrine of riparian rights may, however, encompass more than just the right to use water. See chapter 6 at notes 154-156. In Nevada, the supreme court has recognized and applied the doctrine of riparian rights with respect to reliction. *State Engineer* v. *Cowles Brothers*, 86 Nev. 872, 478 Pac. (2d) 159, 161-162 (1970).

in this decision, did his best later, as leader of the bar in California, to discredit the decision; and that it had been said that the decision drove Justice Lewis, who wrote the opinion, off the bench. Wiel also said that so great was the popular disapproval and the reaction against the *Vansickle* and *Ferris* decisions[93] that most of the younger States came to deny any rights to waters in any landowner as such, whether Federal or private; rejecting thereby any Federal title to water; and abrogating *in toto* the common law of riparian rights, refusing ever since to recognize it at all.[94]

Reversal of such an unpopular riparian decision in a region of such pronounced aridity was predictable. In the *Reno Smelting* case, wherein the overruling of *Vansickle* v. *Haines* was approved, the Nevada Supreme Court stated that the matter of applicability of the common law to physical characteristics of the State should be considered, and concluded that the common law doctrine of riparian rights was unsuited to local conditions and should not govern the local water rights decision.[95] Early in the 20th century the court again stressed the unsuitability of this doctrine to conditions prevailing in this State, saying that: "Irrigation is the life of our important and increasing agricultural interests, which would be strangled by the enforcement of the riparian principle."[96] And a few years earlier, the court had stated that the doctrine of riparian rights had been entirely swept away as unsuited to the conditions of the State, the necessities of agriculture, mining, and milling, and the prosperity of the people, and that: "It is now the settled doctrine of this state that a person can acquire the right to use the waters flowing in a stream, for the purpose of irrigation, by appropriation as against riparian proprietors or other persons, the priority of rights of various claimants to the use thereof to be determined by the priority of time in making the various appropriations."[97]

Interrelationships of the Dual Systems

Although, as noted immediately above, the riparian water-use doctrine was repudiated by the Nevada Supreme Court in 1885 after 13 years of recognition, some riparian rights were adjudicated during that period. A Federal circuit court said that final and unreversed decrees of riparian rights, whether legally correct or not, became *res adjudicata* of the subject matter of the suits as between the parties and their successors in interest.[98] "This court must

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[93] *Vansickle* v. *Haines*, 7 Nev. 249 (1872); *Union Mill & Min. Co.* v. *Ferris*, 24 Fed. Cas. 594 (No. 14, 371) (C.C.D. Nev. 1872), discussed at notes 87-88 *supra.*

[94] Wiel, S. C., "Water Rights in the Western States," vol. 1, §§87 and 118 (3d ed. 1911).

[95] *Reno Smelting, Mill. & Reduction Works* v. *Stevenson*, 20 Nev. 269, 280, 282, 21 Pac. 317 (1889).

[96] *Twaddle* v. *Winters*, 29 Nev. 88, 105-107, 85 Pac. 280 (1906), 89 Pac. 289 (1907).

[97] *Bliss* v. *Grayson*, 24 Nev. 422, 456, 56 Pac. 231 (1899).

[98] *Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 73, 116 (C.C.D. Nev. 1897). Judge Hawley's decree in this case was directed toward a practicable as well as equitable enforcement of the riparian rights of the parties as determined in previous decrees rendered by the same court during the period of riparian recognition and specified how

follow its former decrees, in so far as they were based on riparian proprietorship."[99] The court refused to allow any one of the riparian parties to the suit to claim any priority over the others based upon the Nevada Supreme Court's recognition of appropriative rights and repudiation of the riparian rights doctrine in 1885.[100]

Ground Waters

Definite underground streams.—In an early case involving a right to use water flowing from a spring which constituted the source of a creek, the Nevada Supreme Court discussed rules of law applicable to ground waters because the spring water in litigation passed through the ground before reaching the creek.[101] Although the subterranean flow in this case was not that of a definite underground stream, the court stated its understanding to be that no distinction exists in the law between waters running under the surface in defined channels and those flowing in distinct channels on the surface. The actual distinction, said the court, is made between all waters flowing in distinct channels, whether on the surface or beneath it, and waters percolating through the soil in varying quantities and uncertain directions.

Percolating waters.—The Nevada Supreme Court held in an early case that water percolating underground in "no known or defined course" belonged to the owner of the land, and that such owner was not responsible for injury caused to others by reason of his diversion of the water, even though the percolating water was the source of a spring on the land of someone else.[102]

The rule of absolute ownership of percolating waters was affirmed in *Strait* v. *Brown* in 1881.[103] However, the right of a landowner to divert water from springs on his land, the waters of which constituted the source of a creek but passed thereto either by percolation or conveyance by unknown subterranean channels, was denied by the court. This decision was reached because the diversion was made directly from the springs after the water had appeared on the surface. This taking would have the same effect as if the water were taken from the stream itself. The court reasoned that none of the reasons which

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the water should be shared. These former decrees, said Judge Hawley, settled but one question—the respective parties thereto were riparian proprietors, and as such were equally entitled to make a beneficial use of the water. Nothing else was determined; the court declined to pass upon any other question. *Id.* at 120-122. As noted above under "Early Uses of Water," Judge Hawley was himself one of the pioneers in Carson Valley.

[99] *Id.* at 120.

[100] *Id.* at 85, 92, 115-116.

Regarding the significance of riparian rights in Nevada, see also Ohrenschall, J.C., "Legal Aspects of the Nevada Water Plan—A Case Study of Law in Action," 2 Nat. Res. Lawyer 250, 263 (1969).

[101] *Strait* v. *Brown*, 16 Nev. 317, 321 (1881).

[102] *Mosier* v. *Caldwell*, 7 Nev. 363, 366-367 (1872).

[103] *Strait* v. *Brown*, 16 Nev. 317 (1881).

supported the theory relating to percolating waters existed under these conditions.[104]

Ground water statutes.—Legislation relating to all ground waters was enacted in 1939 and has been amended at successive sessions of the legislature.[105] The act provides that all ground waters within the boundaries of the State belong to the public, are subject to all existing rights of use, and are appropriable for beneficial use only under the laws of the State relating to appropriation and use of water.[106] The statute does not apply to obtaining permits for the use and development of ground water from a well for domestic purposes when the draught does not exceed a daily maximum of 1,800 gallons, except as to the furnishing of any information required by the State Engineer.[107]

Existing rights to use ground water are recognized. For the purposes of this act, vested rights are the rights to use water from (1) an "artesian or definable aquifer" acquired prior to March 22, 1913, and (2) "percolating water, the course and boundaries of which are incapable of determination," acquired prior to March 25, 1939. The determination of whether the water is in a definable aquifer or whether it is percolating, the course and boundaries of which are incapable of determination, shall be made by the State Engineer.[108]

Claimants of vested ground water rights may petition the State Engineer to adjudicate such rights,[109] as provided in the procedures discussed later under "Determination of Conflicting Water Rights—Statutory adjudication procedure."

The act provided that a legal right could only be acquired to appropriate water in Nevada from an artesian or definable aquifer since March 22, 1913, or from percolating water, the course and boundaries of which are incapable of determination, since March 25, 1939, by complying with the general appropriation statutes.[110] The date of priority of all such appropriations of ground water is the date of filing the application for a permit in proper form in the office of the State Engineer pursuant to the general appropriation statutes.[111]

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[104] In this situation, there was no uncertainty as to the existence of the water or the quantity that had been taken against the interests of the appropriators of the stream. The spring waters were held to be subject to the rights of the stream appropriators, even though the means by which the waters were conveyed from springs to the creek were subterranean and not well understood.

[105] Nev. Rev. Stat. § §534.010 to .190 (Supp. 1973).

[106] *Id.* §534.020(1).

[107] *Id.* §534.180.

Domestic use "extends to culinary and household purposes, in a single-family dwelling, the watering of a family garden, lawn, and the watering of domestic animals." *Id.* §534.010(1)(c).

[108] *Id.* §534.100(1).

[109] *Id.* §534.100(1), referring to ch. 533.

[110] *Id.* §534.080, referring to ch. 533, discussed at note 23 *et seq.*

Anyone allowing unnecessary waste of water from an artesian well is guilty of a misdemeanor. *Id.* §534.070.

[111] *Id.* §534.080, referring to ch. 533.

Under the 1939 legislation, when the State Engineer (either on his own initiative or upon the petition of at least 40 percent of the appropriators of record in his office) finds it necessary to administer the ground water law relating to designated areas, he shall designate such areas.[112] Thereafter, no one may make withdrawals from the designated basin without first obtaining a permit to appropriate such water in accordance with provisions relating to the appropriation of public waters.[113] Where the designated area is in a single county, a ground water board may be established, and if established the State Engineer shall not approve any requests for permits until he has conferred with the board and obtained its written advice and recommendations.[114]

In areas that have not been designated by the State Engineer, no application or permit to appropriate such water is necessary until after the well is sunk or bored and water developed; but a permit to appropriate such water must be obtained before any legal diversion can be made from the well.[115]

Each permitted appropriation must allow for a reasonable lowering of the static water level at the appropriator's point of diversion, considering the economics of pumping water for the general type of crops grown in the area and the effect of water use on the economy of the area.[116]

In any basin, or portion thereof, where it appears that the average annual replenishment may not be adequate for all permittees and vested-right claimants, the State Engineer may order that withdrawals be restricted to conform to priority rights.[117]

In any basin, or portion thereof, designated by the State Engineer, he may restrict drilling of wells if he determines that additional wells would cause an undue interference with existing wells, subject to review by the appropriate district court.[118]

In the event the State Engineer determines that the ground water in a designated basin is in his judgment being depleted, he is empowered to make such rules, regulations, and orders as he deems essential for the welfare of the area. He is expressly authorized to: designate preferred uses in these areas;[119] issue temporary permits to appropriate ground water (permits may be revoked when water can be furnished by a water supplier); deny applications to appropriate ground water when the area is served by a water

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[112] *Id.* § 534.030.

[113] *Id.* § 534.050, referring to ch. 533.

[114] *Id.* § § 534.035(1) and (7). See chapter 20 at note 356 regarding this statute prior to its amendment in 1973.

[115] *Id.* § 534.050, referring to ch. 533.

[116] *Id.* § 534.110.

[117] *Id.*

[118] *Id.*

[119] "* * * and in acting on applications to appropriate ground water he may designate such preferred uses in different categories with respect to the particular areas involved within the following limits: Domestic, municipal, quasi-municipal, industrial, irrigation, mining and stock-watering uses."

supplier; limit the depth of domestic wells; or prohibit the drilling of domestic wells when the area is served by a water supplier.[120]

Any ground water rights may be forfeited for failure to beneficially use the water for 5 successive years. Such water reverts to the public and is available for further appropriation, subject to existing rights.[121] Any right to use ground water may also be abandoned.[122]

Determination of Conflicting Water Rights

Court transfer procedure.—In any suit brought to determine water rights, all persons who claim rights to use such water are to be made parties. When any such suit has been filed, the court is required to direct the State Engineer to furnish a complete hydrographic survey of the stream system. Any such suit, at the court's discretion, may be transferred to the State Engineer for determination under the special statutory adjudication procedure.[123]

Statutory adjudication procedure.—A determination of relative rights to use water of any stream or stream system,[124] if the facts and conditions justify it, is commenced by the State Engineer either on petition of one or more water users or on his own motion.[125] An examination is made of water supplies, diversions, and irrigated lands; and proofs of appropriations filed by all claimants are taken.[126] Based upon these findings, a preliminary order of determination is made by the State Engineer.[127] His final order of determination after hearing objections, together with the evidence, is filed in the appropriate district court as the basis of a civil action.[128] The court holds hearings on the exceptions and, at the conclusion of the proceeding, enters a decree affirming or modifying the order of the State Engineer.[129] Appeal from the decree of adjudication may be taken to the Nevada Supreme Court by the State Engineer or by any party in interest.[130]

The Nevada Supreme Court has indicated that the purpose of the statutory adjudication procedure in Nevada was to provide a workable, comprehensive procedure for the determination of relative rights on a stream system, with as little delay and expense as possible, as a prerequisite to control the

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[120] *Id.* §534.120.

[121] *Id.* §534.090(1).

[122] *Id.* §534.090(2).

[123] Nev. Rev. Stat. §533.240 (Supp. 1973).

[124] "Stream system" is to "be interpreted as including any stream, together with its tributaries and all streams or bodies of water to which the same may be tributary." *Id.* §533.020.

[125] *Id.* §533.090.

[126] *Id.* §§533.095 to .135.

[127] *Id.* §§533.140 to .155.

[128] *Id.* §§533.160 to .165.

[129] *Id.* §§533.170 to .195.

Even if no exceptions are filed, the court may take further testimony, if deemed proper, and enter its findings of fact and decree. *Id.* §533.170(3).

[130] *Id.* §533.200.

distribution of water by the State for the protection of all users in the exercise of their rights.[131] It was intended to apply to all water rights, whether acquired before or after the law was adopted.[132]

The constitutionality of a provision originally in the law, which purported to make the State Engineer's determination conclusive, subject to the right of appeal, was questioned by the Nevada Supreme Court in the *Ormsby County* case.[133] The statute was amended in 1915 to eliminate the objectionable feature and to prescribe the procedure now in force,[134] which requires the State Engineer's order of determination to be filed in court as the basis of a civil action–following the procedure adopted in Oregon. As so amended, these provisions have been held valid by both State and Federal courts.[135]

Administration of Water Rights and Distribution of Water

For the purpose of supervising public waters, the State Engineer is directed to divide the State into water districts as the need arises; he may appoint an advisory board of representative citizens from within the district to assist him in formulating plans and projects for the conservation and use of water resources in the district.[136] It is his duty to divide or cause to be divided the

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[131] *Ormsby County* v. *Kearney*, 37 Nev. 314, 336-338, 142 Pac. 803 (1914); *Vineyard Land & Stock Co.* v. *District Ct.*, 42 Nev. 1, 13-14, 171 Pac. 166 (1918); *State ex rel. Hinckley* v. *Sixth Judicial Dist. Ct.*, 53 Nev. 343, 352, 1 Pac. (2d) 105 (1931); *Ruddell* v. *Sixth Judicial Dist. Ct.*, 54 Nev. 363, 367, 17 Pac. (2d) 693 (1933).

Some additional purposes are mentioned in *Pitt* v. *Scrugham*, 44 Nev. 418, 427-428, 195 Pac. 1101 (1921); *Humbolt Land & Cattle Co.* v. *District Ct.*, 47 Nev. 396, 407, 324 Pac. 612 (1924).

[132] *Ormsby County* v. *Kearney*, 37 Nev. 314, 352-353, 142 Pac. 803 (1914). In approving this interpretation, a Federal court pointed out that more than 90 percent of the water rights on the Humboldt River system determined in a proceeding by the State Engineer had been acquired prior to 1913, and that holders of such rights were entitled to more than 95 percent of the total water flow; hence, to construe the law as applying only to rights initiated after its enactment would completely defeat its objects and purposes. *Humboldt Land & Cattle Co.* v. *Allen*, 14 Fed. (2d) 650, 654 (D. Nev. 1926), affirmed, 274 U.S. 711 (1927).

[133] *Ormsby County* v. *Kearney*, 37 Nev. 314, 355-392, 142 Pac. 803 (1914). See comments in *Vineyard Land & Stock Co.* v. *District Ct.*, 42 Nev. 1, 15, 171 Pac. 166 (1918).

[134] Nev. Laws 1915, ch. 253, Rev. Stat. §533.160 *et seq.* (Supp. 1973).

[135] *Vineyard Land & Stock Co.* v. *District Ct.*, 42 Nev. 1, 14-26, 171 Pac. 166 (1918); *Bergman* v. *Kearney*, 241 Fed. 884, 906, 908-910 (D. Nev. 1917). Certain sections applying to the administrative determination by the State Engineer were held unconstitutional, were then amended, and as amended, were held valid. *Pitt* v. *Scrugham*, 44 Nev. 418, 427-428, 195 Pac. 1101 (1921); *Humboldt Land & Cattle Co.* v. *District Ct.*, 47 Nev. 396, 408, 224 Pac. 612 (1924).

In 1952 the Nevada Supreme Court cited, in a footnote to a decision, a long list of cases to support the statement that "on numerous occasions" a large portion of the law "has been analyzed and passed upon section by section." *McCormick* v. *Sixth Judicial Dist. Ct.*, 69 Nev. 214, 217-218, 246 Pac. (2d) 805 (1952).

[136] Nev. Rev. Stat. §533.300 (Supp. 1973).

waters of natural sources of supply among claimants of water rights according to their several rights.[137] For stream systems or water districts subject to regulation and control, water commissioners are appointed by the State Engineer, subject to confirmation by any court having jurisdiction.[138] The Nevada Supreme Court has indicated that, as with the sections providing for the statutory adjudication procedure, above, the whole scope and purpose of this statute show that the part governing State administrative control over distribution of water to parties entitled thereto applies to all water rights, whether acquired before or after the enactment. "There would be little or no use in attempting state control over a stream or stream system unless all water rights were brought under that control."[139]

After an order of determination in a special statutory proceeding has been filed in court, distribution of water by the State Engineer and water commissioners is under the court's supervision and control. These administrative officials charged with distributing the waters are at all times to be deemed officers of the court in making the distribution pursuant to such determination or to the court's decree.[140]

In addition, a suit not brought under the special procedure, water rights may be administered by the State Engineer pursuant to the final decree therein. This is separate and distinct from administration of a decree entered in a proceeding under the statutory adjudication procedures previously noted. It is effected by order of the court that entered the decree, after petition of water users and hearing of objections. At the court's discretion, a hydrographic survey of the stream system may be ordered. As with adjudications made under the special procedure, State officials in administering the decree are officers of the court.[141] The Nevada Supreme Court has held that use of this authorized procedure for distributing adjudicated waters is within the discretion of the court that entered the decree, and that the enactment is constitutional.[142]

The State Engineer also has authority to regulate the distribution of water among various ditch or reservoir users whose rights have been adjudicated, or whose rights are listed with the clerk of a court pursuant to the water rights statute.[143]

The procedure for review of any order or decision of the State Engineer, acting in person or through those under him (noted earlier under "Appropriation of Water of Watercourses—Procedure for appropriating water") applies to administration of determined rights as well as to the acquisition of water rights.

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[137] *Id.* §533.305.
[138] *Id.* §533.270.
[139] *Ormsby County* v. *Kearney*, 37 Nev. 314, 352, 142 Pac. 803 (1914).
[140] Nev. Rev. Stat. §533.220(1) (Supp. 1973).
[141] *Id.* §533.310.
[142] *McCormick* v. *Sixth Judicial Dist. Ct.*, 69 Nev. 214, 220-230, 246 Pac. (2d) 805 (1952).
[143] Nev. Rev. Stat. §533.305(2) (Supp. 1973).

Where the administration of adjudicated rights is involved, the proceedings are brought in the court that entered the decree.[144]

New Mexico

Governmental Status

The area embraced within the present State of New Mexico was a part of the Mexican State of Sonora. It was ceded to the United States by Mexico in 1848, at the conclusion of the war with Mexico, by the Treaty of Guadalupe Hidalgo.[1] The Territory of New Mexico was established September 9, 1850.[2] The proclamation of the President admitting New Mexico to statehood was signed January 6, 1912.[3]

Pre-American Water Enterprises

Development and use of water for irrigation in New Mexico long antedated the coming of the Spaniards.[4] The chroniclers of Coronado's expedition refer to the cultivation of cotton and corn by the Pueblo Indians of the Middle Rio Grande Valley. Espejo, writing of his explorations of 1582-1583, speaks with approval of the irrigation ditches supplying the pueblos in the general region of Socorro and above, and refers to irrigation by the inhabitants of Acoma "with many partitions of the water" in a marsh 2 leagues from the pueblo. And other writers have referred to prehistoric irrigation in other localities in the region. Under the climatic conditions obtaining in the area, the extent to which the inhabitants were employing irrigation in raising diversified crops was a general index of the state of their advancement. The community ditch was a usual adjunct of many Indian pueblos in New Mexico. Juan de Oñate placed a community at San Juan, New Mexico, near the junction of the Rio Chama and the Rio Grande, in 1598. On August 11 of that year work was begun on an irrigation ditch, the Spaniards being assisted in their labor by some 1,500 Indians. Other colonies were located from time to time; and the community acequia was the original or the eventual instrument for providing water for most of the irrigated land. Many of these organizations still exist. See "Water Rights of Community Acequias," below.

State Administrative Agency

The State Engineer has supervision over the acquisition of water rights[5] and distribution of water pursuant to licenses and court adjudications.[6] His role in

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[144] *Id.* § 533.450.

[1] 9 Stat. 922 (1848).

[2] 9 Stat. 446, ch. 49 (1850).

[3] 37 Stat. 1723 (1912).

[4] For discussion and references, see Hutchins, W. A., "The Community Acequia: Its Origin and Development," 31 Southwestern Historical Quarterly 261 (1928).

[5] N. Mex. Stat. Ann. § § 75-5-1 to 75-5-13 (1968).

[6] *Id.* § 75-2-9.

the determination of water rights is limited to making hydrographic surveys and requesting the Attorney General to commence determination proceedings or to intervene in private adjudication proceedings.[7] Various aspects of these functions are discussed under succeeding topics.

Water Rights of Community Acequias

The "community acequia" or "public acequia" is an irrigation ditch organization, "acequia" being used synonymously with "ditch" in the statutes and court decisions of New Mexico. It is an ancient institution in the Southwest, with greatest concentration in New Mexico. Some such organizations antedated acquisition of the region by the United States.[8]

In a decision that determined the character of a water right held by a consumer under a community acequia, the New Mexico Supreme Court observed that this institution is peculiar to the native people living in the part of the Southwest acquired from Mexico, having been a part of their system of agriculture and community life long before the American occupation; and that after the Territory was organized, the legislature "provided for the government of community acequias, and doubtless incorporated into the written law of the Territory the customs theretofore governing such communities."[9] The court went on to describe how the settlements were established and how the irrigation ditch was constructed and operated and the water distributed by and to the water users.

The old community acequias derived their rights from the Spanish and Mexican laws and customs. In the enjoyment of these rights they have been protected by the Territorial and State governments ever since the cession of the region to the United States. Community ditches that began the use of water after the cession necessarily derived their rights from the Territorial or State laws in effect at the time the rights were initiated; but whether they antedated or postdated the cession, these distinctive organizations have been administratively on the same basis and subject to the same legislative provisions. Legislation concerning the management and affairs of community acequias has been in effect since the Territory of New Mexico was established; and the courts have been equally zealous in safeguarding their water rights.

The Kearny Code, promulgated during the war with Mexico, provided for continued enforcement of existing laws concerning watercourses.[10] The first Territorial legislature declared that the course of ditches or acequias already established should not be disturbed; that courses of water theretofore known as public ditches or acequias were thereby established as such; and that all inhabitants might construct either private or common acequias for their water

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[7] *Id.* §§75-4-2 to 75-4-6.

[8] See Hutchins, *supra* note 4. See also Hutchins, W. A., "Community Acquias or Ditches in New Mexico," 8th Bien. Rept., State Engineer, N. Mex., 1926-1928, p. 227 (1928).

[9] *Snow* v. *Abalos*, 18 N. Mex. 681, 691, 692-693, 140 Pac. 1044 (1914).

[10] Kearny Code, §1.

supplies.[11] Statutes have been enacted and court decisions rendered from time to time concerning community acequias.[12] The old established ones were granted certain exemptions from the operation of the water administrative law.[13] In addition, legislative provisions relating to these organizations occupy a considerable number of sections in the statutes.[14]

The Pueblo Water Right

Origin of the pueblo rights doctrine.—The pueblo water right, which has appeared in the jurisprudence of both California and New Mexico, is the paramount right of an American city as successor of a Spanish or Mexican pueblo to the use of water naturally occurring within the old pueblo limits to supply the needs of the city and its inhabitants. The doctrine originated in early decisions of the California Supreme Court (see the discussion in the California State summary), and it was adopted in 1959 by the Supreme Court of New Mexico. The origin, character, and extent of the pueblo right are discussed in chapter 11.

As discussed below under "Adoption of the doctrine in New Mexico," the only declared authority for adoption of the pueblo rights doctrine in New Mexico is the California decisions, which themselves, as discussed in chapter 11, are predicated upon meager Spanish-Mexican authority and, with respect to the pueblo's monopolistic right, upon a mere judicial presumption.

As these California high court decisions are the acknowledged source of authority for New Mexico's adoption of the pueblo rights doctrine, it is pertinent to briefly repeat here the major facets of the concept as portrayed by the California decisions. See the California State summary. Briefly, the American successor city has the prior and paramount right to the use of waters that flowed naturally through or by the pueblo to the extent of the needs of the city's inhabitants; the right grows not only with the number of inhabitants to whatever extent this increases, but also with the extension of the city limits

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[11] N. Mex. Laws, July 20, 1851.

[12] *Territory* v. *Baca*, 2 N. Mex. 183 (1882); *Territory* v. *Tafoya*, 2 N. Mex. 191 (1882); *DeBaca* v. *Pueblo of Santo Domingo*, 10 N. Mex. 38, 60 Pac. 73 (1900); *Leyba* v. *Armijo*, 11 N. Mex. 437, 68 Pac. 939 (1902); *Candelaria* v. *Vallejos*, 13 N. Mex. 146, 81 Pac. 589 (1905); *Pueblo of Isleta* v. *Tondre & Pickard*, 18 N. Mex. 388, 137 Pac. 86 (1913); *Snow* v. *Abalos*, 18 N. Mex. 681, 140 Pac. 1044 (1914); *La Mesa Community Ditch* v. *Appelzoeller*, 19 N. Mex. 75, 140 Pac. 1051 (1914); *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 143 Pac. 207 (1914); *Halford Ditch Co.* v. *Independent Ditch Co.*, 22 N. Mex. 169, 159 Pac. 860 (1916); *Acequia del Llano* v. *Acequia de Las Joyas del Llano Frio*, 25 N. Mex. 134, 179 Pac. 235 (1919); *State ex rel. Black* v. *Aztec Ditch Co.*, 25 N. Mex. 590, 185 Pac. 549 (1919); *State ex rel. Sanchez* v. *Casados*, 27 N. Mex. 555, 202 Pac. 987 (1921); *La Luz Community Ditch Co.* v. *Alamagordo*, 34 N. Mex. 127, 279 Pac. 72 (1929); N. Mex. Laws 1895, ch. 1.

[13] N. Mex. Stat. Ann. §§75-5-2, 75-8-2 and 75-14-60 (1968). See *Pueblo of Isleta* v. *Tondre & Pickard*, 18 N. Mex. 388, 392, 395-396, 137 Pac. 86 (1913).

[14] N. Mex. Stat. Ann. §§75-14-1 to 75-14-61 and 75-15-1 to 75-15-10 (1968).

by annexation of land not within the limits of the original pueblo; and the right extends to so much of the waters of the stream as the expanding needs of the city require, but to the use of water only within the city limits. It attaches to the use of all surface and ground waters of the stream that naturally flowed through the original pueblo, including its tributaries, from its source to its mouth. It relates to the use of water needed by the city and its inhabitants for all beneficial purposes. The pueblo right generally is superior to riparian rights of other proprietors and to rights of appropriators on the stream. Regardless of how extensive existing uses of the water by others may be, the pueblo right is available for the use of the city whenever and to whatever extent the city is ready to exercise it. No method by which it can be lost to the city has yet been declared by the California Supreme Court.

Adoption of the doctrine in New Mexico.—In 1914 the New Mexico Supreme Court held, with respect to the residents of the town of Tularosa, that no exclusive right on their part to the use of water could be sustained under Spanish and Mexican laws as a "pueblo right," because there had been no Spanish or Mexican pueblo at the townsite and hence there could be no pueblo water right.[15] Later, the supreme court held that notwithstanding occupancy of a "pueblo" at the villa de Santa Fe by the Spanish authorities, no grant had been made to the pueblo by the King, and that without a grant there could be no pueblo water right.[16] In both these cases, therefore, claims of pueblo water rights were involved, but in neither decision was the pueblo rights doctrine either approved or disapproved.

In the *Cartwright* case, decided in 1959—111 years after the cession of this area to the United States—the Supreme Court of New Mexico rendered its first definitive decision on the subject of pueblo water rights.[17]

By a vote of three to two in the *Cartwright* case, the court held that the Town and City of Las Vegas, New Mexico, as American successors to the Mexican Pueblo of Las Vegas, had succeeded to ownership of the pueblo water right in the Gallinas River which had vested in the pueblo with a priority right of 1835, prior and paramount to any rights of other users of water from this stream.[18] The supreme court did not base its decision on any specific Spanish or Mexican authority; in fact, if the court actually searched for such authorities, or if it found and examined any, there is nothing in its opinion that so suggests. What this court did was to cite the chief California decisions and to

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[15] *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 376, 143 Pac. 207 (1914).

[16] *New Mexico Products Co.* v. *New Mexico Power Co.*, 42 N. Mex. 311, 315, 77 Pac. (2d) 634 (1937).

[17] *Cartwright* v. *Public Serv. Co. of N. Mex.*, 66 N. Mex. 64, 343 Pac. (2d) 654 (1959). An attempt by the parties to litigate the same issues again was blocked on *res adjudicata* grounds, *Cartwright* v. *Public Serv. Co. of N. Mex.*, 68 N. Mex. 418, 362 Pac. (2d) 796 (1961).

[18] 66 N. Mex. at 65-72, 86-87.

quote extensively from several texts;[19] yet the only authorities cited by the writers of these quoted texts to support their statements are the California decisions. It is particularly noteworthy that none of the statements so quoted, and none of the statements made by the court in the *Cartwright* case, are supported by any specifically cited Spanish or Mexican law, regulation, custom, or text to the effect that a pueblo was endowed on its creation with this complete monopoly of stream waters.

Hence the divided New Mexico Supreme Court applied to its decision in this case the law of another American State, rather than Spanish-Mexican law. Although the minority's dissenting opinion severely criticized the basis of the California doctrine,[20] the majority accepted this doctrine with full approval and applied it to the settlement of this case. The conclusion reached by the majority was that the reasons for adoption of the pueblo rights doctrine in California applied with equal force in New Mexico.[21]

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—Recognition of the right to divert and use stream water for domestic and irrigation purposes in New Mexico is implicit rather than clearly expressed in early Territorial legislation, which related to construction and operation of acequias or ditches rather than with establishment of a legal doctrine of relative water rights. It has been the State supreme court's view, however, that the law of appropriation antedated the cession of this area from Mexico.

(1) Legislation. As noted earlier under "Water Rights of Community Acequias," the Kearny Code provided, among other things, that the laws theretofore enforced concerning watercourses should continue in force, regulation being transferred from village to county governing officials.[22]

The first Territorial legislature declared that the course of ditches or acequias already established should not be disturbed; that all streams theretofore known as public ditches or acequias were thereby established as such; and that all inhabitants might construct either private or common acequias and take water into them from whatever source they could, but that they must pay just compensation for rights of way over others' lands. It was also provided that the course of irrigation water should not be impeded, as irrigation should be paramount to other uses of water.[23] Other legislation over the years related to affairs of community acequias. See the earlier discussion under "Water Rights of Community Acequias." Legislation in 1887 related to organization of corporations for service of water to consumers for irrigation, mining, manufacturing, domestic, and other public purposes and for cultivation and improvement

[19] 66 N. Mex. at 80-84.
[20] 66 N. Mex. at 96-99.
[21] 66 N. Mex. at 85-87.
[22] Kearny Code, § 1.
[23] N. Mex. Laws, July 20, 1851.

of land, with the right to divert surplus water from any stream, lake, or spring, subject to prior vested rights.[24]

In 1891 the legislature provided for sworn statements describing water control works to be thereafter constructed or enlarged. Such claims were to be recorded within 90 days after commencement of work and no priority of right for any purpose was to attach until the recording was made. Vested rights and public acequias were not to be affected.[25] This law was superseded by two statutes enacted in 1905.[26] These acts in turn were superseded by the comprehensive legislation of 1907 which, with amendments and additions, is still in force.[27]

(2) Judicial recognition. According to the New Mexico Supreme Court:[28]

> The law of prior appropriation existed under the Mexican republic at the time of the acquisition of New Mexico * * *. The doctrine of prior appropriation has been the settled law of this territory by legislation, custom and judicial decision. Indeed, it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation, and, if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande valley in New Mexico.

The supreme court said that the appropriation doctrine grew out of the condition of the country and the necessities of its inhabitants.[29] Territorial, State, and Federal courts invariably emphasized their conviction that this doctrine is and has been the sole law governing water rights in New Mexico.[30]

The New Mexico court also has insisted that the appropriation doctrine prevailed in the region before its acquisition by the United States. The constitutional provision noted below under "(3) Constitutional recognition," said the court, is only "declaratory of prior existing law" and has always been the rule and practice under Spanish and Mexican dominion.[31]

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[24] N. Mex. Laws 1887, ch. 12.

[25] N. Mex. Laws 1891, p. 130.

[26] N. Mex. Laws 1905, chs. 102 and 104.

[27] N. Mex. Laws 1907, ch. 49, Stat. Ann. § 75-1-1 *et seq.* (1968).

[28] *United States* v. *Rio Grande Dam & Irr. Co.*, 9 N. Mex. 292, 306-307, 51 Pac. 674 (1898), reversed, 174 U.S. 690 (1899), but not on the point under discussion herein.

[29] *Snow* v. *Abalos*, 18 N. Mex. 681, 693, 140 Pac. 1044 (1914).

[30] *Albuquerque Land & Irr. Co.* v. *Gutierrez*, 10 N. Mex. 177, 240, 61 Pac. 357 (1900), affirmed, 188 U.S. 545, 556-557 (1903); *Hagerman Irr. Co.* v. *McMurry*, 16 N. Mex. 172, 181-182, 113 Pac. 823 (1911); *Murphy* v. *Kerr*, 296 Fed. 536, 540 (D. N. Mex. 1923); *Yeo* v. *Tweedy*, 34 N. Mex. 611, 615, 286 Pac. 970 (1929); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Lindsey* v. *McClure*, 136 Fed. (2d) 65, 69 (10th Cir. 1943).

[31] *State ex rel. State Game Comm'n* v. *Red River Valley Co.*, 51 N. Mex. 207, 217, 182 Pac. (2d) 421 (1945). The doctrine of prior appropriation, based on the theory that all waters subject to appropriation are public waters, obtained under Mexican sovereignty and continued after the American acquisition.

(3) Constitutional recognition. The State constitution, adopted in 1911, declares that the unappropriated water of every natural stream, perennial or torrential, within the State belongs to the public and is subject to appropriation for beneficial use in accordance with State law; that priority of appropriation gives the better right; and that beneficial use is the basis, measure, and limit of the right to use of water.[32]

Procedure for appropriating water.—The first step to be taken in appropriating water—before commencing any construction for such purpose—is to make application to the State Engineer for a permit to make the appropriation.[33] An application that receives the approval of the State Engineer endorsed thereon becomes a permit. On conclusion of construction of works a certificate of construction is issued to the permittee; and on final inspection of the project he receives a license to appropriate water to beneficial use to the extent and under the condition of its actual application to such use.[34] Instead of a fixed statutory amount of water, which formerly prevailed, the amount allowed is based upon beneficial use and in accordance with good agricultural practices. The rate of diversion is also governed by good agricultural practices as well as the most effective use of available water in order to prevent waste.[35]

In 1923 the New Mexico Supreme Court observed that the statute of 1907 "seems to provide an exclusive method for the appropriation of water after that act became effective."[36] Subsequent statements have been to the effect that the current statutory procedure *is* exclusive.[37] Nevertheless, the court said in a recent case that if rights were acquired pursuant to common law appropriations prior to the enactment of the 1907 Water Code, "these rights were in no way dependent on the existence of an application to or a permit from the State Engineer."[38]

All natural waters in the State flowing in streams and watercourses, whether perennial or torrential, are subject to appropriation under the statute.[39]

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[32] N. Mex. Const. art. XVI, § § 2 and 3.

[33] Statutory provisions governing applications to appropriate water do not apply to community ditches already constructed. N. Mex. Stat. Ann. § 75-5-2 (1968).

[34] *Id.* § § 75-5-1 to 75-5-13.

[35] N. Mex. Stat. Ann. § 75-5-17 (Supp. 1973).

[36] *Farmers' Dev. Co.* v. *Rayado Land & Irr. Co.*, 28 N. Mex. 357, 368, 213 Pac. 202 (1923).

[37] *Harkey* v. *Smith*, 31 N. Mex. 521, 526, 247 Pac. 550 (1926). The statement in this case that the statute "controls the whole matter" of acquisition, means, and manner of enjoyment of water rights was referred to in *Carlsbad Irr. Dist.* v. *Ford*, 46 N. Mex. 335, 340, 128 Pac. (2d) 1047 (1942). Later, in *State ex rel. Bliss* v. *Dority*, 55 N. Mex. 12, 19, 225 Pac. (2d) 1007 (1950), the court said that in *Harkey* v. *Smith, supra*, it had held the 1907 statutory procedure of acquiring water rights to be exclusive.

[38] *May* v. *Torres*, 86 N. Mex. 62, 519 Pac. (2d) 298, 300 (1974).

[39] N. Mex. Const. art. XVI, § 2; N. Mex. Stat. Ann. § 75-1-1 (1968).

"A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw, or

(*Continued*)

Diversion and distribution of water for irrigation and domestic purposes in New Mexico constitute a public purpose.[40] Such uses of water were characteristic of purposes and practices of the community acequias from the earliest times. Beneficial use to which public waters may be put includes recreation and fishing.[41] The State supreme court held that the use of water in stockraising is a beneficial purpose for which water may be appropriated.[42] But the water appropriation statute does not apply to the construction of stock dams, water tanks, or ponds with maximum capacity of 10 acre-feet.[43] Water of all natural sources and flows therefrom—but not including wells, and ponds or reservoirs constructed by individuals for their personal use—are free for all travelers for their own use and for a reasonable number of animals under their charge.[44]

An appropriation may be made by any person, association, or corporation, public or private, by the State of New Mexico, or by the United States.[45]

To constitute a valid appropriation of water, there must be (1) a rightful diversion and (2) an application of the water to some beneficial use; and neither of these is sufficient without the other.[46] With respect to water impounded in a reservoir constructed on a public watercourse—some of the water to be used for irrigation downstream and some held in storage for flood control—the supreme court held that the mere act of impounding the water did not clothe it with appropriative status.[47] The court repeated that to constitute

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(*Continued*)

wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water." N. Mex. Stat. Ann. §75-1-1 (1968).

Artificial surface waters that pass unused beyond the domain of the owner or developer and enter a natural watercourse, and are not reclaimed for a period of 4 years from first appearance there, are subject to appropriation; but the owner or developer cannot be compelled against his will to continue to furnish such water supply. *Id.* §75-5-25.

[40] *Albuquerque Land & Irr. Co.* v. *Gutierrez*, 10 N. Mex. 177, 231, 61 Pac. 357 (1900). See the supreme court's definition of "domestic use" as used in an ordinance of the City of Albuquerque. *Water Supply Co. of Albuquerque* v. *Albuquerque*, 17 N. Mex. 326, 334, 128 Pac. 77 (1912).

[41] *State ex rel. State Game Comm'n* v. *Red River Valley Co.*, 51 N. Mex. 207, 218, 182 Pac. (2d) 421 (1945).

[42] *First State Bank of Alamogordo* v. *McNew*, 33 N. Mex. 414, 422, 269 Pac. 56 (1928).

[43] N. Mex. Stat. Ann. §§75-5-30 and 75-8-3 (1968).

Nor does the appropriation statute apply to dams for any purpose which are no more than 10 feet high or impound no more than 10 acre-feet of water, or to works designed solely for silt retention, not beneficial use. *Id.* §75-5-30.

[44] *Id.* §§75-1-4 and 75-1-5.

[45] *Id.* §75-5-1.

[46] *Albuquerque Land & Irr. Co.* v. *Gutierrez*, 10 N. Mex. 177, 240, 61 Pac. 357 (1900). See *Millheiser* v. *Long*, 10 N. Mex. 99, 104, 61 Pac. 111 (1900); *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 371, 143 Pac. 207 (1914).

[47] *State ex rel. State Game Comm'n* v. *Red River Valley Co.*, 51 N. Mex. 207, 223-224, 182 Pac. (2d) 421 (1945).

an appropriation there must be a diversion and an application to beneficial use. It held that the impounded water was all public water until applied to beneficial use, hence necessarily not appropriated until application to use had been effected.

In a recent case the court said, "We hold that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes."[48] The court said that the "grazing on and harvesting of grasses does not constitute appropriation of the water * * *."[49]

Priority in time of making an appropriation gives the better right.[50] Rights to the use of water initiated before March 19, 1907 (effective date of the water right statute), relate back to initiation of the claim, on diligent prosecution to completion of surveys and works for applying the water to beneficial use. Those initiated after such date relate back to the date of receipt of application therefor in the office of the Territorial or State Engineer, subject to compliance with the statute and rules and regulations established thereunder.[51] The time permitted by the State Engineer for putting the water to beneficial use may be extended by him, with certain limitations, for various reasons indicating due diligence and reasonable cause for delay.[52]

The right of gradual or progressive development in consummating an appropriation is recognized, provided (1) that at the time of initiating his appropriation the intending appropriator claimed the gradually enlarging use, and (2) that he proceeded with reasonable diligence to continue to completion the construction work and application of water to beneficial use.[53] The New Mexico Supreme Court has held that a city's appropriative right may extend to its future use to satisfy its needs resulting from normal increase in population within a reasonable period of time. If not so applied, such right may be lost.[54] The court indicated that such treatment was comparable to that accorded appropriations for anticipated expansion in irrigated acreage.

An applicant or other party dissatisfied with any decision, act, or refusal of the State Engineer to act may take an appeal to the appropriate district court.

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[48] *State ex rel. Reynolds* v. *Miranda*, 83 N. Mex. 445, 493 Pac. (2d) 409, 411 (1972).

[49] *Id.*

[50] N. Mex. Const. art. XVI, §2; N. Mex. Stat. Ann. §75-1-2 (1968). See *Lindsey* v. *McClure*, 136 Fed. (2d) 65, 69 (10th Cir. 1943); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938).

[51] N. Mex. Stat. Ann. §75-1-2 (1968).

See *Keeney* v. *Carillo*, 2 N. Mex. 480, 493 (1883), decided before enactment of any statute prescribing a method for appropriating water. See also *Farmers' Dev. Co.* v. *Rayado Land & Irr. Co.*, 28 N. Mex. 357, 367-369, 213 Pac. 202 (1923); *Rio Puerco Irr. Co.* v. *Jastro*, 19 N. Mex. 149, 153, 141 Pac. 874 (1914).

[52] N. Mex. Stat. Ann. § §75-5-5, 75-5-7, and 75-5-13 (1968).

[53] *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 371, 143 Pac. 207 (1914).

[54] *State* v. *Crider*, 78 N. Mex. 312, 431 Pac. (2d) 45 (1967).

The procedure on appeal shall be *de novo* as cases originally docketed in the district court, although evidence taken in hearings before the State Engineer may be considered as original evidence subject to legal objection.[55] Appeal may be taken from the decision of the district court.[56]

Restrictions on the right to appropriate water.—The State Engineer is required to reject an application to appropriate water if in his opinion there is no unappropriated water available. He may refuse to consider or approve an application if in his opinion approval would be contrary to the public interest.[57] At his discretion the State Engineer may approve an application for a lesser quantity of water than is applied for; or he may vary the periods of annual use of the water.[58]

The question of public interest was considered in a case decided shortly before attainment of statehood.[59] The supreme court believed that matters of public interest went beyond questions as to whether the project was dangerous to public health or safety; that the purpose of the statute was to obtain the greatest possible benefit to the public. For example, the public interest would be served by protecting investors against making worthless investments in New Mexico, especially if made as a result of official approval of unsound enterprises. The court believed, further, that while the question of relative costs of two competing water supply projects was not conclusive on the question of public interest, it should be taken into account.

There are both constitutional and statutory declarations to the effect that beneficial use limits the right to use water;[60] and both State and Federal courts have stressed this principle.[61] Unnecessary waste of water is not within the appropriative right;[62] it is against public policy. The statutory allowable rate of diversion is that "consistent with good agricultural practices and which will result in the most effective use of available water in order to prevent waste."[63]

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[55] N. Mex. Stat. Ann. §75-6-1 (Supp. 1973). See also N. Mex. Const. art. XVI, §2.
For discussions of the historical and current scope of an appeal *de novo* under this provision and an earlier version, see *Fellows* v. *Schultz*, 81 N. Mex. 496, 469 Pac. (2d) 141 (1970); *Fort Sumner Irr. Dist.* v. *Carlsbad Irr. Dist.*, 87 N. Mex. 149, 530 Pac. (2d) 943 (1974).

[56] N. Mex. Stat. Ann. §75-6-3 (1968).

[57] *Id.* §75-5-6.

[58] *Id.* §75-5-5.

[59] *Young & Norton* v. *Hinderlider*, 15 N. Mex. 666, 667-668, 110 Pac. 1045 (1910).

[60] N. Mex. Const. art. XVI, §3; N. Mex. Stat. Ann. §75-1-2 (1968).

[61] In *Harkey* v. *Smith*, 31 N. Mex. 521, 531, 247 Pac. 550 (1926), the court said, "[N]o 'dog in the manger' policy can be allowed in this state." The quantity of water applied to beneficial use, not ditch capacity, limits the appropriator's right. *Millheiser* v. *Long*, 10 N. Mex. 99, 104, 117, 61 Pac. 111 (1900). See also *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 371, 143 Pac. 207 (1914); *Murphy* v. *Kerr*, 296 Fed. 536, 542, 545 (D. N. Mex. 1923).

[62] *Snow* v. *Abalos*, 18 N. Mex. 681, 694-695, 140 Pac. 1044 (1914).

[63] N. Mex. Stat. Ann. §75-5-17 (Supp. 1973), discussed in *State ex rel. Reynolds* v.

The statute recognizes the natural right of people living in the upper valleys of stream systems to impound and utilize a reasonable share of waters precipitated upon and having their source in such valleys and superadjacent mountains, but exercise of the right is subject to the provisions of laws governing appropriation of water.[64]

Some aspects of the New Mexico appropriative right.—Under the New Mexico statute, all waters appropriated for irrigation purposes—except as otherwise provided by written contract between landowners and owners of works for storage or conveyance of the water—are appurtenant to specified lands of the water right holder so long as the water can be beneficially used on such land, subject to separability in connection with change of place of use under statutory authority as noted below.[65] Appurtenance of the right to the particular land upon which the water is applied to beneficial use is also recognized by the courts.[66]

The right of a junior appropriator to the use of water is always subservient to that of prior appropriators and can be exercised only after their needs have been supplied.[67] The senior appropriator, however, is limited to the quantity of water to which his appropriative right attaches, and any surplus over that quantity can be appropriated by those who come later.[68]

Water may be delivered into "any ditch, stream, or watercourse" to supply appropriations therefrom in exchange for water taken above or below such point of delivery, less transmission losses determined by the State Engineer, if the rights of others are not thereby injured.[69] This statutory provision was held unconstitutional by the New Mexico Supreme Court insofar as it authorized the taking of a property right without compensation, in that the statute does not provide for compensation to the owner of a *ditch* in a case in which a

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Mears, 86 N. Mex. 510, 525 Pac. (2d) 870, 875-876 (1974). See also the discussion at note 121 *infra* regarding waste of artesian ground waters.

[64] N. Mex. Stat. Ann. §75-5-27 (1968).

[65] *Id.* §75-1-2.

[66] *Murphy* v. *Kerr*, 296 Fed. 536, 541, 545 (D. N. Mex. 1923); *Middle Rio Grande Water Users Assn.* v. *Middle Rio Grande Conservancy Dist.*, 57 N. Mex. 287, 299, 258 Pac. (2d) 391 (1953). For status of appurtenance of a right to use water for raising stock on the public domain, see *First State Bank of Alamogordo* v. *McNew*, 33 N. Mex. 414, 423-429, 269 Pac. 56 (1928).

[67] *Harkey* v. *Smith*, 31 N. Mex. 521, 530-531, 247 Pac. 550 (1926).

But if needed, and the water is not reaching his diversion point, the prior appropriator must make his needs known. *Worley* v. *U.S. Borax & Chemical Corp.*, 78 N. Mex. 112, 428 Pac. (2d) 651, 654 (1967), discussed in note 131 *infra*.

[68] *State ex rel. Community Ditches* v. *Tularosa Community Ditch*, 19 N. Mex. 352, 371, 143 Pac. 207 (1914). When one's requirements are satisfied, he must permit others to use the water. *Snow* v. *Abalos*, 18 N. Mex. 681, 695, 140 Pac. 1044 (1914). See also *Harkey* v. *Smith*, 31 N. Mex. 521, 531, 247 Pac. 550 (1926). Regarding burden of proof, see *Pecos Valley Artesian Conservancy Dist.* v. *Peters*, 52 N. Mex. 148, 152-154, 193 Pac. (2d) 418 (1948).

[69] N. Mex. Stat. Ann. §75-5-24 (1968).

nonowner attempts to take advantage of the statute.[70] But it must be understood, the court stated specifically, that this holding was for the purposes of this case and like cases only, where the question is as to the right to use a senior ditch, constructed and maintained at cost to the owners, without compensation. It "has no application to cases where the right to use natural streams and water courses is involved. In the latter class of cases we can see no objection to the statute."

It was well settled long ago that water might be diverted from a stream by an individual or corporation and served to others for their beneficial use, the builder and diverter being the water users' agent for such purpose.[71] A commercial water company, therefore, may appropriate water for such purpose;[72] in fact, the water rights statute provides that owners of works who make application to store or carry water in excess of their own needs are required, as trustees of such right, to deliver the surplus "at reasonable and uniform rates to parties entitled to use the same under like conditions and circumstances."[73] When a company constructs works and sells land to farmers together with water supply contracts, the water right becomes appurtenant to the land irrigated and belongs to the landowner.[74]

A section of the water appropriation statute provides that water may be transferred from one stream or drainage into another and diverted therefrom, less transmission losses determined by the State Engineer.[75] Another section makes it unlawful to divert waters of any public stream for use in a valley other than that of such stream, to the impairment of subsisting prior appropriations.[76]

With the State Engineer's approval, an appropriator may use water for a purpose other than that for which is was appropriated, or he may change the place of diversion, storage, or use;[77] but no change may be allowed to the detriment of holders of rights on the stream system.[78]

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[70] *Miller* v. *Hagerman Irr. Co.*, 20 N. Mex. 604, 612-614, 151 Pac. 763 (1915). The State can compel such portage of water in a private ditch, said the court, but only when just compensation is made, which is not provided for here.

[71] *Albuquerque Land & Irr. Co.* v. *Gutierrez*, 10 N. Mex. 177, 240-241, 61 Pac. 357 (1900), affirmed, 188 U.S. 545, 555-556 (1903).

[72] *Hagerman Irr. Co.* v. *McMurry*, 16 N. Mex. 172, 182, 113 Pac. 823 (1911).

[73] N. Mex. Stat. Ann. §75-5-16 (1968).

[74] *Murphy* v. *Kerr*, 296 Fed. 536, 545 (D. N. Mex. 1923). The physical waterworks system is the property of the construction agency, but the contracting water users hold easements in the company's works. *Bolles* v. *Pecos Irr. Co.*, 23 N. Mex. 32, 41, 167 Pac. 280 (1917); *Murphy* v. *Kerr*, *supra* at 546-549, affirmed, 5 Fed. (2d) 908 (8th Cir. 1925).

[75] N. Mex. Stat. Ann. §75-5-24 (1968).

[76] *Id.* §75-7-5.

[77] In case of community acequias in operation before the statute of 1907 went into effect, no permit is necessary for authority to change the place of diversion provided it works no increase in quantity of water appropriated. *Id.* §75-14-60.

[78] *Id.* §75-5-23. A change of proposed point of diversion in a corrected application to

The right to use water for irrigation on land to which it is appurtenant may never be severed from the land without the consent of the landowner; but with his consent, all or any part of the right may be severed therefrom and simultaneously transferred to and become appurtenant to other land, or it may be transferred for any other purposes, without losing priority of right theretofore established. Essential conditions are that the change be made without detriment to existing rights, that the State Engineer give his approval, and that approval be preceded by published notice as required by the State Engineer.[79]

Possible ways of losing water rights that have been discussed in opinions of the New Mexico Supreme Court are:

(1) Abandonment. The New Mexico Supreme Court has indicated that water rights may be lost by abandonment. The doctrine of abandonment, unlike statutory forfeiture, discussed below, requires the element of intention. Nonuse alone is not sufficient to show intent to abandon. But "[a]fter a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse."[80]

(2) Statutory forfeiture. A New Mexico statute provides that when the party entitled to use water fails, for 4 years, to beneficially use all or any part of the water for the purpose for which the vested right was appropriated or adjudicated, such unused water shall, if the appropriator fails to beneficially use the water for 1 year after notice and declaration of nonuse given by the State Engineer, revert to the public and be regarded as

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appropriate water is subject to these provisions and the rules and regulations of the State Engineer. *Id.* §75-5-3. Section 75-5-23.1 (Supp. 1973) includes a procedure for granting temporary approval of changes in points of diversion, storage, or use of water in emergency situations.

In *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 79 N. Mex. 65, 439 Pac. (2d) 714, 718 (1968), the court noted that the State Engineer, having determined that a change could be made without detriment to existing rights, in granting the change nevertheless took the precautionary measure of imposing conditions that limited the amount of water to be diverted, required measurement and recording of water diversions and return flow, protected certain junior appropriators, and generally prohibited any detriment to existing rights. The court also noted that the appropriator making the change could take no more water than would have been available at the old point of diversion as provided in an adjudication decree.

With respect to changing diversions of interrelated surface and ground waters, see *Langenegger* v. *Carlsbad Irr. Dist.*, 82 N. Mex. 416, 483 Pac. (2d) 297, 300 (1971), wherein the court said, *inter alia*, "Applicants [for wells] are appropriators of water from the mainstream or channel of the Pecos River, and, as such, are entitled, subject to the rights of other appropriators, to rely and depend upon all the sources which feed the main stream above their points of diversion, all the way back to the farthest limits of the watershed."

[79] N. Mex. Stat. Ann. §§75-5-21 and 75-5-22 (1968). See §75-5-21 regarding an exception for storage reservoirs.

[80] *State ex rel. Reynolds* v. *South Springs Co.*, 80 N. Mex. 144, 452 Pac. (2d) 478, 481-482 (1969).

unappropriated water.[81] Upon a showing of reasonable cause for delay or nonuse or upon a finding by the State Engineer that it is in the public interest, the State Engineer may grant extensions of time, not to exceed 1 year for each extension, in which to apply the water to beneficial use. The forfeiture shall not occur for certain stated exceptions; nor shall it necessarily occur if circumstances beyond the control of the owner caused the nonuse such that the water could not be diligently placed to beneficial use.[82] A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the forfeiture period for the period of the exemption, and such period shall not be included in computing the forfeiture period.[83]

(3) Adverse possession and use. In 1937, the New Mexico Supreme Court, in referring to the testimony introduced in the trial in the lower court, said that the testimony did not prove an abandonment of the water right in question, "nor a prescriptive right (if such a right can be acquired under our law) * * *."[84] In a 1961 case, the court included in its opinion the following statement: "The trial court did not determine, nor do we, whether a water right is subject to being acquired by prescription. A determination of that legal question, likewise, requires the presence of all persons who would be affected by the question being resolved."[85]

(4) Estoppel. Questions of estoppel have been considered in several water rights decisions of the Supreme Court of New Mexico. By his conduct one may

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[81] See 452 Pac. (2d) at 480-481.

See the discussion at note 119 *infra* regarding forfeiture for nonbeneficial use or waste of artesian ground waters.

[82] In the latter regard, see *W.S. Ranch Co.* v. *Kaiser Steel Corp.*, 79 N. Mex. 65, 439 Pac. (2d) 714, 717 (1968); *State ex rel. Reynolds* v. *South Springs Co.*, 80 N. Mex. 144, 452 Pac. (2d) 478, 482 (1969). These and some earlier cases are discussed in chapter 14 at notes 301-303.

[83] N. Mex. Stat. Ann. §75-5-26 (1968).

[84] *Pioneer Irrigating Ditch Co.* v. *Blashek*, 41 N. Mex. 99, 102, 64 Pac. (2d) 388 (1937).

In *Bounds* v. *Carner*, 53 N. Mex. 234, 205 Pac. (2d) 216, 223 (1949), in response to the defendants' claim of a prescriptive right based on 10-years' use, the court said: "Limitation did not begin to run from the date water was used by defendants; but from the date their use deprived plaintiffs of their appropriated water, which was in 1945 * * *.

"Defendants acquired no right to the use of plaintiffs' appropriated water by limitation or prescription."

In *Martinez* v. *Mundy*, 61 N. Mex. 87, 295 Pac. (2d) 209, 214 (1956), the court held that under the circumstances no prescriptive right had been acquired to water livestock and cut wood, or to pasturage and use of roads, because the claimed use was not continuous, was permissive, and was not exclusive since it also was claimed by many others.

In an early case, the court held that under the circumstances thereof an easement in land crossed by an artificial acequia had been acquired by adverse use for a very long period. *Trambley* v. *Luterman*, 6 N. Mex. 15, 23-24, 26, 27 Pac. 312 (1891).

[85] *State* v. *W. S. Ranch Co.*, 69 N. Mex. 169, 364 Pac. (2d) 1036, 1040 (1961).

have led another to take a position with respect to water use that is detrimental to his own interest. Such questions are usually determined according to principles of equity and good conscience.[86] The court has indicated that it is necessary that the party who claims an estoppel shall have acted in reliance upon the silence of the others,[87] not merely with their knowledge.[88] But where a party, such as a prior appropriator, is not bound to object to the act of another, such as a junior appropriator, his failure to object does not deprive him of his remedy.[89]

The water rights statute authorizes the United States, the State of New Mexico, or any person, firm, association, or corporation to condemn rights of way for works for the storage or conveyance of water for beneficial uses, including the right to enlarge existing structures and to use them in common with the former owners.[90] In a recent case,[91] the New Mexico Supreme Court held that under the State's constitution and legislation, a right of way to lay a pipeline to a watercourse to make beneficial use thereof under an appropriative right could be acquired by eminent domain by a private corporation for coal mining purposes. The court indicated that the same principles would be applied to irrigation and other beneficial uses of water.[92]

Repudiation of the Riparian Water-Use Doctrine

The courts of New Mexico have declared consistently that the common law doctrine of riparian water-use rights is not—and never has been—in force in that jurisdiction. "We have said many times that the Common law doctrine of riparian right was not suited to the region, was never recognized, and did not obtain in this jurisdiction. * * * There is no room left here for the operation of the common law. Riparian rights do not obtain."[93]

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[86] *La Luz Community Ditch Co.* v. *Alamogordo*, 34 N. Mex. 127, 141, 145, 279 Pac. 72 (1929). The question was discussed at length in the opinion in this case.

[87] *Halford Ditch Co.* v. *Independent Ditch Co.*, 22 N. Mex. 169, 175, 159 Pac. 860 (1916).

[88] *Martinez* v. *Cook*, 56 N. Mex. 343, 352, 244 Pac. (2d) 134 (1952).

[89] *Trambley* v. *Luterman*, 6 N. Mex. 15, 26, 27 Pac. 312 (1891).

The question of the applicability of the doctrine of estoppel as against the State is discussed in chapter 14, at notes 905-907.

[90] N. Mex. Stat. Ann. § § 75-1-3 and 75-5-14 (1968).

With respect to individuals' exercise of the right of eminent domain, see *Young* v. *Dugger*, 23 N. Mex. 613, 615, 170 Pac. 61 (1918). See also *Albuquerque* v. *Garcia*, 17 N. Mex. 445, 449-454, 130 Pac. 118 (1913). With respect to condemnation of property already devoted to a public use, see the discussion in chapter 7 at notes 300-301, regarding *Albuquerque* v. *Garcia, supra*, and *Raton* v. *Raton Ice Co.*, 26 N. Mex. 300, 307, 191 Pac. 516 (1920).

[91] *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 81 N. Mex. 414, 467 Pac. (2d) 986 (1970).

[92] 467 Pac. (2d) at 990-991.

[93] *State ex rel. State Game Comm'n* v. *Red River Valley Co.*, 51 N. Mex. 207, 218, 225, 182 Pac. (2d) 421 (1945). For some other typical expressions, see *Trambley* v.

(*Continued*)

In a case decided in 1914, the State supreme court remarked that when the riparian question came before the courts for adjudication,[94] the doctrine of prior appropriation was judicially recognized and became the settled law of the Territory.[95] "The judicial declaration, however, did not make the law; it only recognized the law as it had been established and applied by the people, and as it had always existed from the first settlement of this portion of the country."

Ground Waters

Early court decisions.—In the earliest decision in which the New Mexico Supreme Court discussed rights to the use of ground waters, definite underground streams and percolating ground waters were differentiated in both law and fact.[96] Water artificially drained from a marsh into the natural channel of a canyon, in which the water flowed partly on the surface and partly under it to springs from which appropriations had been made, were held to be part of a definite underground stream subject to the appropriation doctrine, not a case of percolating water within the meaning of the law.

In a later case—*Vanderwork* v. *Hewes & Dean*[97]—involved water originating from seepage but diffused over the ground, which the court called seepage water or spring water from some unknown source, and which was treated in the case as percolating water. A third party attempted to appropriate the water, by a ditch through the land of the party on which the water arose, pursuant to the State statutory appropriation procedure. The supreme court held that the only seepage water subject to appropriation under permit from the Territorial Engineer was seepage water from constructed works, which did not apply to this present situation. With respect to rights to use percolating water, in small quantity from an unknown source, the court said, "It must be conceded, that for many years, the law as to such waters has been that the water was a part of the land and that each land owner could do with it as he chose."[98] The court differentiated the situation before it from that to which the doctrine of reasonable use, as defined in the California case of *Katz* v. *Walkinshaw*,[99] might apply, since that case involved rights to use percolating

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(*Continued*)

Luterman, 6 N. Mex. 15, 25, 27 Pac. 312 (1891); *Albuquerque Land & Irr. Co.* v. *Gutierrez*, 10 N. Mex. 177, 238, 61 Pac. 357 (1900); *Hagerman Irr. Co.* v. *McMurry*, 16 N. Mex. 172, 181-182, 113 Pac. 823 (1911); *Yeo* v. *Tweedy*, 34 N. Mex. 611, 615, 619-621, 286 Pac. 970 (1929); *Lindsey* v. *McClure*, 136 Fed. (2d) 65, 69 (10th Cir. 1943).

The doctrine of riparian rights may, however, encompass more than just the right to use water. See chapter 6 at notes 154-156.

[94] In *Albuquerque Land & Irr. Co.* v. *Gutierrez*, 10 N. Mex. 177, 61 Pac. 357 (1900).

[95] *Snow* v. *Abalos*, 18 N. Mex. 681, 693, 140 Pac. 1044 (1914).

[96] *Keeney* v. *Carillo*, 2 N. Mex. 480, 495-496 (1883).

[97] *Vanderwork* v. *Hewes & Dean*, 15 N. Mex. 439, 445-449, 110 Pac. 567 (1910).

[98] 15 N. Mex. at 446.

[99] *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

water from large areas of land saturated with artesian water. Also, in the instant case, the water while on the land on which it rose, and on the adjoining land on which it was being used, was not subject to appropriation by anyone without the consent of those landowners, so as to deprive them of the use of the water on their land. The court indicated that the rights of the adjoining landowner were subject to the prior right of the owner of the land on which the water rose to apply all of the water to a beneficial use on his own lands. The court suggested that any surplus above such beneficial use could be appropriated by the adjoining landowner, and that any surplus after the use of both such landowners was subject to appropriation in accordance with the general western law of prior appropriation.[100]

Legislation.—A ground water appropriation statute was enacted in 1931[101] to replace legislation enacted in 1927 which had been declared invalid because of technical defects.[102] There have since been various amendments and additions to the 1931 law.

The legislation declares:

> The water of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use.[103]

The legislation also includes the following provisions:

> For the purposes of this act [75-11-19 to 75-11-22] all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use within the state of New Mexico. All existing rights to the beneficial use of such waters are hereby recognized.
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> * * * *
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> No permit and license to appropriate underground waters shall be required except in basins declared by the state engineer to have reasonably ascertainable boundaries.[104]

Beneficial use is declared in the 1931 act to be the basis, the measure, and the limit to the right to use the waters described in the act.[105] The statute

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[100] The court stated later, in *Yeo* v. *Tweedy*, 34 N. Mex. 611, 624, 286 Pac. 970 (1929), that in the *Vanderwork* case it had left open the question as to whether the water there involved, seeping from an unknown source, was subject to appropriation at all.

[101] N. Mex. Laws 1931, ch. 131, Stat. Ann. §§75-11-1 to 75-11-12 (1968).

[102] *Yeo* v. *Tweedy*, 34 N. Mex. 611, 286 Pac. 970 (1929).

The validity of the 1931 statute was contested and was sustained in 1950 in *State ex rel. Bliss* v. *Dority*, 55 N. Mex. 12, 225 Pac. (2d) 1007 (1950), appeal dismissed for want of a substantial Federal question, 341 U.S. 924 (1951).

[103] N. Mex. Stat. Ann. §75-11-1 (1968).

[104] *Id.* §§75-11-19 and 75-11-21.

[105] *Id.* §75-11-2.

recognizes existing rights based upon application of the water to beneficial use, and the priorities of such rights.[106] Claimants of vested ground water rights may file declarations of their claims.[107]

Intending appropriators for irrigation or industrial uses of water are required to apply to the State Engineer for permits. If no objections are filed, and the State Engineer finds that there are unappropriated waters in the designated ground water source, or that the proposed appropriation would not impair existing water rights attaching to such source, he shall issue a permit to appropriate all or part of the waters applied for, subject to the rights of prior appropriators from that source of supply. If protests are filed, the State Engineer holds a hearing before granting or denying the application.[108]

In a 1967 case, *Mathers* v. *Texaco, Incorporated*, the New Mexico Supreme Court rejected "the view of the trial court that the taking of any water from [a non-rechargeable] basin, which could never be replaced, amounted to an impairment of existing rights."[109] The court indicated that the rights of prior

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[106] *Id.* § 75-11-4.

[107] *Id.* § § 75-11-5 and 75-11-6.

[108] N. Mex. Stat. Ann. § 75-11-3 (Supp. 1973).

All applications for watering livestock, for irrigation of 1 acre or less of noncommercial trees, lawn or garden, or for household or domestic use, shall be issued permits as a matter of course. And applicants to use 3 acre-feet or less of water for 1 year or less in prospecting, mining, or constructing public works and roads, or in drilling to discover or develop mineral resources, shall be issued permits if others' existing rights will not be *permanently* impaired. N. Mex. Stat. Ann. § 75-11-1 (1968).

A 1967 statute provides that no past or future order of the State Engineer declaring an underground basin shall include water in an acquifer containing nonpotable water, the top of which is 2,500 or more feet deep. However, notice of such wells shall be published, the State Engineer may require that data thereon be reported to him, and court actions for damages or injunctive relief may be brought by others claiming impairment of existing rights. *Id.* § § 75-11-37 to 75-11-40.

Sections 75-11-26 to 75-11-36, relating to rights in underground waters prior to inclusion in an underground basin, were repealed by Laws 1969, ch. 51, § 1. This is discussed in chapter 19 at notes 116 to 118.

In *Albuquerque* v. *Reynolds*, 71 N. Mex. 428, 379 Pac. (2d) 73, 79 (1963), the New Mexico Supreme Court indicated *inter alia* that, where both sources are public waters subject to appropriation, a prior appropriator from a stream may enjoin another from taking ground waters which would otherwise reach the stream and are necessary to serve the prior right.

[109] *Mathers* v. *Texaco, Inc.*, 77 N. Mex. 239, 421 Pac. (2d) 771, 775 (1967).

The court said that cases relied on by the protestants (one of which, *Heine* v. *Reynolds*, is discussed in note 116 *infra*) related to changes in well location or water use under § 75-11-7 of the statutes and that "unappropriated waters was not involved in those cases, and is not involved in the approval or rejection of an application filed pursuant to the provisions of § 75-11-7 * * *." 421 Pac. (2d) at 776-777. The court also said that the statements it referred to in the *Heine* case in no way require "a finding of impairment of existing rights merely because of a decline in the water level. We expressly recognized that the question of impairment of existing rights is one which must generally be decided upon the facts in each case * * *." 421 Pac. (2d) at 776.

appropriators are not necessarily impaired because a subsequent appropriator, by withdrawing waters from a non-rechargeable basin, causes a decline in the water level, higher pumping costs, and lower pumping yields.[110] The court said, "This must, of necessity, be true in a non-rechargeable basin * * * if the water is to be put to a beneficial use, and if the use is to be made available to more than the initial appropriator."[111] The court also said:

> The administration of a non-rechargeable basin, if the waters therein are to be applied to a beneficial use, requires giving to the stock or supply of water a time dimension, or, to state it otherwise, requires the fixing of a rate of withdrawal which will result in a determination of the economic life of the basin at a selected time.
>
> The very nature of the finite stock of water in a non-rechargeable basin compels a modification of the traditional concept of appropriable supply under the appropriation doctrine.[112]

The State Engineer had calculated the amount of water that could be withdrawn from each township in the basin and still leave one-third of the water in storage at the end of 40 years, at which time "it was contemplated that some of the remaining water could economically be withdrawn for domestic, and perhaps some other uses, but that it would no longer be economically feasible to withdraw the water for agricultural and most other purposes."[113] On this basis, there was available for appropriation by Texaco 350 acre-feet per year, which the State Engineer granted.[114] The court said, with respect to the 40-year time limitation established by the State Engineer, "There is nothing before us to prompt a feeling that this method of administration and operation does not secure to the public the maximum beneficial use of the waters in this basin."[115]

With the State Engineer's approval, the owner of a water right may change the location of his well or the use of water, upon a showing that the change will not impair existing rights.[116]

Sections 75-11-3 (regarding original appropriations) and 75-11-7 (regarding changes) both employ the term "not impair" existing rights.

[110] 421 Pac. (2d) at 775-776.

[111] 421 Pac. (2d) at 776.

[112] 421 Pac. (2d) at 775.

[113] 421 Pac. (2d) at 774.

[114] *Id.*

[115] 421 Pac. (2d) at 776.

[116] N. Mex. Stat. Ann. §75-11-7 (Supp. 1973). This section includes a procedure for making temporary changes not exceeding 1 year for not more than 3 acre-feet of water.

In *Heine* v. *Reynolds*, 69 N. Mex. 398, 367 Pac. (2d) 708, 710 (1962), the New Mexico Supreme Court said, "The burden is on the applicant to show *no impairment* of existing rights * * *. We cannot agree that the legislature intended to qualify the term 'impairment' by adding 'substantial' thereto." The court also said, however, "We are of the view that the question of impairment of existing rights is a matter which must

(*Continued*)

When the holder of a permit to appropriate ground waters fails to beneficially use the waters for 4 years for the purpose for which it was granted or has vested or has been adjudicated, such unused water shall, if the appropriator fails to beneficially use it for 1 year after notice and declaration of nonuse given by the State Engineer, revert to the public and be regarded as unappropriated water.[117] The forfeiture shall not occur under certain stated exceptions; provisions are included regarding extensions of time that may be granted by the State Engineer and related matters (which are similar to the forfeiture provisions regarding watercourses discussed earlier).[118] The New Mexico Supreme Court has held that one who allowed water from an artesian well to continuously flow uncontrolled over grazing land for more than 4 years forfeited his appropriative right because of his waste of water, which it indicated was a nonpermissible "nonbeneficial use."[119]

Appeals from decisions of the State Engineer may be taken to the courts within 30 days after his decisions.[120]

(*Continued*)

generally depend upon each application, and to attempt to define the same would lead to severe complications." 367 Pac. (2d) at 711. (See note 109 *supra* regarding a discussion of this case in a later case involving an original appropriation.) In a subsequent case, the court said, "We do not decide whether there is an impairment if there is a 'worsening' * * * in the quality of water. * * * The quality of the water has not worsened (deteriorated) as a result of the lowering of the water level, if the result of such lowering is of such little consequence that it should be disregarded." *Roswell* v. *Berry*, 80 N. Mex. 110, 452 Pac. (2d) 179, 185 (1969).

In *Roswell* v. *Berry*, 86 N. Mex. 249, 522 Pac. (2d) 796, 802 (1974) the court said that the State Engineer "had the authority to approve the * * * application subject to conditions necessary to prevent impairment of existing rights."

With respect to changing diversions of interrelated surface and ground waters, see *Langenegger* v. *Carlsbad Irr. Dist.*, 82 N. Mex. 416, 483 Pac. (2d) 297 (1971), discussed in note 78 *supra*.

Special provisions and conditions pertaining to replacement and supplemental wells in emergencies are included in N. Mex. Stat. Ann. § § 75-11-24 and 75-11-25 (1968).

[117] N. Mex. Stat. Ann. § 75-11-8 (1968).

[118] See the discussion of § 75-5-26 at notes 81-83 *supra*.

Unlike § 75-5-26 regarding watercourses, which expressly pertains to failure to beneficially use "all or any part" of the water, § 75-11-8 regarding ground waters refers simply to the failure to apply the waters to beneficial use, as described above. In *State ex rel. Reynolds* v. *Mears*, 86 N. Mex. 510, 525 Pac. (2d) 870, 873-874 (1974), the New Mexico Supreme Court left undecided the question of whether under § 75-11-8 " 'water rights in underground basins are not forfeited, pro tanto, for partial non-user.' "

[119] *State ex rel. Erickson* v. *McLean*, 62 N. Mex. 264, 308 Pac. (2d) 983, 987-989 (1957). The court said, "We do not want to be understood as holding that public waters cannot be beneficially used for irrigating native grass, but we do hold that the method employed by defendant in watering the grass on his land, as well as his livestock, cannot be considered as being beneficially used within the meaning of our Constitution and laws of this State." 308 Pac. (2d) at 987.

[120] N. Mex. Stat. Ann. § 75-11-10 (1968).

New Mexico legislation includes specific provisions that enable the State Engineer to regulate the use of waters in artesian basins with reasonably ascertainable boundaries so as to prevent their waste.[121] Where artesian conservancy districts have been organized, such districts have concurrent authority to enforce such regulations so far as waters to be conserved and controlled by such districts are affected.[122]

An artesian district may acquire the same rights and authority, which it has over artesian waters, over any other ground waters within its boundaries if such waters have reasonably ascertainable boundaries, are derived substantially from the artesian basin in the district, and are so closely related to the artesian waters that they can be effectively conserved by the district.[123]

A 1971 statute provides that in addition to the duty of water for irrigation within an artesian conservancy district established under the applicable legislation, a specified additional amount shall be granted to compensate for carriage loss from point of appropriation to point of beneficial use.[124]

Special Statutory Adjudication Procedures

Statutory adjudications of water rights in New Mexico are made exclusively in the courts. The State Engineer is directed to make hydrographic surveys of stream systems in the State and to deliver to the Attorney General, upon completion of such a survey, the portion thereof necessary for a determination of all water rights on the stream system. On request of the State Engineer, the Attorney General is required to initiate suit on behalf of the State for such determination unless a suit therefor has been begun by private parties. However, in any water adjudication suit not initiated under the statutory procedure, the Attorney General must intervene on behalf of the State if in the opinion of the State Engineer the public interest requires it. On the filing of any suit for determination of water rights the court must order the State Engineer to make or furnish a complete hydrographic survey.[125]

In any suit to determine water rights on any stream system, all claimants are to be made parties.[126] On completion of the adjudication,

> [The] decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant,

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[121] *Id.* §§75-12-1 to 75-12-12.

[122] *Id.* §75-12-2.

[123] *Id.* §§75-13-22 and 75-13-23.

Artesian wells and conservancy districts have been discussed in more detail in chapter 19 at notes 225-242.

[124] N. Mex. Stat. Ann. §75-13-25 (Supp. 1973).

[125] N. Mex. Stat. Ann. §§75-4-2 to 75-4-6 (1968).

[126] *Id.* §75-4-6.

> together with such other conditions as may be necessary to define the right and its priority.[127]

In a 1931 case involving the adjudication of rights to interconnected surface and ground waters, the New Mexico Supreme Court declared that the jurisdiction of the court in which the adjudication action was pending was exclusive of that of another coordinate court to entertain an adverse suit by artesian basin appropriators. The court also said that a statutory suit to adjudicate water rights of a stream system is all-embracing; that it includes claims of appropriators of water in an artesian basin within the system who claim that the surface waters contribute to the recharge of their artesian water supply.[128]

In a subsequent suit to adjudicate water rights in an artesian basin, the defendants argued that the statutory provisions relating to adjudications applied only to stream systems and not to artesian or shallow water pools. In response, the supreme court stated, "It is sufficient answer to this argument to point out that in the [1931] case * * *, this Court held that the [statutory adjudication] procedure * * * was 'all-embracing and includes claimed rights of appropriators from artesian basin' within a stream system."[129]

Administration of Water Rights and Distribution of Water

The State Engineer is vested by statute with supervision of the apportionment of water in accordance with licenses issued by him and his predecessors and adjudications of the courts.[130]

The State Engineer has jurisdiction to create and to change water districts from time to time when necessary for proper apportionment of water. Upon written application of a majority of water users in a water district, he is required to appoint a watermaster who has immediate charge over the apportionment of waters therein under the general supervision of the State Engineer and he shall so control the water as to prevent waste.[131] Even in the

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[127] *Id.* § 75-4-8.

[128] *El Paso & R. I. Ry.* v. *District Ct.*, 36 N. Mex. 94, 95, 8 Pac. (2d) 1064 (1931).

[129] *State ex rel. Reynolds* v. *Sharp*, 66 N. Mex. 192, 344 Pac. (2d) 943, 944 (1959), referring to *El Paso & R. I. Ry.* v. *District Ct.*, 36 N. Mex. 94, 8 Pac. (2d) 1064 (1931).

[130] N. Mex. Stat. Ann. § 75-2-9 (1968).

[131] In a 1967 case, the New Mexico Supreme Court held that a downstream senior appropriator is entitled to use water within his appropriation to the extent of his needs, but if he does not need it, upstream junior appropriators may use it. (In this regard, see also the discussion at notes 67-68 *supra*.) If needed, and if the water is not reaching his diversion point, he must make his needs known. "We are not required to decide whether the demand must be made upon the State Engineer (see § § 75-2-1 and 75-2-9, N.M.S.A. 1953), the water master (see § § 75-3-1 and 75-3-2, N.M.S.A. 1953), the upstream junior appropriators or one or more of them. Here, it is undisputed that no demand of any kind was made." *Worley* v. *U.S. Borax & Chem. Corp.*, 78 N. Mex. 112, 428 Pac. (2d) 651, 653-655 (1967).

absence of such an application by the water users, he may appoint a watermaster for either temporary or permanent service if, in his opinion, local conditions require it. The watermasters are to report such information to the State Engineer as he may require, such as the adequacy or inadequacy of the water supply, and the State Engineer shall correct any errors of apportionment as may be needed. During the existence of an emergency, and only during such time, the State Engineer may employ assistants to serve under a watermaster.[132]

Any person may appeal from the acts or decisions of a watermaster to the State Engineer, and thence to the district court for judicial review of the State Engineer's decisions.[133]

Local or community customs, rules, and regulations adopted by the water users under a common lateral or irrigation system with respect to distribution of water therefrom, and not detrimental to the public welfare, are not to be changed unless desired by the interested users. This, however, is not to be construed as impairing the authority of the State Engineer and watermaster to regulate distribution of water from stream systems to ditches and irrigation systems entitled thereto.[134]

When water rights of New Mexico landowners pertaining to interstate streams have been litigated in the State or Federal courts of an adjoining State, the State Engineer's duty is to assume control over all or any part of such stream and to administer the same in the public interest. Conservancy districts, irrigation districts, and Federal reclamation projects in the State are exempted.[135]

North Dakota

Governmental Status

The Territory of Dakota was established March 2, 1861.[1] Both North Dakota and South Dakota were created out of the Territory of Dakota on the same day, but by separate acts of Congress. North Dakota was admitted to statehood on November 2, 1889.[2]

State Administrative Agencies

The State Engineer, subject to the approval of the Water Conservation Commission (of which he is secretary and chief engineer[3]), has supervision over the acquisition of water rights.[4] All functions relating to the administration of

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[132] N. Mex. Stat. Ann. § § 75-3-1 to 75-3-5 (1968).

[133] *Id.* § 75-3-3, referring to § § 75-6-1 (discussed at note 55 *supra*) and 75-6-2.

[134] *Id.* § 75-8-2.

[135] *Id.* § 75-4-11.

[1] 12 Stat. 239 (1861).

[2] 26 Stat. 1548 (1889).

[3] N. Dak. Cent. Code Ann. § 61-03-01 (1960).

[4] N. Dak. Cent. Code Ann. § § 61-02-30 and 61-04-02 (Supp. 1973).

water rights are exercised by the Water Conservation Commission.[5] In the determination of water rights generally, the role of the State agencies is limited to the preparation of hydrographic surveys by the State Engineer and to his making requests to the Attorney General to commence determination proceedings or to intervene in private adjudication proceedings.[6] Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—In 1881 the Legislature of Dakota Territory enacted a water use statute which declared principles of the appropriation doctrine, including posting and filing of certificates of location of water rights. While granting to landowners the right to use stream waters for certain beneficial purposes, the statute provided that the right to such use should not interfere with prior rights or claims in connection with which the law had been complied with by doing the necessary work. And this legislation recognized the preexistence of rights "acquired before the passage of this act" by declaring that such rights in good standing were not to be impaired by the enactment.[7]

The earliest water rights decision of the Territorial supreme court involved a dispute between two homesteaders.[8] The later entryman (plaintiff) located a water right on defendant's earlier possession for the purpose of diverting

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[5] N. Dak. Cent. Code Ann. ch. 61-02 (1960).

Included among the various powers and duties assigned to the Commission are the full powers (1) to regulate, construct, operate, and supervise all works, both public and private, which in its judgment may be necessary or advisable (a) to control low-water flow and flood flows of streams, (b) to conserve and develop waters within natural watershed boundaries and, subject to vested rights, to divert waters from one watershed to another and from one river, lake, or stream into another, (c) to develop and restore water for domestic, agricultural, municipal, irrigation, flood control, recreation, and wildlife conservation uses, and (d) to provide for the storage, development, diversion, delivery, and distribution of water for irrigation of agricultural land and supply water for municipal and industrial purposes; (2) to establish rules and regulations (a) for the sale of waters and water rights, (b) for the full supervision, regulation, and control of water supplies, and (c) for the complete supervision and control of acts tending to pollute watercourses; and (3) to exercise all express and implied rights, power, and authority that may be necessary. *Id.* §61-02-14, as amended.

See also §§61-02-29, 61-02-37, 61-02-41, 61-02-44 (1960), and 61-02-38 (Supp. 1973).

[6] N. Dak. Cent. Code Ann. §§61-03-15 to 61-03-17 (1960).

The Water Conservation Commission has authority to institute and prosecute suits to adjudicate water rights and join parties under certain circumstances. *Id.* §61-02-23.

[7] Terr. Dak. Laws 1881, ch. 142.

[8] *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541 (1890). It was held, and affirmed, that defendant's lawful occupancy under settlement and entry before any action had been taken by plaintiff was a prior appropriation of the water right which plaintiff could not displace. This case is discussed further under "The Riparian Doctrine" and "Interrelationships of the Dual Systems," *infra.*

stream water thereon for conveyance to and use upon his own adjoining homestead. This was done in May 1880, before defendant had made any use of the water. Plaintiff posted a written notice, and he caused a copy to be filed as a certificate in the county records on May 9, 1881, several months after enactment of the Territorial statute noted above. One of the findings of fact as set forth in the opinion of the United States Supreme Court on appeal was that the custom which had existed in the county ever since its settlement recognized the right to locate water rights and to divert, appropriate, and use stream waters for purposes of irrigation when such acts did not conflict or interfere with rights vested and accrued prior thereto.[9]

Procedure for appropriating water.—A statute enacted by the Territory of Dakota in February 1881, noted under the previous subtopic, declared that owners of mineral or agricultural lands were entitled to the usual enjoyment of stream waters for mining, milling, agricultural, or domestic purposes, but not such as to interfere with any prior right or claim in connection with which the law had been complied with by doing the necessary work.[10] This act also provided, among other things, that rights to the use of water, whether mining, milling, agricultural, or domestic, were to be determined by dates of appropriation. Within 20 days from the date of location of a water right, the locator had to file a location certificate in the appropriate county office and post a copy at or near the place of diversion. Failure to commence construction within 60 days and to prosecute work to completion without unnecessary delay constituted abandonment. Rights acquired before passage of the act were not to be impaired thereby; but if the project was not worked on for the immediately preceding year, the water right should be deemed abandoned and forfeited.

This act of 1881 was carried over into the laws of the State of North Dakota. It was specifically repealed in the Revised Codes of 1895,[11] but was reenacted in 1899 in the same form, mostly in identical or substantially identical language.[12]

The 1899 law was replaced by the "Irrigation Code" of 1905, which repealed all conflicting laws.[13] This act established the original administrative procedure for appropriating water after first making application to the State Engineer; for determination of water rights; and for distribution of water by water commissioners who together with the State Engineer as president had general supervision of the apportionment of waters of the State. With respect to water commissioners, see the later discussion, "Administration of Water Rights and Distribution of Water." The 1905 act has since been amended in various respects.

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[9] 133 U.S. at 552.
[10] Terr. Dak. Laws 1881, ch. 142.
[11] N. Dak. Rev. Codes, p. 1518 (1895).
[12] N. Dak. Laws 1899, ch. 173.
[13] N. Dak. Laws 1905, ch. 34, approved March 1, 1905.

Before commencing construction or taking water from constructed works, an intending appropriator must make application to the State Engineer for a permit to appropriate the water, unless such construction or taking is for domestic, livestock, or fish, wildlife and other recreational purposes and the impoundment for such purposes will not be capable of retaining more than 12½ acre-feet of water.[14] Subject to the approval of the Water Conservation Commission, the State Engineer may accept and process the application to completion.[15]

Upon the filing of an application, the State Engineer shall order the applicant to provide notice of the application.[16] Following proof of publication, the State Engineer shall determine from the evidence presented by the interested parties whether or not to approve the application.[17] In case he refuses to approve the application, the applicant may appeal to the appropriate district court from any decision of the State Engineer which denies a substantial right.[18]

The North Dakota constitution provides that all flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation, and manufacturing purposes.[19]

As amended in 1955 and 1957, section 61-01-01 of the water appropriation statute provides that waters that belong to the public and are subject to appropriation pursuant to the applicable provisions comprise:

1. Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; and
2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters; and

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[14] N. Dak. Cent. Code Ann. §61-04-02 (Supp. 1973). The provision regarding excepted uses was added by Laws 1965, ch. 447, §5. But, upon completing any constructed works for the excepted purposes, the water user must notify the State Engineer where such works are located and their acre-feet capacity. N. Dak. Cent. Code. Ann. §61-04-02 (Supp. 1973).

Regardless of the proposed use, a permit is required before constructing an impoundment with a capacity of more than 12½ acre-feet of water. *Id.* §§61-04-02 and 61-02-20. Section 61-03-21 includes special procedures regarding water-storage reservoirs with a capacity exceeding 1,000 acre-feet.

[15] N. Dak. Cent. Code Ann. §61-02-30 (Supp. 1973).

Water rights may be appropriated by the Commission, the United States, any agency or department thereof, any person, association, firm, corporation, municipality, or any State or agency or political subdivision thereof. *Id.* and §61-04-02.

[16] *Id.* §61-04-05.

[17] *Id.* §61-04-06.

[18] N. Dak. Cent. Code Ann. §61-04-07 (1960).

[19] N. Dak. Const. art. XVII, §210.

3. All residual waters resulting from beneficial use, and all waters artificially drained; and
4. All waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is hereby defined to be any area which does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency oftener than once in three years over the latest thirty year period * * *.[20]

The third and fourth categories were added by the 1957 amendment.

If an application is approved it shall become a conditional water permit.[21] Upon satisfactory completion of construction, the State Engineer shall issue a perfected water permit.[22]

Appropriative rights initiated prior to enactment of the statute of 1905 relate back to the date of initiation of the claim, upon diligent prosecution to completion. Priorities of rights initiated thereafter relate back to the date of receipt of the application by the State Engineer, subject to the taking of all required steps;[23] failure to make changes in constructed works required by the State Engineer on his inspection on completion of an appropriation causes the postponement of priority, and any application subsequent in time may have the benefit of such postponement of priority.[24] The time for applying water to beneficial use may be extended for good cause.[25]

Restrictions and preferences in appropriation of water.—Beneficial use is the basis, the measure, and the limit of the right to use water.[26]

The State Engineer is required to reject an application if, in his opinion, there is no unappropriated water available. Publication of notice of any application that does not comply with the law, and rules and regulations thereunder, must be refused. Moreover, the State Engineer may refuse to consider or approve an application or to order publication of notice if in his opinion its approval would be contrary to the public interest.[27]

In issuing a water permit after the application of the water to beneficial use, such permit shall include "such limitations upon the water permit as shall be warranted by the condition of the works and to the extent and under the conditions of the actual application of the water to a beneficial use, but in no manner extending any right described in the conditional water permit."[28]

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[20] N. Dak. Cent. Code Ann. §61-01-01 (1960).
[21] N. Dak. Cent. Code Ann. §61-04-06 (Supp. 1973).
[22] *Id.* §61-04-09.
[23] N. Dak. Cent. Code Ann. §61-01-03 (1960).
[24] N. Dak. Cent. Code Ann. §61-04-09 (Supp. 1973).
[25] *Id.* §61-04-14.
[26] *Id.* §61-01-02.
[27] N. Dak. Cent. Code Ann. §61-04-07 (1960). See also N. Dak. Cent. Code Ann. §61-04-06 (Supp. 1973).
[28] N. Dak. Cent. Code Ann. §61-04-09 (Supp. 1973).

In permits for and adjudications of irrigation water rights, the quantity of water allowed must not exceed 1 cubic foot per second for each 80 acres, for a specified time or its equivalent, delivered on the land.[29]

A provision enacted in 1963 and amended in 1965 states:

> In all cases where the use of water for different purposes conflicts such uses shall conform to the following order of priority:
>
> 1. Domestic use.
> 2. Livestock use.
> 3. Irrigation and industry.
> 4. Fish, wildlife and other outdoor recreational uses.
>
> As between appropriators for the same use, priority in time shall give the better right.[30]

With respect to priorities, another section of the statutes states generally, "Priority in time shall give the better right."[31]

The question of pending applications made at approximately the same time to use water from an underground stream was considered by the State supreme court in a 1968 case. In this case, which largely concerned the validity of 1955 legislation and its effect upon riparian rights, discussed in more detail later under "Interrelationships of the Dual Systems," the court noted, as a pertinent fact, that it had been stipulated by the parties:

> That in the year 1955, the State of North Dakota specifically declared that [in addition to specified surface watercourses] all waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters, belong to the public and are subject to appropriation for beneficial use.[32]

The court, among other things, said:

> In upholding the constitutionality of Section 61-01-01, N.D.C.C., we do not approve the procedure followed by the State Water Commission

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[29] *Id.* §61-14-03. However, the State Engineer may allow a higher rate where the method of irrigation or the type of soil to which the water is to be applied so requires, up to a limit of 2 acre-feet per acre for any one season, and in no case more than can be beneficially used. And, during periods of sufficient water supply, the State Engineer (subject to the approval of the Water Conservation Commission and in accordance with the method of irrigation being used, the type of soil to which the water is to be applied, and other criteria established by the State Engineer) may increase the amount of water to 3 acre-feet per acre per season for a specified time not to exceed the period of sufficient water supply. *Id.*

[30] N. Dak. Laws 1963, ch. 419, §1, Laws 1965, ch. 447, §2, Cent. Code Ann. §61-01-01.1 (Supp. 1973).

[31] N. Dak. Cent. Code Ann. §61-01-02 (Supp. 1973).

[32] *Baeth* v. *Hoisveen*, 157 N.W. (2d) 728, 730 (N. Dak. 1968). The 1955 legislation is discussed at note 20 *supra.*

> in the instant case, which resulted in granting to one of two landowners, who owned adjacent land and who made application at approximately the same time for beneficial use of water [from an underground stream], the use of so much water that the other was in effect denied use of any water. The failure on the part of the State Water Commission to determine the actual amount of water available before granting the first neighbor's application resulted in a very disproportionate granting of water rights. Such a procedure, if followed in the future, might well justify legislative action directed toward preventing the reoccurrence of such inequitable results.[33]

In acquiring rights and administering its functions, the State Water Conservation Commission is not limited to the procedure applicable to appropriations generally. The Commission may initiate a water right by executing a written declaration of intention to store, divert, or control the unappropriated waters of a particular source and by causing such declaration to be filed in the office of the State Engineer.[34] The priority shall date from the date of filing.[35] In case of modification of plans, the Commission shall file a declaration with the State Engineer releasing all or part of the affected waters.[36] On completion of construction and application of the water to beneficial use the Commission shall file a declaration of completion of the appropriation with the State Engineer.[37]

Some aspects of the North Dakota appropriative right.—Water appropriated for irrigation is appurtenant to land owned by the appropriator so long as the water can be beneficially used thereon, and conveyance of title to land carries with it all appurtenant irrigation water rights, unless such rights have been severed as discussed below.[38]

Owners of works who propose to store or carry water in excess of their needs may make application to appropriate such excess. They are held as trustees of the excess for parties who apply the water to beneficial use, and are required to furnish it to them at reasonable rates.[39] Owners of works which contain water in excess of the owners' needs are required to deliver the surplus at reasonable rates to parties entitled thereto. Such rates may be determined if necessary by the State Engineer. Delivery of water under such circumstances may be enforced by the district court.[40]

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[33] *Id.* at 373-374.

[34] N. Dak. Cent. Code Ann. §61-02-30 (Supp. 1973).
Regarding additional powers and duties of the Commission, see the discussion at note 5 *supra.*

[35] *Id.* §§61-02-30 and 61-02-31.

[36] N. Dak. Cent. Code Ann. §61-02-32 (1960).

[37] *Id.* §61-02-33.

[38] N. Dak. Cent. Code Ann. §§61-01-02 and 61-04-15 (Supp. 1973). This is discussed in note 43 *infra.*

[39] N. Dak. Cent. Code Ann. §61-04-03 (1960).

[40] *Id.* §61-04-17.

Water may be turned into a watercourse and reclaimed below, subject to existing rights, due allowance for losses to be determined by the State Engineer.[41] If the Water Conservation Commission uses natural streams for conveyance of water from place of confinement to place of use, it is directed to adopt proper means of determining the natural flow when insufficient to satisfy prior rights.[42]

A North Dakota statute provides that changes may be made by an appropriator of water in the purpose of use or place of diversion, storage, or use. Another statute provides that irrigation appropriations may be assigned or transferred to other lands owned by the holder, with the approval of the State Engineer, if this can be done without detriment to existing rights.[43]

When any appropriated water or portion thereof has not been put to useful or beneficial purpose, or having been so used has ceased to be so used for more than 3 successive years (unless the nonuse shall be due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause), the State Engineer shall declare such "water permit or right" forfeited. The statutes provide for notice, hearing, and appeal procedures for the forfeiture and cancellation of the right.[44]

The use of or attempt to appropriate water from a watercourse, stream, or body of water, or from an underground source, for a beneficial use over a

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[41] *Id.* § 61-01-05.

[42] *Id.* § 61-02-36.

[43] N. Dak. Cent. Code Ann. § § 61-14-05 (1960) and 61-04-15 (Supp. 1973). The former section provides that such changes may be made "in the manner, and under the conditions prescribed in section 61-14-04." Prior to 1963, § 61-14-04 had provided, among other things, for administrative approval of such changes. However, in 1963 § 61-14-04 was repealed. N. Dak. Laws 1963, ch. 417, § 26. The 1963 laws, in ch. 417, § 1, amended § 61-01-02 of the statutes to provide that appropriations for irrigation purposes shall be appurtenant to specified owned lands "unless such rights to use water have been severed for other beneficial uses as provided by section 61-04-15." As amended in 1963, 1965, and 1969, § 61-04-15, among other things, provides, as noted in the text, that the assignment or transfer of irrigation appropriations requires administrative approval.

Section 61-04-15 also provides for temporary assignments or transfers of water permits held by State agencies or institutions.

Another statute regarding water rights of the State Water Conservation Commission initiated by filing declarations, discussed at notes 34-37 *supra*, provides that changes in means or place of diversion or control shall not affect the priority if others are not injured thereby. *Id.* § 61-02-31.

[44] N. Dak. Cent. Code Ann. § § 61-04-23 to 61-04-26 (Supp. 1973).

Hearings shall be initiated by the State Engineer but also may be initiated upon request of any owner of a water permit using water from a common supply, any applicant therefor, or any interested party, all of whom may appeal a denial of the request. *Id.* § 61-04-24.

Section 61-04-23 of the statutes provides that a water permit or right held by a State agency, department, board, commission, or institution may be declared forfeited only by the North Dakota Legislative Assembly.

period of 20 years prior to July 1, 1963, "shall be deemed to have acquired a right to the use of such water without having filed or prosecuted an application to acquire the beneficial use of such waters," if claims for such water are filed under the permit procedures within 2 years from July 1, 1963. If the State Engineer finds that the application and supporting documents substantiate the claim he shall approve the application. If no claim is filed within the 2-year period by the "prescriptive user," the right shall be "abandoned and forfeited." Any such "prescriptive water permit" acquired under this provision is subject to forfeiture for nonuse in the same manner as perfected appropriative rights.[45]

The United States, or any person, corporation, or association may exercise the power of eminent domain to acquire for public use any property or rights necessary for application of water to beneficial use, including the right to enlarge existing structures and to use them in common with the former owner.[46]

The Riparian Water-Use Doctrine

Early recognition of the riparian doctrine: Legislative.—An 1866 statute of the Territory of Dakota provided:[47]

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue, nor pollute the same.

This statute was carried over into the laws of North Dakota, but it was repealed in 1963.[48]

In the first appropriation statute of 1881 (see the earlier discussion, "Appropriation of Water of Watercourses—Procedure for appropriating water"), the Territorial legislature accorded to holders of title or possessory rights in mineral or agricultural lands "the usual enjoyment" of stream waters for mining, milling, agricultural, or domestic purposes, subject to prior rights to the use of such waters that were kept in good legal standing.[49] But this provision was replaced by the 1905 water rights statute in which the 1881 declaration was not repeated.

Early recognition of the riparian doctrine: Judicial.—Riparian rights in the

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[45] *Id.* §61-04-22.

[46] N. Dak. Cent. Code Ann. §61-01-04 (1960).

[47] Terr. Dak. Laws 1865-1866, ch. 1, §256, Civ. Code §255 (1877).

[48] N. Dak. Rev. Codes §3362 (1895), Rev. Code §4798 (1905), Comp. Laws §5341 (1913), Rev. Code §47-0113 (1943), Cent. Code Ann. §47-01-13 (1960), repealed, Laws 1963, ch. 419, §7.

[49] Terr. Dak. Laws 1881, ch. 142.

Territory of Dakota were recognized by the United States Supreme Court in *Sturr* v. *Beck*, a case appealed from the supreme court of the Territory.[50]

The State supreme court held in 1896 that the common law doctrine of riparian water-use rights was in force in the Territory of Dakota at the time the State constitution was adopted. By virtue thereof, riparian owners in the Territory were vested with property rights in the beds of natural watercourses and in the water itself.[51] The riparian water-use doctrine was also recognized by the State supreme court in 1917 and 1940.[52] In both cases, the court cited a later version of the 1866 statutory declaration[53] as recognizing the riparian doctrine.

Accrual and character of the riparian right.—In the early *Sturr* v. *Beck* case, the United States Supreme Court indicated that the riparian right accrued when the riparian land passed from the Federal Government to private ownership.[54]

In *Bigelow* v. *Draper*, decided in 1896, the North Dakota Supreme Court held that the owner of land through which a nonnavigable stream flowed was possessed of title to the bed of the stream and to a reasonable use of the water flowing in the channel, and that such rights were under the protection of the 14th amendment to the United States Constitution.[55] Hence such rights could not be divested by the State constitutional provision declaring all flowing streams and natural watercourses to be the propery of the State for mining, irrigation, and manufacturing purposes.[56] The court held that this constitutional provision was not framed to divest the rights of riparian owners in the waters and beds of streams. It was to be construed as placing the integrity of the State's watercourses beyond control of individual proprietors—a question which, however, was not then before the court. (But see the later discussion of a 1968 case, *Baeth* v. *Hoisveen*, regarding unused riparian rights.[57])

It was also said in *Bigelow* v. *Draper* that there is eminent authority for the principle that riparian rights are real estate.[58] A railroad company, through its

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[50] *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541, 547, 551 (1890). The United States Supreme Court took notice of and quoted both the 1866 and 1881 statutory declarations mentioned above as well as §650 of the Code of Civil Procedure relating to actions to protect lawful entries on the public domain. 133 U.S. at 551-552.

[51] *Bigelow* v. *Draper*, 6 N. Dak. 152, 162-163, 69 N.W. 570 (1896).

[52] *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-472, 165 N.W. 504 (1917); *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-777, 291 N.W. 113 (1940).

[53] N. Dak. Comp. Laws §5341 (1913), cited in note 48 *supra.*

[54] *Sturr* v. *Beck*, 133 U.S. 541, 551 (1890), affirming 6 Dak. 71, 50 N.W. 486 (1888).

[55] *Bigelow* v. *Draper*, 6 N. Dak. 152, 162-163, 69 N.W. 570 (1896), cited and quoted with approval in *Ozark-Mahoning Co.* v. *State*, 76 N. Dak. 464, 472-473, 37 N.W. (2d) 488 (1949).

[56] N. Dak. Const. art. XVII, §210.

[57] See this discussion at notes 68-73 *infra*. See note 69 regarding the court's reference to the *Bigelow* case.

[58] 6 N. Dak. at 161-162, cited with approval in *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-777, 291 N.W. 113 (1940).

receivers, was allowed to condemn riparian rights in a stream for the purpose of improving its railway line, without taking also the fee of the lands through which the river flowed.

The rules of law considered by the North Dakota Supreme Court in another case, *McDonough* v. *Russell-Miller Milling Company*, decided in 1917, began with a rephrasing of the 1866 Dakota Civil Code statute to the effect that the owner of land traversed by a natural stream may use the water therein so long as it remains on his land, but he may not prevent the natural flow of the stream nor pollute it.[59] This was an action by one riparian owner against another to recover damages for the alleged pollution of the common stream water and to enjoin further pollution.

It was held in this case that the right to use the streamflow is not a mere easement or appurtenance, but a natural right inseparably annexed to the soil itself, which arises immediately with every new subdivision or severance of the ownership. The court indicated that the right of a riparian to have the water flow in natural quantity and purity is necessarily subject to the rights of every riparian proprietor to make a reasonable use thereof. The court further stated that the question of reasonableness is to be determined by all the circumstances of each particular case, with due consideration given to character and size of the watercourse, location, uses to which it may be applied, and general usage of the country in similar cases. On the question of reasonableness of use by the upper proprietor, there may be taken into consideration also the character and extent of his business, as well as the use to which the lower proprietor is putting the water. Reasonable use is primarily a question of fact. Under the circumstances of this case the supreme court held that the downstream riparian proprietor had wholly failed to establish his alleged cause of action against the upper owner.[60]

The statute of 1866 was again referred to and the holding in the *McDonough* case noted in *Johnson* v. *Armour & Company*, decided in 1940, with the additional observation that a riparian owner could make a valid sale of his riparian right and grant of an easement over his land.[61]

Interrelationships of the Dual Systems

As noted previously, the doctrine of prior appropriation in North Dakota is recognized both legislatively and judicially, and the riparian doctrine was recognized in early Territorial legislation and court decisions. But questions of interrelationships between appropriative and riparian rights were meager.[62] The

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[59] *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 471-472, 165 N.W. 504 (1917), citing N. Dak. Comp. Laws §5341 (1913), a later version of the 1866 statute.

[60] *McDonough* v. *Russell-Miller Mill. Co.*, 38 N. Dak. 465, 472-473, 165 N.W. 504 (1917).

[61] *Johnson* v. *Armour & Co.*, 69 N. Dak. 769, 776-779, 291 N.W. 113 (1940), citing N. Dak. Comp. Laws §5341 (1913), a later version of the 1866 statute.

[62] In the earliest North Dakota water rights case, *Sturr* v. *Beck*, decided by the Territorial

(*Continued*)

first legislative declaration regarding riparian rights, made in 1866 (long before the appropriation doctrine was recognized) and eliminated in 1963, referred to riparian rights only. The second declaration, made in 1881 and eliminated in 1905, announced what were certain rights of landowners for specified purposes of use, but made them subject to valid prior appropriations.[63]

A 1955 provision, also eliminated in 1963, declared, without mentioning appropriative rights, that rights of riparian owners, other than municipalities, "comprise the ordinary or natural use of water for domestic and stockwatering purposes."[64]

As explained earlier, the 1955 act also amended section 61-01-01 of the statutes regarding waters subject to appropriation.[65] And 1963 legislation, among other things, added a provision regarding priority of water rights and water-use preferences.[66] By virtue of a 1965 amendment, no permit is required for small domestic or livestock, or fish, wildlife, and other recreational uses.[67]

In a 1968 case, the North Dakota Supreme Court noted, as a pertinent fact, that it had been stipulated by the parties:

> That in the year 1955, the State of North Dakota specifically declared that [in addition to specified surface watercourses] all waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters, belong to the public and are subject to appropriation for beneficial use.[68]

(*Continued*)
supreme court and affirmed by the United States Supreme Court, it was adjudged that an earlier homesteader had made a prior appropriation of both land and water of a stream that flowed through it—even without making use of the water—as against a later downstream homestead entryman who trespassed upon the upper land in order to locate an appropriative water right thereon. *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541 (1890), also discussed at note 50 *supra*. But none of the later reported Territorial or State supreme court decisions, discussed above under "Accrual and character of the riparian right," involved a controversy over rights to use the waters of a particular source in which the adverse parties consisted of appropriative claimants on the one hand and riparian claimants on the other. As a matter of fact, in none of these cases was any question of appropriative rights involved; all dealt with rights of riparian proprietors only.

[63] See the discussion at notes 47-49 *supra*.

[64] N. Dak. Laws 1955, ch. 345, §2, Cent. Code Ann. §61-01-01.1 (1960), entire subject matter deleted from section and other provisions substituted, Laws 1963, ch. 419, §1.

[65] N. Dak. Laws 1955, ch. 345, §1, Cent. Code Ann. §61-01-01 (1960), discussed at note 20 *supra*.

[66] This legislation, as amended in 1965, is discussed at note 30 *supra*.

[67] This is discussed at note 14 *supra*.

[68] *Baeth* v. *Hoisveen*, 157 N.W. (2d) 728, 730 (N. Dak. 1968). (Emphasis added.) The 1955 legislation is discussed at note 20 *supra*.

The comparable 1905 provision had stated, "All waters within the limits of the state from all sources of water supply belong to the public and, except as to navigable waters, are subject to appropriation for beneficial use." N. Dak. Laws 1905, ch. 34, §1, set out

The court appears to have concluded that, inasmuch as the right of a riparian landowner to use an underground stream for irrigation purposes had not been exercised before the 1955 legislation, the unused right could be validly abrogated without compensation by the legislation, at least as against appropriative rights acquired thereafter, and that the riparian owner could validly be required by the legislation to apply for and be governed by an appropriative-right permit.[69] However, the court qualified this as follows:

> In upholding the constitutionality of Section 61-01-01, N.D.C.C., we do not approve the procedure followed by the State Water Commission in the instant case, which resulted in granting to one of two landowners, who owned adjacent land and who made application at approximately the same time for beneficial use of water, the use of so much water that the other was in effect denied use of any water. The failure on the part of the State Water Commission to determine the actual amount of water available before granting the first neighbor's application resulted in a very disproportionate granting of water rights. Such a procedure, if followed in the future, might well justify legislative action directed toward preventing the reoccurrence of such inequitable results.[70]

One concurring justice said, among other things, "[A] provision not objectionable on its face may be adjudged unconstitutional because of its effect in operation upon a showing of a fixed and continuous policy of unjust and discriminatory application by the officials in charge of its administration."[71] Another concurring justice said, "[T]he action taken by the Water Commission

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in the *Baeth* case, 157 N.W. (2d) at 731. The exception regarding navigable waters was deleted by a 1939 amendment. Laws 1939, ch. 255, §1.

[69] The court decided that unused riparian rights to use water for irrigation did not constitute "vested rights." In doing so, it construed the above-mentioned statutory declarations regarding riparian rights and the declaration regarding waters being owned by the public and subject to appropriation for beneficial use, and it indicated that these should be construed in association with the statement in N. Dak. Cent. Code Ann. §61-01-02 that "Beneficial use shall be the basis, the measure, and the limit of the right to use water." The court added, "Notwithstanding what this court said in Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570 [1896] [discussed at notes 55-58 *supra*] and in subsequent supporting decisions which may be construed to the contrary to what is said in the instant case, we hold that there is no deprivation of a constitutional right or rights, and that the action taken by the legislature in enacting Section 61-01-01, N.D.C.C., is within the police power of the State, as a reasonable regulation for the public good." 157 N.W. (2d) at 733.

See also the discussion at note 77 *infra* regarding the 1963 *Volkman* case regarding percolating groundwaters, which the court drew upon in the *Baeth* case.

[70] 157 N.W. (2d) at 733-734. This is discussed in Bard, D. E., & Beck, R. E., "An Institutional Overview of the North Dakota State Water Conservation Commission: Its Operation and Setting," 46 N. Dak. L. Rev. 31, 42 (1969); Case Note, 4 Land & Water L. Rev. 185 (1969); Beck, R. E., & Hart, J. C., "The Nature and Extent of Rights in Water in North Dakota," 51 N. Dak. L. Rev. 249, 266 (1974).

[71] 157 N.W. (2d) at 734.

may not be within a valid exercise of the police power, and thus constitutes an unconstitutional application of the law." [72]

This case did not involve any consideration of the 1963 and 1965 legislation mentioned earlier.[73] Applications for the water uses in controversy were initiated before it was enacted.

Ground Waters

The Territorial act of 1866, relating to ownership of water, provided that the owner of land may use water running in a definite stream either over or *under* the surface so long as it remains there, but that he may not prevent its natural flow. This was carried over into the laws of North Dakota, but was repealed in 1963.[74]

Section 61-01-01 of the water appropriation statute as amended in 1955 and 1957 declares that waters belonging to the public and subject to appropriation include "Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters." [75]

A 1968 case concerning the validity of the 1955 legislation and its effect upon unused riparian rights in an underground stream has been discussed earlier.[76]

The various procedures for appropriating water and other aspects of appropriative water rights also have been discussed earlier.

In a 1963 case, the State supreme court indicated that where a landowner had applied percolating ground water to a reasonable beneficial use on his land and thereby acquired a vested right to such use, the State could not, by the subsequent legislation in 1955, deprive him of that right without compensation.[77]

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[72] *Id.*

[73] See the discussion of the 1963 and 1965 legislation at notes 63-66 *supra.*

[74] N. Dak. Cent. Code Ann. §47-01-13 (1960), repealed by Laws 1963, ch. 419, §7. See the discussion at notes 47-48 *supra.*

[75] N. Dak. Cent. Code Ann. §61-01-01 (1960), discussed at note 20 *supra.*

[76] See the discussion of *Baeth* v. *Hoisveen*, 157 N.W. (2d) 728 (N. Dak. 1968), at note 68 *et seq. supra.*

[77] *Volkman* v. *Crosby*, 120 N.W. (2d) 18, 24 (N. Dak. 1963). This case was drawn upon in *Baeth* v. *Hoisveen*, 157 N.W. (2d) 728, 732 (N. Dak. 1968), in *conversely* deciding that previously *unused* riparian rights in an underground stream could be validly abrogated, without compensation, by the 1955 legislation.

In the 1963 *Volkman* case, the court indicated that percolating water was the property of the overlying landowner [citing N. Dak. Cent. Code Ann. §47-01-13 (1960)], subject to the rule of reasonable use in connection with the land from which it is taken, and may be appropriated by him for beneficial purposes [citing in the latter regard N. Dak. Cent. Code Ann. §61-01-01 (1960)]. The court further indicated that, regardless of whatever may be the correlative rights of the owners of lands overlying a common source of supply, one landowner may not extract and convey the waters off his land to the injury of a prior reasonable beneficial use on overlying lands.

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Legislation regarding artesian wells regulates drilling procedures and requires valves capable of controlling their flow.[78] It is a misdemeanor to cause waste of artesian water in various ways.[79]

Special Statutory Adjudication Procedures

The provisions of the water rights statute relating to determination of water rights[80] provide that the State Engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the State, beginning with those most used for irrigation. He shall obtain and record all available data for the determination, development, and adjudication of the water supply of the State.[81] On completing such a survey of any stream system, he shall deliver a copy thereof, together with copies of all data necessary to determine all rights to use water of the stream system surveyed, to the Attorney General who, within 60 days thereafter, shall bring suit on behalf of the State to determine all rights to use such water.[82]

If an adjudication suit has been begun by private parties, the Attorney General is not required to bring suit, but he shall intervene on behalf of the State if notified by the State Engineer that in his opinion the public interest requires such action.[83]

In any suit for the determination of water rights, all who claim the right to use such waters shall be made parties. When any suit has been filed, the court shall direct the State Engineer to make or furnish a complete hydrographic survey of the stream system in order to obtain all data necessary to the determination of the rights involved.[84] Upon the completion of the adjudication, a certified copy of the decree is filed with the State Engineer, stating,

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As noted above, the court's ruling in the 1963 *Volkman* case that percolating waters were the property of the overlying landowner was based upon N. Dak. Cent. Code Ann. §47-01-13 (1960). This provided in part that "The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream." However, this statute was repealed by the legislature later the same year. Laws 1963, ch. 419, §7.

[78] N. Dak. Cent. Code Ann. §§61-20-01 and 61-20-04 (1960) and 61-20-05 to 61-20-07 (Supp. 1973).

[79] N. Dak. Cent. Code Ann. §61-20-04 (1960).

[80] These provisions closely follow those of the Bien Code, discussed in chapter 15 at notes 96-100.

[81] N. Dak. Cent. Code Ann. §61-03-15 (1960).

[82] *Id.* §61-03-16.

[83] *Id.*

[84] *Id.* §61-03-17.

The cost of such suit, including costs on behalf of the State, and of such surveys, shall be charged against each of the private parties to the suit in proportion to the amount of the water right allotted to him. In this regard, see the discussion in chapter 15, note 324.

In any water suit, the court is authorized to appoint a referee or referees, not to exceed three, to take testimony and report upon rights of the parties, as in other equity suits. *Id.* §61-04-16.

with respect to each adjudged water right, the amount, purpose, priority, and place of use thereof and, if the water is for irrigation, the tracts of land to which the water right shall be appurtenant, and such other conditions necessary to define the right and its priority.[85]

In addition to the foregoing provisions, the State Water Conservation Commission is authorized to (1) institute and prosecute suits to adjudicate all water rights upon any watercourse or source of water supply from which waters are derived for reservoirs and other distribution works; and (2) join in any action all owners of vested water rights in order to adjudicate "all surplus water upon all of the watercourses and sources, water supplies or any project constructed under the supervision and control of the commission * * *."[86]

Administration of Water Rights and Distribution of Water

All functions relating to the administration of water rights and distribution of water are exercised through the Water Conservation Commission, which is accorded full control over all unappropriated waters of the State, whether above or in the ground, to the extent necessary to fulfill its functions.[87] The Commission's rights to waters acquired for its purposes attach at their source; its jurisdiction over them extends throughout their course to places of use, and also to waters furnished by it that seep or overflow from places of use.[88] The Commission may use any method or perform any act to prevent any unauthorized diversion of its waters.[89] Any holder of a water right on a natural stream may give the Commission authority over diversion of water due under such rights and the Commission may exercise the same authority over these waters as in the case of waters appropriated by the Commission.[90] Court-appointed water commissioners have no authority to deprive the Commission of any water owned or administered under agreement with owners.[91]

For purposes of regulating the diversion of the natural flow of waters, the Commission may enter upon the means and place of use of all appropriators to make surveys of rights and seasonal needs.[92] When engaged in controlling and diverting the natural flow of any stream, the Commission is deemed to be exercising a police power of the State;[93] but it is required to take into consideration court decrees of adjudication,[94] and holders of vested rights who

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[85] *Id.* §61-03-19.
[86] *Id.* §61-02-23.
[87] *Id.* §61-02-29. See also §§61-02-37, 61-02-41, 61-02-44 (1960), 61-02-14, and 61-02-38 (Supp. 1973).
[88] N. Dak. Cent. Code Ann. §61-02-35 (1960).
[89] *Id.* §61-02-37.
[90] N. Dak. Cent. Code Ann. §61-02-38 (Supp. 1973).
[91] N. Dak. Cent. Code Ann. §61-02-44 (1960).
[92] *Id.* §61-02-41.
[93] *Id.* §61-02-44.
[94] *Id.* §61-02-42.

claim that the Commission is not respecting their rights may resort to courts of law or equity for protection.[95]

Oklahoma

Governmental Status

The Territory of Oklahoma was created May 2, 1890, out of what had been known as Indian Territory—a geographical area not under a Territorial form of government.[1] The Organic Act creating the Territory of Oklahoma also prescribed the boundaries of Indian Territory proper and provided for court jurisdiction therein.

The Enabling Act providing for admission of the Territory of Oklahoma and of Indian Territory as a single State of Oklahoma was approved June 16, 1906.[2] Oklahoma was admitted to the Union by proclamation of the President on November 16, 1907.[3]

State Administrative Agency

The Oklahoma Water Resources Board supervises the acquisition of surface and ground water rights.[4] The Board is empowered to institute actions for the determination of water rights from stream systems[5] and to request the Attorney General to intervene in private actions to adjudicate stream waters if the Board finds that the public interests would best be served by such actions.[6] The Board is also directed to divide the State into water districts in conformity with drainage areas, "as may be necessary for the economical and satisfactory apportionment of the water * * *."[7]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—(1) Legislative. In 1897 the Territorial Legislature enacted a statute relating to water rights.[8] It declared the unappropriated waters of the ordinary flow or underflow of every stream, and storm and rainwaters, in areas in which irrigation is beneficial to agriculture, to be the property of the public, subject to appropriation. Diversion of ordinary flow or underflow was forbidden to the prejudice of the

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[95] *Id.* §61-02-44.

[1] 26 Stat. 81 (1890).

[2] 34 Stat. 267 (1906).

Okla. Stat. Ann., Constitution, pp. XIII-XXXVII (1952), "A History of the Constitution of Oklahoma," by John Rogers, contains a statement of the historical background of Oklahoma and of governmental developments that preceded statehood.

[3] 35 Stat. 2160 (1907).

[4] Okla. Stat. Ann. tit. 82, §§105.9 and 1020.7 (Supp. 1974).

[5] *Id.* §105.6.

[6] *Id.* §105.5.

[7] *Id.* §1085.3.

[8] Terr. Okla. Laws 1897, ch. XIX.

riparian owner, without his consent, except after condemnation which was specially provided for. The statute provided for filing claims in the county records for both new enterprises and preexisting rights.

In 1905 a more comprehensive procedure for appropriating water under the supervision of Territorial officials was provided.[9] This statute has been reenacted from time to time by succeeding State legislatures in substantially its original form. It constitutes the current legislative authority for the acquisition of water rights.[10]

(2) Judicial. In 1907, the Oklahoma Supreme Court decided a case in which the parties were appropriative claimants who had not proceeded under either the 1897 or the 1905 law, but who based their claims "upon the general rule of law applicable to such cases."[11] The court applied to the facts of the case the general western law of priority of appropriation without construing either of the statutes. In subsequent cases the supreme court construed and applied provisions of the statute of 1905 relating to the acquisition of appropriative rights.[12]

Procedure for appropriating water.—The first appropriation law of 1897 provided for the filing in county records of claims for new enterprises, as well as for rights previously existing.[13] In passing on the relative priorities of conflicting claims which originated prior to enactment of the 1905 law, the Oklahoma Supreme Court drew upon the criteria established in the Western States for requirements under nonstatutory procedures—construction of ditch, diversion of water, conveyance to place of use, and actual application of water to beneficial use.[14]

The statute of 1905[15] prescribed procedures by which a right to appropriate water from a surface stream could be acquired. Included were (1) the making of a hydrographic survey by the Oklahoma Water Resources Board, in case such survey had not already been made; (2) a judicial determination of existing rights; and (3) a series of steps to be taken by the intending appropriator relating to the issuance to him, by the Board, of a license to appropriate water. The making of hydrographic surveys and judicial determination of existing rights on the stream are discussed later under "Special Statutory Adjudication

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[9] Terr. Okla. Laws 1905, ch. XXI, art. 1.

[10] Okla. Stat. Ann. tit. 82 (1970), as amended. Sections of the 1897 law relating to appropriability of stream and storm waters and to condemnation of "water belonging to the riparian owner" were omitted from Revised Laws (1910) and were thereby repealed. Okla. Laws 1910-1911, ch. 39. The Revised Laws carried forward only the law of 1905.

[11] *Gates* v. *Settlers' Mill., Canal & Res. Co.*, 19 Okla. 83, 84-91, 91 Pac. 856 (1907).

[12] *Gay* v. *Hicks*, 33 Okla. 675, 684-686, 124 Pac. 1077 (1912); *Owens* v. *Snider*, 52 Okla. 772, 778-782, 153 Pac. 833 (1915); *Grand-Hydro* v. *Grand River Dam Authority*, 192 Okla. 693, 695-696, 139 Pac. (2d) 798 (1943).

[13] Terr. Okla. Laws 1897, ch. XIX.

[14] *Gates* v. *Settlers' Mill., Canal & Res. Co.*, 19 Okla. 83, 84-85, 91 Pac. 856 (1907).

[15] Terr. Okla. Laws 1905, ch. XXI.

Procedures." These statutory adjudication provisions, in connection with the ensuing sections governing the making of appropriations,[16] were so construed by the Oklahoma Supreme Court as to make a hydrographic survey and a determination of existing water rights requisite to the issuance by the Board of a permit to appropriate water for irrigation purposes,[17] although not for the development of power.[18] However, the statutes were amended in 1963 to expressly provide that neither a hydrographic survey or adjudication of existing rights need be made before issuance of a permit.[19]

The statute of 1897—repealed in 1910—subjected to appropriation unappropriated waters of the ordinary flow or underflow of every river or natural stream, canyon, ravine, depression, or watershed in those portions of the Territory in which by reason of insufficiency or irregularity of the rainfall irrigation was beneficial for agricultural purposes.[20] The current statute, which pertains to stream water use, does not specify any such classification of appropriable water. It provides procedures by which one who intends to acquire the right to beneficial use of "any water" shall go about acquiring such rights.[21]

Legislation in 1963 included amendments and provisions with respect to riparian domestic use of water, preexisting rights, and relative priorities of rights under various circumstances. It provided that domestic use is not subject to the provisions of the appropriation law. While most of these provisions were repealed in 1972, they were largely reenacted without substantial change. This is discussed later under "Interrelationships of the Dual Systems."

The statute provides that before commencing construction of works for appropriation of water, or before taking water from constructed works, the intending appropriator shall make application to the Oklahoma Water Resources Board for a permit to make the appropriation. The intending appropriator may be a person, firm, corporation, State or Federal governmental agency, or subdivision thereof. After notice and hearing, the Board shall act on the

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[16] Okla. Stat. Ann. tit. 82, §§ 11-14, 21-28, and 56 (1970).

[17] *Gay* v. *Hicks*, 33 Okla. 675, 124 Pac. 1077 (1912); *Owens* v. *Snider*, 52 Okla. 772, 153 Pac. 833 (1915).

[18] *Grand-Hydro* v. *Grand River Dam Authority*, 192 Okla. 693, 695-696, 139 Pac. (2d) 798 (1943). The permit herein had been issued by the Conservation Commission, which was created in 1927 to succeed the State Engineer in the exercise of certain powers and to have additional powers, including specific authority to grant permits for water power development.

[19] Okla. Stat. Ann. tit. 82, §§ 11 and 12 (1970). These sections were repealed by Laws 1972, ch. 256, § 33; but § 12, regarding adjudications, was reenacted as § 105.6 (Supp. 1974). See the discussion at notes 118-119 *infra*.

[20] Terr. Okla. Laws 1897, ch. XIX, omitted from Revised Laws (1910).

[21] Okla. Stat. Ann. tit. 82, § 105.9 (Supp. 1974), a modification of § 21 (1970).

Section 105.1 includes the following definition: " 'Definite Stream' means a watercourse in a definite, natural channel, with defined beds and banks, originating from a definite source or sources of supply. The stream may flow intermittently or at irregular intervals if that is characteristic of the sources of supply in the area."

application.[22] Criteria for issuing or denying a permit and provisions regarding regular and other types of permits and their terms are discussed later under "Restrictions on the right to appropriate water." If not appealed, the Board's decision shall be final.[23]

The permit shall state the time within which the water shall be applied to beneficial use,[24] subject to certain statutory directives if it cannot be put to use within 7 years, including provision for setting a time based on the useful life of the proposed project, improvement or structure, and the step-by-step completion of percentages of the whole amount authorized.[25] To the extent it is not so put to use, the amount not so used shall be forfeited and again become public water available for appropriation.[26]

Any permit shall expire unless construction of works is begun within 2 years. However, a 2-year extension beyond the time specified in the permit may be granted, for good cause shown, and an additional extension may be made due to unavailability of materials in a national emergency.[27] Upon satisfactory completion of the required work, the permittee receives a certificate of completion of construction which may include limitations but may not extend the rights described in the permit.[28]

The statutes provide generally that "Priority in time shall give the better right."[29] The doctrine of relation back was recognized by the Oklahoma Supreme Court with respect to an appropriative right that was alleged to have been initiated in 1895.[30] Under the present law, rights initiated prior to November 15, 1907 (the day before Oklahoma was admitted to the Union), relate back to initiation of the beneficial use of water, while those initiated thereafter relate back to the date of filing application therefor in the Board's office, subject to certain modifications and compliance with statutory requirements and rules and regulations established thereunder.[31] Failure to make changes in constructed works within the time required by the Board in its inspection on completion of an appropriation causes postponement of priority.[32]

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[22] *Id.* §§105.9 - .14, a modification of §§21-25 (1970).

[23] *Id.* §105.12(4).

[24] *Id.*

[25] In no event shall a regular permit require that the whole amount be put to use within less than 7 years. *Id.* §105.16, a modification of §32 (1970).

[26] *Id.* §105.17, a modification of §32A (1970).

[27] *Id.* §§105.15 and .30, a modification of §§32 and 56 (1970).

[28] *Id.* §105.26, formerly §53 (1970).

[29] *Id.* §105.2, formerly §1-A (1970).

[30] *Gay* v. *Hicks*, 33 Okla. 675, 682, 124 Pac. 1077 (1912). Diligent prosecution of the appropriation to its completion caused the priority to relate back to initiation of the claim.

[31] Okla. Stat. Ann. tit. 82, §§105.2(B)(1) and (4) and .10 (Supp. 1974), formerly §§1-A(b)(1) and (4) and 22 (1970).

[32] *Id.* §105.25, a modification of §52 (1970).

The right to make gradual or progressive development without loss of priority, where the evidence showed the entire work to have been one continuous project carried on with no lack of diligence, was recognized by the State supreme court in an early case, but with a qualification.[33] This was that the original priority of the senior appropriator would extend to the quantity of water actually applied by him to beneficial use at the time a junior appropriator made his appropriation; but after this quantity was taken by the senior appropriator, the junior's right would become effective with respect to the quantity of water he applied to beneficial use, after which the senior appropriator's right would again attach to any excess. This apparently was decided without reference to any particular statutory provision.

In the exercise of its powers and duties, the Water Resources Board shall comply with the procedures provided in the Administrative Procedures Act. Appeals shall be taken as provided in that Act.[34]

Restrictions on the right to appropriate water.—The 1972 legislation mentioned above provides that after the hearing on an application the Oklahoma Water Resources Board shall determine whether (1) there is unappropriated water available in the amount applied for, (2) the applicant has a present or future need for the water for a beneficial use, and (3) the proposed use does not interfere with domestic or existing appropriative uses. If the latter two requirements are satisfied, but not the first, an amended application may be made for a lesser amount of water, which may be approved.[35] "In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, applicants within such stream system shall have a right to all of the water required to adequately supply the beneficial needs of the water users therein. The Board shall review the needs within such area of origin every five (5) years."[36]

Four types of permits may be issued. A "regular permit" authorizes the holder to appropriate water on a year-round basis. A "seasonal permit" authorizes diversion of available water for specified time periods during the year. A "temporary permit" may not exceed 3 months in duration. A "term permit" is issued for a term of years. Temporary and term permits do not vest the holder with any permanent right.[37]

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[33] *Gates* v. *Settlers' Mill., Canal & Res. Co.*, 19 Okla. 83, 89-91, 91 Pac. 856 (1907).

[34] Okla. Stat. Ann. tit. 82, §1085.10 (Supp. 1974).

[35] *Id.* §105.12 and .14.

Previous Oklahoma legislation largely provided simply for the denial of an application if there was no unappropriated water, and for refusal to order publication of notice of an application not meeting all statutory requirements. Okla. Stat. Ann. tit. 82, §25 (1970). Before 1963, it also provided for refusal to publish notice or consider or approve an application if deemed contrary to the public interest. Okla. Rev. Laws §3647 (1910), Stat. Ann. tit. 82, §25 (1950). But in 1963 the latter provision was replaced by provisions for the approval of a lesser amount of water than originally applied for. Okla. Laws 1963, ch. 207, §8, Stat. Ann. tit. 82, §25 (1970).

[36] Okla. Stat. Ann. tit. 82, §105.12(4) (Supp. 1974).

[37] *Id.* §105.1.

Even where the Board finds there is no unappropriated water available for a regular permit, seasonal, temporary, or term permits may be issued at any time it finds such issuance will not impair or interfere with domestic uses or existing rights of prior appropriators.[38]

Previous legislation included maximum limitations on the rate or amount of water to be used for irrigation purposes.[39] But this was repealed by the 1972 legislation.[40]

Oklahoma legislation provides that unappropriated waters which the United States intends to utilize may be withheld from appropriation for a period of 3 years upon notification to the Board, during which time plans for the proposed work must be filed in order to hold the waters for such purpose.[41]

Some aspects of the Oklahoma appropriative right.—Any permit to appropriate water may be assigned, but to be binding upon the parties thereto it must be filed with the Board. All water used in the State for irrigation shall remain appurtenant to the land on which used, subject to transfer to other lands under certain conditions,[42] as noted below. No irrigation appropriative water right may be transferred apart from the land to which it is appurtenant except in the manner specially provided by law; and transfer of title to land in any manner carries with it all rights to the use of appurtenant water for irrigation purposes.[43]

As noted above, all water used for irrigation remains appurtenant to the land of use, subject to change under prescribed conditions. These are that if for any reason it should become impracticable to continue irrigation beneficially or economically on the original land of use, the right may be severed therefrom and simultaneously transferred to other land, to which it thereupon becomes appurtenant, without losing priority of right—provided that the change can be made without detriment to existing rights and that it has the Board's formal approval after notice has been given. The Board may deny the application or approve it in whole or in part upon such conditions as are necessary to preserve the rights of the parties.[44] In the manner and under the conditions noted above, an appropriator of water may use it for other purposes, or may change the place of diversion, storage, or use.[45]

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[38] *Id.* § 105.13.

[39] Okla. Stat. Ann. tit. 82, § 33 (1970). This provision had been amended in 1967. Laws 1967, ch. 391, § 1.

[40] Okla. Laws 1972, ch. 256, § 33.

[41] Okla. Stat. Ann. tit. 82, § 105.29 (Supp. 1974), formerly § 91 (1970).

[42] *Id.* § 105.22, formerly § 34 (1970).

[43] *Id.* § 105.24, formerly § 27 (1970).

[44] *Id.* § 105.22, formerly § 34 (1970). Any person aggrieved by the order may seek relief as provided in the Administrative Procedures Act [Okla. Stat. Ann. tit. 75, § 301 *et seq.* (Supp. 1974).]

[45] Okla. Stat. Ann. tit. 82, § 105.23 (Supp. 1974), formerly § 35 (1970). See also § 105.10, formerly § 22 (1970), regarding change in proposed point of diversion of water.

An owner of works for storage, diversion, or conveyance of water which contain water in excess of his needs for the use for which it has been appropriated shall be required to deliver the surplus to those entitled to its beneficial use at reasonable rates fixed by the Board for storage or conveyance of the water, or both, as the case may be. If he refuses to make such delivery, the appropriate district court may compel him to do so.[46]

The senior or prior appropriator has, to the extent of his perfected right, the exclusive right to use of the water as against a junior appropriator.[47] But the junior appropriator in his turn has rights that must be respected by the prior appropriator. After provision has been made for the prior appropriator's right, in the quantity and to the extent to which he has actually made beneficial use, a later appropriator may acquire a right to such portion of the stream water in excess of that covered by the prior right as this junior appropriator himself has put to beneficial use.[48]

Water turned into a natural or artificial watercourse by any party entitled to its use may be reclaimed and diverted below, subject to existing rights. Due allowance for conveyance losses is to be made by the Board.[49]

An Oklahoma statute had provided that if an owner of land to which water had become appurtenant "abandons its use thereon, the water reverts to the public, subject to general appropriations." This provision was repealed in 1972.[50]

When the party entitled to use water commences using water but fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which appropriated, for 7 continuous years, such unused water shall revert to the public and be regarded as unappropriated public water.[51] The statutes include procedures whereby the administrative agency *may* cancel such unused rights. Failure of the agency to determine that a water right has been lost in whole or in part through nonuse shall not in any way revive or continue the right.[52] The Board may accept the surrender of any water right pursuant to its rules and regulations.[53]

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[46] *Id.* § 105.21, a modification of former § 101 (1970).

[47] See *Gay* v. *Hicks*, 33 Okla. 675, 682, 124 Pac. 1077 (1912); *Owens* v. *Snider*, 52 Okla. 772, 781-782, 153 Pac. 833 (1915).

[48] *Gates* v. *Settlers' Mill., Canal & Res. Co.*, 19 Okla. 83, 91, 91 Pac. 856 (1907).

[49] Okla. Stat. Ann. tit. 82, § 105.4 (Supp. 1974), formerly § 3 (1970).

[50] Okla. Stat. Ann. tit. 82, § 34 (1970), repealed, Laws 1972, ch. 256, § 33. Compare the statement in *Gates* v. *Settlers' Mill., Canal & Res. Co.*, 19 Okla. 83, 89-90, 91 Pac. 856 (1907), concerning treatment of failure to use due diligence in making an appropriation as abandonment, as against a subsequent appropriator whose right attached pending completion of the first one's right. The court also stated what it thought was settled law in the irrigation States, overlooking essential questions of intent and postponement of priority. This case is discussed at note 33 *supra*.

[51] With respect to forfeiture for failure to initially put water to beneficial use, see the discussion at note 26 *supra*.

[52] Okla. Stat. Ann. tit. 82, § § 105.17 and .18 (Supp. 1974), formerly § § 32A and 32B (1970).

[53] *Id.* § 105.19.

(*Continued*)

The power of eminent domain may be exercised by any "person, corporation or association" for acquisition of rights of way for storage or conveyance of water, including the right to enlarge existing structures and to use them in common with previous owners.[54]

The Riparian Doctrine

Recognition of the riparian doctrine.–(1) Legislative. A statute passed in 1890 by Oklahoma's First Territorial Legislative Assembly declared the right of a landowner with respect to use of water naturally occurring on or in his land. This statute provided:[55]

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

This statute is still in effect but was amended in several respects in 1963, as explained later under "Interrelationships of the Dual Systems."

The first statute authorizing appropriation of water contained a recognition of riparian rights in a proviso that the flow or underflow of streams should not be diverted to the prejudice of a riparian owner, without his consent, except after condemnation proceedings, and authorized condemnation of "water belonging to the riparian owner."[56] These provisions were repealed in 1910. See "Appropriation of Water of Watercourses–Recognition of doctrine of prior appropriation."

(2) Judicial. The Territorial statute of 1890 regarding rights of landowners to the use of water, noted above, was quoted or cited in several decisions of the Oklahoma Supreme Court.[57] In addition, the court recognized the existence of

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Section 105.16, formerly §32 (1970), provides, "Nothing in this act shall be deemed to reestablish any right to the use of any water which has been lost by failure to use same or by forfeiture prior to July 5, 1961." See also §105.32.

[54] *Id.* §105.3. Prior to 1972 legislation, this specific eminent domain power also could be used to acquire water-use rights. Okla. Stat. Ann. tit. 82, §2 (1970), repealed by Laws 1972, ch. 256, §33.

[55] Okla. Stat. Ann. tit. 60, §60 (1963). The original Oklahoma declaration, Terr. Okla. Stat. §4162 (1890), was copied from Terr. Dak. Laws 1865-1866, ch. 1, §256, Civ. Code §255 (1877), Comp. Laws §2771 (1887). The Dakota Territorial statute from which this Oklahoma statute was copied was said by the South Dakota Supreme Court to have been a concise statement of the common law doctrine applicable to the rights of riparian owners. *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 525-526, 91 N.W. 352 (1902).

[56] Terr. Okla. Laws 2897, ch. XIX.

[57] *Broady* v. *Furray*, 163 Okla. 204, 205, 21 Pac. (2d) 770 (1933); *Grand-Hydro* v. *Grand River Dam Authority*, 192 Okla. 693, 695, 139 Pac. (2d) 798 (1943); *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501, 172 Pac. (2d) 1002 (1946); *Oklahoma*

the common law doctrine of relative rights and liabilities of riparian owners respecting water of watercourses.[58]

Nature and extent of the riparian right.—The State supreme court indicated that the right of a riparian proprietor to have the water of a stream flow naturally to his land is property.[59] But it was equally well settled that the right to use the stream water is a qualified right of property, not an absolute right.[60]

Following are some general principles regarding the relative rights of riparians that have been indicated in various opinions of the State supreme court. Use of stream water by riparians must be reasonable in consideration of requirements of beneficial use by other owners.[61] Rights of riparian proprietors thus are reciprocal; they severally have the right to make any use of water that is beneficial and practicable, but by reason of concurrence of rights there arises the reciprocal duty of each to limit his taking of water to a reasonable quantity. Excessive use by one proprietor to the injury of another is a legal impairment of the latter's right.[62]

The purpose of use must be beneficial.[63] Purposes of use involved or noted in the Oklahoma cases include irrigation, stockwater, and propagation of fish;[64] fish hatchery and fishing resort;[65] domestic and stockwatering;[66] drilling

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Water Resources Bd. v. *Central Okla. Master Conservancy Dist.*, 464 Pac. (2d) 748 (Okla. 1968), rehearing, 464 Pac. (2d) 755 (Okla. 1969).

[58] *Chicago, R. I. & P. Ry.* v. *Groves*, 20 Okla. 101, 111, 93 Pac. 755 (1908); *Burkett* v. *Bayes*, 78 Okla. 8, 10, 187 Pac. 214 (1918, 1920); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 194-195, 102 Pac. (2d) 124 (1940); *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 502, 172 Pac. (2d) 1002 (1946). In another case, the court recognized the right of a lower landowner to recover damages against a city for injuriously polluting water of a stream to which his land was riparian. *Markwardt* v. *Guthrie*, 18 Okla. 32, 34-36, 55, 90 Pac. 26 (1907).

Most of the foregoing cases were nuisance cases, rather than controversies between riparian owners who were claiming coequal rights of use. An exception was *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 500-503, 172 Pac. (2d) 1002 (1946), which involved the relative rights of riparian owners to divert water from a commonly contiguous stream for beneficial use. Another exception was *Oklahoma Water Resources Bd.* v. *Central Okla. Master Conservancy Dist.*, 464 Pac. (2d) 748 (Okla. 1968), rehearing, 464 Pac. (2d) 755 (Okla. 1969), which dealt, *inter alia*, with the question of water supply by a municipality by virtue of its riparian status.

[59] *Atchison, T. & S.F. Ry.* v. *Hadley*, 168 Okla. 588, 591, 35 Pac. (2d) 463 (1934).

[60] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501, 172 Pac. (2d) 1002 (1946); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[61] *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[62] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 172 Pac. (2d) 1002 (1946); *Broady* v. *Furray*, 163 Okla. 204, 205, 21 Pac. (2d) 770 (1933); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 194-196, 102 Pac. (2d) 124 (1940).

[63] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946).

[64] *Markwardt* v. *Guthrie*, 18 Okla. 32, 33-34, 90 Pac. 26 (1907).

[65] *Broady* v. *Furray*, 163 Okla. 204, 205, 21 Pac. (2d) 770 (1933); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[66] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 500, 172 Pac. (2d) 1002 (1946);

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operations;[67] and recovery of sand.[68] However, the State supreme court has held that under the riparian doctrine a city's riparian status did not entitle it to abstract water for distribution to its inhabitants for domestic purposes.[69]

The riparian right extends to the flow of water to the riparian land,[70] and to quality of the water.[71] But it is not a doctrine of exclusive rights; unlike the right of prior appropriation, the riparian right generally does not relate to a specific quantity of water.[72]

A riparian owner may cause the stream channel to be changed on his own premises, provided he returns the water to the stream before it leaves his holding.[73]

Riparian lands and proprietors.—To be entitled to riparian rights in a stream, land must be contiguous to the stream. This inherent feature of the riparian doctrine has been recognized in Oklahoma by both the legislature and courts.[74]

Riparian rights may be asserted not only by owners of riparian lands, but also by lawful occupants thereof.[75] They may also be asserted by grantees of a riparian owner for use either on or off the riparian premises, subject in all cases to coequal rights of other riparian owners.[76] The supreme court said in its

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Oklahoma City v. *Tytenicz*, 171 Okla. 519, 521, 43 Pac. (2d) 747 (1935); *Presto-O-Lite Co.* v. *Howery*, 169 Okla. 408, 37 Pac. (2d) 303 (1934); *Gulf Oil Corp.* v. *Miller*, 198 Okla. 54, 55-56, 175 Pac. (2d) 335 (1946); *Ogden* v. *Baker*, 205 Okla. 506, 508, 239 Pac. (2d) 393 (1951).

[67] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 500, 172 Pac. (2d) 1002 (1946).

[68] *Zalaback* v. *Kingfisher*, 59 Okla. 222, 223, 158 Pac. 926 (1916); *Kingfisher* v. *Zalabak*, 77 Okla. 108, 109-110, 186 Pac. 936 (1920).

[69] *Oklahoma Water Resources Bd.* v. *Central Okla. Master Conservancy Dist.*, 464 Pac. (2d) 748 (Okla. 1968), rehearing, 464 Pac. (2d) 755-756 (Okla. 1969), discussed in chapter 6, note 273.

[70] *Chicago, R. I. & P. Ry.* v. *Groves*, 20 Okla. 101, 111, 93 Pac. 755 (1908); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[71] Okla. Stat. Ann. tit. 60, §60 (1971). *Markwardt* v. *Guthrie*, 18 Okla. 32, 37, 54, 90 Pac. 26 (1907); *Enid* v. *Brooks*, 132 Okla. 60, 61-63, 269 Pac. 241 (1928); *Oklahoma City* v. *Tytenicz*, 171 Okla. 519, 521, 43 Pac. (2d) 747 (1935); *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195, 102 Pac. (2d) 124 (1940).

[72] If a specific apportionment of water is made as between riparians, "it should not follow that rights thereafter are fixed by the decree further than where facts incident thereto coincide with the facts at the time of such decree." *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 502, 172 Pac. (2d) 1002 (1946).

[73] *Burkett* v. *Bayes*, 78 Okla. 8, 10-11, 187 Pac. 214 (1918).

[74] Okla. Stat. Ann. tit. 60, §60 (1971); *Culbertson* v. *Greene*, 206 Okla. 210, 212, 243 Pac. (2d) 648 (1952); *Garrett* v. *Haworth*, 183 Okla. 569, 83 Pac. (2d) 822 (1938); *Burkett* v. *Bayes*, 78 Okla. 8, 10, 187 Pac. 214 (1918). See *Broady* v. *Furray*, 163 Okla. 204, 21 Pac. (2d) 770 (1933).

[75] *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 196, 102 Pac. (2d) 124 (1940); *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501, 172 Pac. (2d) 1002 (1946).

[76] *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 195-196, 102 Pac. (2d) 124 (1940); *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946).

syllabus in a 1946 case, "The right of a riparian proprietor to the use of the water of a stream may be conveyed, but he cannot convey more than the reasonable use, nor can the grantee acquire more."[77]

Nonriparian use.—The Supreme Court of Oklahoma has expressed the view that the taking of water by a riparian to nonriparian land or his contracting for its use on such land is not of itself an unreasonable use of the water, although when considered in connection with all other circumstances, including the size and character of the stream and the quantity of water diverted, it might be unreasonable.[78]

Interrelationships of the Dual Systems

Both the riparian and appropriative systems of water-use rights have been recognized in Oklahoma as a result of acts of the legislature and decisions of the supreme court. As noted earlier, a statute passed by the first Oklahoma Territorial Legislative Assembly in 1890 provides, among other things, that water running in a definite natural stream may be used by the landowner as long as it remains there, but that he may not prevent the natural flow of the stream nor pursue nor pollute it.[79] The Oklahoma Territorial and State Legislatures also had enacted various water appropriation statutes discussed earlier under "Appropriation of Water of Watercourses—Recognition of the doctrine of prior appropriation."[80]

The 1890 statute was quoted or cited in several decisions of the Oklahoma Supreme Court,[81] which in numerous cases decided questions relating to various aspects of the riparian right, and of the appropriative right, but none involving conflicts between riparian claimants on the one hand and appropriators on the other.

In 1963, the early 1890 statute, unchanged since enactment, was amended in several vital respects. Pursuant to the amendment, water running in a definite natural stream may be used by the landowner *for domestic purposes* as long as it remains there, but he may not prevent the natural flow of the stream nor pursue nor pollute it, *as such water then becomes public water and is subject to*

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[77] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 172 Pac. (2d) 1002 (1946).

[78] *Smith* v. *Stanolind Oil & Gas Co.*, 197 Okla. 499, 501-502, 172 Pac. (2d) 1002 (1946), citing *Lawrie* v. *Silsby*, 82 Vt. 505, 74 Atl. 94, 96 (1909), and *Martin* v. *British Am. Oil Producing Co.*, 187 Okla. 193, 102 Pac. (2d) 124 (1940) (involving water pollution).

See the discussion at note 69 *supra* regarding a city's distribution of water to its inhabitants.

[79] Terr. Okla. Stat. §4162 (1890), Stat. Ann. tit. 60, §60 (1971), set out at note 55 *supra*.

[80] Under the 1897 Territorial statute, which was eliminated in 1910 (as discussed in note 10 *supra*), appropriators were forbidden to divert the ordinary flow or underflow of streams to the prejudice of the riparian owner without his consent, except by condemnation.

[81] These cases are cited in note 57 *supra*.

appropriation for the benefit and welfare of the people of the State as provided by law.[82]

Section 2 of this 1963 statute related to the rights to use water, domestic use, and priorities. It provided that water taken for domestic use was not subject to the provisions of the appropriation law and "Any natural person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises," as provided in section 1.[83]

By the 1963 amendment, the legislature undertook to respect existing claims of water rights based upon beneficial use, but to restrict the exercise of unused riparian water-use rights to water for domestic purposes only, as defined in the act. Provision has been made for obtaining priorities based on present beneficial riparian use initiated before the effective date of the act, dating from initiation of the beneficial use. But no such priority right for a beneficial use initiated after statehood shall take precedence over those for a beneficial use with a priority date earlier than the effective date of the 1963 amendment arising by compliance with the appropriation statutes.[84] Provision has been

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[82] Okla. Laws 1963, ch. 205, §1, Stat. Ann. tit. 60, §60 (1971). The italicized words were added by the 1963 amendment. The amendment also includes a provision authorizing limited storage of such waters. See chapter 6, note 269.

[83] Provisions also were included regarding the storage of water for such purposes. Okla. Laws 1963, ch. 205, §2, Stat. Ann. tit. 82, §1-A (1970). See chapter 6, note 270 and the end of note 269. Okla. Stat. Ann. tit. 82, §1-A (1970) and certain other sections were repealed in 1972 but several were substantially reenacted with different section numbers. See the discussion at note 90 *infra*. The provisions of tit. 82, §1-A referred to here have been substantially reenacted in §105.2 (Supp. 1974).

The statute also provided that anyone having a right to use water from a stream as defined in the amended 1890 provision, or in the statutes regarding waters and water rights may bring suit in the appropriate district court, provided such a right is claimed under the amended 1890 provision or has been established pursuant to the statutes regarding waters and water rights. Okla. Stat. Ann. tit. 82, §4 (1970), now §105.5 (Supp. 1974). See the discussion at note 120 *infra*.

[84] Moreover, such a priority might have been lost in whole or in part because of nonuse. Okla. Stat. Ann. tit. 82, §1-A(b)(6) (1970), now §105.2(B)(6) (Supp. 1974), referring to §32, now §105.16 (Supp. 1974). By virtue of Laws 1965, ch. 336, tit. 82, §§32A and 32B (1970), now §§105.17 and .18 (Supp. 1974), provide that vested rights of use may be declared lost in whole or in part due to 7-years' nonuse. See Rarick, J. F., "Oklahoma Water Law, Stream and Surface Under the 1963 Amendments," 23 Okla. L. Rev. 19, 42-44 (1970).

Certain existing riparian rights conceivably may be affected and protected by the following provisions of the 1963 legislation: (1) Okla. Stat. Ann. tit. 82, §1-A(b)(1) (1970), now §105.2(B)(1) (Supp. 1974), pertains to beneficial uses initiated before statehood. (2) Title 82, §1-A(b)(2) (1970), now §105.2(B)(2) (Supp. 1974), specifies that priorities established in adjudications under prior legislation will be accorded priority as assigned in the adjudication decrees if they have not been lost in whole or in part because of nonuse as provided in §32 (1970), now §105.16 (Supp. 1974). See Rarick, *supra* at 42; Rarick, J. F., "Oklahoma Water Law, Stream and Surface in the Pre-1963 Period," 22 Okla. L. Rev. 1, 38 (1969).

made for protection of priorities based on beneficial use previously made under various combinations of circumstances,[85] and a special procedure for determining vested rights was created.[86]

In a 1968 case, the Oklahoma Supreme Court held that this 1963 legislation did not apply to situations in which it concluded that the rights of the litigants had vested under the laws in existence prior to this amendment, although it held this legislation to have retroactively eliminated certain procedural requirements in previous appropriation statutes.[87] The court's opinion includes some discussion of the question of the correlation of riparian and appropriative rights under the pre-1963 Oklahoma Laws.[88]

The existing statutory provisions discussed above, except for the 1890 provision as amended in 1963,[89] were repealed in 1972 but were substantially reenacted as a part of new provisions regarding stream water use.[90]

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[85] Okla. Stat. Ann. tit. 82, §1-A(b) (1970), now §105.2(B) (Supp. 1974).

[86] Okla. Stat. Ann. tit. 82, §§5 and 6 (1970), repealed, Laws 1972, ch. 256, §33.

[87] *Oklahoma Water Resources Bd.* v. *Central Okla. Master Conservancy Dist.*, 464 Pac. (2d) 748 (Okla. 1968). The court in its 1968 opinion held that the 1963 legislation had no application to the case because "This act was passed both *after* the initiation of the appropriation by the District and *after* the commencement of Draper Dam project [by Oklahoma City, the coplaintiff on appeal]. The rights of the District and of the City vested under the law in existence before the cited amendment was enacted." *Id.* at 755. Nevertheless, in its 1969 supplemental opinion on rehearing, the court held the 1963 legislation had eliminated "pre-1963 statutory conditions precedent for the perfection of a water right, i.e., hydrographic survey and adjudication proceedings" with which the District had not complied. *Id.* at 756. Regarding these conditions, see the discussion at notes 15-19 *supra*. The court held these to be procedural requirements and that "no one has a vested right in any particular mode of procedure for the enforcement of defense of his rights. Hence, the general rule that statutes will be construed to be prospective only does not apply to statutes affecting procedure; but such statutes, unless the contrary intention is clearly expressed or implied, apply to all actions falling within their terms, whether the right of action existed before or accrued after the enactment." *Id.* This case was critically reviewed in Rarick, *supra* note 84, 23 Okla. L. Rev. at 52-70.

[88] See the discussion in chapter 6 at note 273.

[89] See the discussion of Okla. Stat. Ann. tit. 60, §60 (1971) at note 82 *supra*.

[90] Okla. Laws 1972, ch. 256, §33, repealing tit. 82, §§1-A to 6, 11 to 14, 21 to 35 (and other specified sections), and enacting §§105.1-.32 (Supp. 1974). But the special procedure for determining vested rights created with the 1963 legislation, mentioned at note 84 *supra* (as well as the hydrographic survey provision mentioned in note 87 *supra* and at note 119 *infra*) was repealed and *not* reenacted.

The exemption regarding farm ponds and gully plugs mentioned in chapter 6 at the end of note 269 has been changed so as to apply only to those "which are not located on definite streams." Okla. Stat. Ann. tit. 82, §105.2(A) (Supp. 1974).

The 1972 act provides, " 'Definite Stream' means a watercourse in a definite, natural channel, with defined beds and banks, originating from a definite source or sources of supply. The stream may flow intermittently or at irregular intervals if that is characteristic of the source of supply in the area." *Id.* §105.1(A).

The term "natural person" in the provision set out at note 83 *supra* has been changed to "person." *Id.* §105.2(A).

The 1972 act provides that it and its amendments to existing law shall not "be deemed to reestablish any water rights that have heretofore been lost or forfeited under laws heretofore in effect" nor to "change in any manner priority dates for the right to use water under the laws" previously in effect.[91]

Ground Waters

The Territorial act of 1890, which is still in effect, with amendments, provides:[92]

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

The effect of this statute was to divide ground waters into two classes–(1) definite underground streams and (2) ground waters not flowing in definite streams–and to apply different rules of law to each.

Definite underground streams were subjected by the statute to the same rules as those which apply to surface watercourses, and the law of watercourses so applied to them has been the common law riparian doctrine as well as the appropriation doctrine, although 1963 legislation undertook to restrict unused riparian rights. This is discussed earlier under "Interrelationships of the Dual Systems."

The statute mentioned above declares that the owner of land owns the waters flowing under its surface, but not forming a definite stream–commonly known as percolating ground water. In a 1937 case, the State supreme court, in applying this statute to the use of such waters, indicated that they were subject to the rule of reasonable use as portrayed in the following quoted syllabus from its opinion:

> 3. The owner of land may draw from beneath its surface as much of the percolating waters therein as he needs, even though the water of his neighbor is thereby lowered, so long as the use to which he puts it bears some reasonable relationship to the natural use of his land in agricultural, mining, or industrial and other pursuits, but he may not forcibly extract and exhaust the entire water supply of the community, causing irreparable injury to his neighbors and their lands, for the purpose of transporting and selling said water at a distance from and off the premises.
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> 6. Section 11785, O. S. 1931 [which incorporated the 1890 provision], vesting ownership of percolating water in the owner of the land above it, does not thereby vest said owner with the right to such an unreasonable use as will enable him to destroy his neighbor's property

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[91] Okla. Stat. Ann. tit. 82, §105.32 (Supp. 1974).

[92] Okla. Stat. Ann. tit. 60, §60 (1971). The original Oklahoma declaration was Terr. Okla. Stats. §4162 (1890).

> by forcibly extracting and exhausting the common supply of water for sale at a distance; such use being subject to the same restrictions as are imposed upon ownership of other classes of property.[93]

In 1949, the State legislature enacted the Oklahoma Ground Water Law. And the 1890 ownership statute was amended in 1963 to provide that while the landowner owns the percolating ground water, the use of ground water shall be governed by the ground water law.[94]

The Oklahoma Ground Water Law of 1949, as amended, established a system of prior appropriation applicable to water under the surface of the earth, regardless of the geologic structure in which found,[95] although until a 1967 amendment it did not apply to underground streams.[96] Priorities ordinarily were to be based on first in time, first in right.[97] Those using water prior to the act's effective date were given a priority date as of the date they first applied the water to beneficial use;[98] those basing their claims on later withdrawals were given a priority as of the date they applied for a permit.[99] No permit was required or issued except for designated critical ground water areas.[100] Permits could be issued only to overlying landowners or their lessees.[101] After completion of a court adjudication of existing rights in a basin, any remaining ground water subject to appropriation could be taken only under a permit from the Board. If there had been no court adjudication, in order to establish priority of a claim, application must have been made to the Board which would "officially file the application and notify the applicant of such filing."[102]

The 1949 law, as amended, also included, among other things, provisions regarding well spacing and prevention of waste. The Board was not to issue a permit for extraction of water from a basin if its findings indicated such use would result in "depletion above the average annual ratio of recharge,"[103] and if the withdrawals from a basin exceeded the annual yield it could require cessation of excessive withdrawals in reverse order of priority of rights.[104]

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[93] *Canada* v. *Shawnee*, 179 Okla. 53, 64 Pac. (2d) 694, 695 (1937).

[94] Okla. Laws 1963, ch. 205, §1. See Okla. Stat. Ann. tit. 60, §60 (1971).

[95] Okla. Stat. Ann. tit. 82, §1002 (1970).

[96] Laws 1967, ch. 391, §6 removed the previous exemption of underground streams.

[97] Okla. Stat. Ann. tit. 82, §1005 (1970).

Nevertheless, Rarick, J. F., "Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period," 24 Okla. L. Rev. 403, 421 (1971), states that "In practice the [Oklahoma Water Resources]Board roughly prorated the water among the applicants according to their acreage overlying the basin," by the limitations on water usage it included in their permits.

[98] But, the priority could be wholly or partially lost by certain later nonuse.

[99] Okla. Stat. Ann. tit. 82, §1005 (1970).

[100] *Id.* §§1007-1015.

[101] *Id.* §1013.

[102] *Id.* §§1006 and 1013.

[103] *Id.* §1013.

[104] *Id.* §1015.

Certain domestic and stockwatering uses were exempt, provided such uses did not cause waste as defined in the statute.[105]

However, 1972 legislation which became effective July 1, 1973, has repealed this ground water law and has substituted other provisions.[106] Among other changes, the new provisions do not include special procedures for critical ground water areas. The Board, following hydrographic surveys and hearings, shall make determinations of the maximum annual yield of fresh water from each fresh ground water basin or subbasin.[107] These shall be based, among other specified factors, upon "a minimum basin or subbasin life of twenty (20) years from the effective date of this act."[108] After notice and hearing, the Board shall determine "the maximum annual yield of water which shall be allocated to each acre of land overlying such basin or subbasin."[109] Following such a determination for a particular basin or subbasin, persons are required to obtain, and the Board may issue (after notice and hearing), regular permits for nondomestic purposes.[110] The Board shall issue such a permit if the applicant is an owner or lessee of overlying lands, the use is beneficial, and it finds that waste will not occur.[111] A regular permit shall allocate to the applicant his proportionate part of the maximum annual yield of the basin or subbasin, which shall be that percentage of the total annual yield which is equal to the percentage of the overlying land which he owns or leases. Such permit shall not be issued for less than the remaining life of the basin or subbasin as determined by the Board.[112]

Temporary permits may be issued in areas where hydrographic surveys and maximum yield determinations have not been made.[113] Short-term special permits, for water in excess of that allotted under a regular or temporary permit, may be issued in any area.[114]

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[105] *Id.* §1004.

[106] Laws 1972, ch. 248, §23, repealing tit. 82, §§1001-1019 and substituting §§1020.1-.22.

[107] "Fresh water" means water with less than 5,000 parts per million total dissolved solids. Okla. Stat. Ann. tit. 82, §1020.1(G) (Supp. 1974). "Ground water" includes water under the earth's surface regardless of the geologic structure in which it stands or moves outside the cut bank of any definite stream." *Id.* §1020.1(A).

[108] *Id.* §§1020.4 and .5.

[109] *Id.* §1020.6. The Board may subsequently increase this amount (after later surveys and hearings) but shall not decrease it. *Id.* Hydrographic surveys shall be updated every 10 years. *Id.* §1020.4.

[110] *Id.* §§1020.7 - .9. Domestic uses, defined in §1020.1(B), may be made without a permit and are not subject to well-spacing orders, but are subject to sanctions against waste. *Id.* §1020.3.

Some special provisions apply to wells within municipalities. *Id.* §1020.21.

[111] *Id.* §1020.9. Factors which may constitute waste are set out in §1020.15.

[112] *Id.* §1020.9.

[113] Such permits must be revalidated annually and lapse at the end of their term or upon issuance of a regular permit. Quantity limitations are specified. *Id.* §1020.11(B).

[114] Their duration shall not exceed 6 months. They may be renewed three times, but successive permits shall not be granted for the same purpose. *Id.* §1020.11(C).

Before issuing any permits, the Board may determine and order a proper spacing of wells which it deems necessary to an orderly withdrawal of water from the basin or subbasin.[115]

Actions may be taken by the Board to prevent waste.[116]

Notwithstanding the provisions of the 1972 act, it is provided that persons shall not be deprived "of any right to use ground water in such quantities and amounts as were used or were entitled to be used prior to the enactment hereof." And anyone having the right to make beneficial use of ground water before the act's effective date has "the right to bring his use under the provisions of this act."[117]

Special Statutory Adjudication Procedures

The provisions of the statutes relating to determinations of water rights provide that when the Water Resources Board determines that "the best interests of the claimants to the use of water from a stream system will be served by a determination of all rights to the use of water of such system, the Board may institute a suit on behalf of the state for the determination of all rights to the use of such water * * *."[118]

Prior to 1972, the Board had been directed to make hydrographic surveys of each stream system and source of water supply. Upon the completion of the survey the Board was to determine whether or not to ask the Attorney General to commence an adjudication suit. The provisions regarding hydrographic surveys were repealed in 1972.[119]

The holder of a right to use water from a stream, as defined by statute, which is impaired by acts of others, may bring suit in the appropriate district court. It is provided, however, that the Attorney General shall intervene on behalf of the State in any suit for the adjudication of rights to use the water if notified by the Water Resources Board that the public interests would be best served by such action.[120]

In any suit for the determination of water rights in any stream, any person who has used, is using, or claims, or might claim, the right to use water from the stream may be made a party to the suit. Any person who is using, has used, or claims the right to use water from the stream may intervene. Persons not made parties to the suit shall not be bound by the resultant decree. When any

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[115] *Id.* §§1020.17 and .18. Exceptions may be granted to avoid inequitable or unreasonable results.

[116] *Id.* §1020.15, which sets out factors that may constitute waste.

[117] *Id.* §1020.14.

[118] *Id.* §105.6, formerly §12 (1970), repealed, Laws 1972, ch. 256, §33, reenacted as §105.6.

See also §1085.2(8) regarding more general powers to institute or intervene in court actions.

[119] Okla. Stat. Ann. tit. 82, §§11 and 12 (1970), repealed, Laws 1972, ch. 256, §33.

[120] Okla. Stat. Ann. tit. 82, §105.5 (Supp. 1974), formerly §4 (1970).

suit has been filed, the court may direct the Board to furnish data necessary for the determination of the rights involved.[121]

Upon the completion of the adjudication, a certified copy of the decree shall be filed with the Board, stating, with respect to each adjudged water right, the priority, amount, purpose and place of use thereof, and, if the water is to be used for irrigation, the tracts of land to which it shall be appurtenant, and such other conditions necessary to define the right and its priority.[122]

A special statutory procedure for determining vested rights was enacted in 1963, as mentioned earlier. It was repealed in 1972.[123]

Administration of Water Rights and Distribution of Water

The Water Resources Board "shall, from time to time as may be necessary for the economical and satisfactory apportionment of the water," divide the State into water districts in conformity with drainage areas. The Board may likewise, in its discretion, change these districts.[124]

Prior to 1972, the statutes had provided for the appointment of watermasters for these districts and had specifically vested the Board with supervision over the apportionment of water according to licenses and court adjudications. These provisions were repealed in 1972.[125]

Oregon

Governmental Status

The Territory of Oregon was established August 14, 1848.[1] Oregon was admitted to statehood by an act of Congress approved by the President on February 14, 1859.[2]

State Administrative Agencies

The office of the State Engineer was created in 1905,[3] but administrative supervision over water and water rights, established in 1909,[4] was not given to him until 1923.[5] The State Engineer has responsibility regarding the acquisition of appropriative rights in water[6] and the administration and

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[121] *Id.* § 105.7, formerly § 13 (1970).

[122] *Id.* § 105.8, formerly § 14 (1970).

[123] Okla. Stat. Ann. tit. 82, § § 5 and 6 (1970), repealed, Laws 1972, ch. 256, § 33. See the discussion at note 86 *supra.*

[124] Okla. Stat. Ann. tit. 82, § 1085.3 (Supp. 1974), formerly § 71 (1970).

[125] Okla. Stat. Ann. tit. 82, § § 72-75 and 81 (1970), repealed, Laws 1972, ch. 256, § 33.

[1] 9 Stat. 323 (1848).

[2] 11 Stat. 383 (1859).

[3] Oreg. Laws 1905, ch. 228.

[4] Oreg. Laws 1909, ch. 216.

[5] Oreg. Laws 1923, ch. 283.

[6] Oreg. Rev. Stat. § § 537.130 and .615 (Supp. 1973).

distribution of water.[7] With respect to adjudication of water rights, the orders of determination by the State Engineer are not final, but are filed in court as the initiation of a judicial action which shall be like a suit in equity.[8]

The State Water Resources Board, for which the State Engineer is engineer, was created in 1955[9] and vested with the duty of progressively formulating a water resources program and policy (and issuing statements thereof) for the State pursuant to principles of policy declared by the legislature, and with broad powers to implement them.[10] The Water Resources Board also exercises certain functions pertaining to appropriation of water and procedures therefor.[11]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—(1) Legislative. A statute enacted in 1891 authorized corporations organized for irrigation purposes to appropriate and furnish water to users; declared that all then existing

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[7] Oreg. Rev. Stat. § 540.030(2) (Supp. 1969).

[8] Oreg. Rev. Stat. § § 539.130 and .150 (Supp. 1971).

[9] Oreg. Laws 1955, ch. 707.

[10] Oreg. Rev. Stat. § § 536.210 - .590 (Supp. 1973).

The Board shall deliver a copy of each water resources statement to each State agency or public corporation which may be concerned with or which may carry on activities likely to affect the use or control of the State's water resources. In the exercise of any power, duty or privilege affecting water resources, every State agency or public corporation shall conform to such statements of the Board. No exercise of any such power, duty or privilege which tends to derogate from or interfere with the State water resources policy shall be lawful. And no exercise of any power, duty, or privilege by any State agency or public corporation which has received a copy of a water resources statement which would in any way conflict with that statement shall be effective or enforceable until approved by the Board. *Id.* § § 536.350 - .370.

Except as noted below, the statute provides for notification to the Board by any State agency or public corporation proposing to exercise a power, duty or privilege which would in any way conflict with the State water resources policy, and includes procedures for the Board to follow (including discretionary hearings) in reviewing such actions, which must be reviewed if a protest is timely filed after the notification. Following the Board's review, the Board shall approve, approve with conditions, or disapprove the proposed action. *Id.* § 536.380. Failure of the Board to give timely notification of its contemplated review shall constitute approval. *Id.* § 536.370.

The Board is authorized to enter into agreements or provide by orders, rules or regulations for the approval of the exercise of a power, duty or privilege by any State agency or public corporation which has received a State water resources statement without having to file the notification described above. Any such agreement, order, rule or regulation may be modified or revoked upon reasonable notice to the State agency or public corporation and may contain such other conditions as the Board may require to accomplish the purposes of the State water resources policy. *Id.* § 536.390.

The Board may apply to the appropriate court to enjoin violations of or to enforce compliance with these provisions. *Id.* § 536.400.

[11] *Id.* § § 536.410, 537.170, and 543.225.

appropriations made for beneficial purposes by any person, company, or corporation in accordance with laws, court decisions, or established local customs and regulations should be respected; and provided that all controversies respecting water rights under the statute should be determined by the dates of the respective appropriations.[12] Further recognition of the appropriation doctrine was given in the successive statutes of 1899, 1905, and 1909.[13]

(2) Judicial. In one of its earliest water rights cases, the Oregon Supreme Court held that as between preemptors on unsurveyed government lands contiguous to a stream, the first possessor would have a vested appropriative right in accordance with the Act of Congress of 1866[14] if a local custom to this effect were alleged and proved.[15] Subsequently the supreme court acknowledged that a court could and should take judicial notice of the usage which had become a part of the public history of the area, and of universal application therein, without offer of proof.[16]

In other cases decided in the 1880's and 1890's, the court recognized appropriative rights as vested in settlers on public lands under the congressional legislation,[17] but were careful to restrict their holdings and observations to rights acquired thereunder.[18] In fact, in 1891 the court said that in Oregon the doctrine of rights to water by prior appropriation for mining or irrigation had not been adopted or applied *except* as to parties who had acquired their rights under the Act of 1866; nor, the court further remarked (erroneously), had there been any legislation by the State on the subject.[19]

With this limitation to public land, the appropriative principle was well established in Oregon and many facets of the doctrine were being litigated before the end of the 19th century.[20]

Procedure for appropriating water.—(1) Earlier methods. For many years

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[12] Oreg. Laws 1891, p. 52.

[13] Oreg. Laws 1899, p. 172, Laws 1905, ch. 228, Laws 1909, ch. 216.

[14] 14 Stat. 253, § 9 (1866), amended, 16 Stat. 218 (1870).

[15] *Lewis* v. *McClure*, 8 Oreg. 273, 274-275 (1880).

[16] *Speake* v. *Hamilton*, 21 Oreg. 3, 8, 26 Pac. 855 (1890); *Parkersville Drainage Dist.* v. *Wattier*, 48 Oreg. 332, 336-337, 86 Pac. 775 (1906).

[17] *Kaler* v. *Campbell*, 13 Oreg. 596, 597-598, 11 Pac. 301 (1886); *Tolman* v. *Casey*, 15 Oreg. 83, 88, 13 Pac. 669 (1887).

[18] *Curtis* v. *La Grande Water Co.*, 20 Oreg. 34, 23 Pac. 808, 25 Pac. 378 (1890); *Carson* v. *Gentner*, 33 Oreg. 512, 517, 52 Pac. 506 (1898).

[19] *Simmons* v. *Winters*, 21 Oreg. 35, 42, 27 Pac. 7 (1891). This decision was filed June 24, 1891. Four months earlier, on February 18, 1891, there had been filed the legislative enactment authorizing corporations to appropriate and supply water for general irrigation purposes, household and domestic consumption, and watering livestock on dry lands, and prescribing procedures therefor. Oreg. Laws 1891, p. 52.
Low v. *Schaffer*, 24 Oreg. 239, 242-246, 33 Pac. 678 (1893); *Cole* v. *Logan*, 24 Oreg. 304, 308-312, 33 Pac. 568 (1893); *Low* v. *Rizor*, 25 Oreg. 551, 555-559, 37 Pac. 82 (1894); *Nevada Ditch Co.* v. *Bennett*, 30 Oreg. 59, 85-101, 45 Pac. 472 (1896); *Smyth* v. *Neal*, 31 Oreg. 105, 109-110, 49 Pac. 850 (1897).

prior to enactment of the water code of 1909, an intending appropriator had a choice of two methods of acquiring his right:[21]

(a) He might construct a ditch, divert the water, and apply it to beneficial use, without conforming to any statutory requirement, in which case, if the work was prosecuted with reasonable diligence, on completion of the appropriation the priority would relate back to the first step.

(b) He might elect to follow the statutory procedure then extant—the first of which was enacted in 1891—which required posting a written notice at the proposed place of diversion and recording a copy of the notice in the county records, followed by construction of works and completion of the appropriation. The 1905 law required in addition the filing of a certified copy in the office of the State Engineer.[22] If all statutory requirements, including reasonable diligence, were complied with, the priority related back to the time when the notice was posted.

In various parts of the State, before any legislation relating to methods of appropriating water had been enacted, local customs were in effect, under which an intending appropriator posted a notice of his claim and filed it in the county records.[23] Validity of an appropriation made at such time did not depend upon conformity to the custom, but failure to conform may have had some bearing on application of the doctrine of relation.[24]

(2) Current method. Appropriations of water under the Water Rights Act are governed by provisions of the statute enacted in 1909, which originally became known as the water code[25] and now is officially named the Water Rights Act.[26] Appropriations of water for generation of electricity by individuals and private corporations are governed by provisions of the hydroelectric act.[27]

The supreme court has stated that the prescribed procedure is the only method, since the 1909 act became effective, whereby appropriative water rights in watercourses may be acquired in Oregon.[28]

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[21] *State ex rel. Van Winkle* v. *People's West Coast Hydro-Elec. Corp.*, 129 Oreg. 475, 480-482, 278 Pac. 583 (1929).

[22] Oreg. Laws 1891, p. 52, Laws 1899, p. 172, Laws 1905, ch. 228.

[23] *Cole* v. *Logan*, 24 Oreg. 304, 309, 33 Pac. 568 (1893); *Nevada Ditch Co.* v. *Bennett*, 30 Oreg. 59, 85-86, 45 Pac. 472 (1896); *In re Silvies River*, 115 Oreg. 27, 39-40, 237 Pac. 322 (1925).

[24] *In re Silvies River*, 115 Oreg. 27, 39-40, 237 Pac. 322 (1925). See *Oregon Land & Construction Co.* v. *Allen Ditch Co.*, 41 Oreg. 209, 218, 69 Pac. 455 (1902).

[25] Oreg. Laws 1909, ch. 216.

[26] Oreg. Rev. Stat. §537.010 (Supp. 1973).

[27] *Id.* ch. 543, originally enacted, Laws 1931, ch. 67. Various provisions of this act are discussed in chapter 7 at note 940 *et seq.*

[28] *Staub* v. *Jensen*, 180 Oreg. 682, 686-687, 178 Pac. (2d) 931 (1947).

With respect to vested riparian rights, see the later discussion under "Interrelationships of the Dual Systems—Legislative modification of the riparian doctrine" regarding Oreg. Rev. Stat. §539.010 (Supp. 1971). And see the discussion of this and domestic and stockwatering uses on riparian lands under "Interrelationships of the Dual

(*Continued*)

An intending appropriator under the Water Rights Act is required—before commencing construction, enlargement, or extension of waterworks or performing any work in connection with the construction or proposed appropriation—to make an application to the State Engineer for a permit to make such appropriation. "No person shall use, store or divert any waters until after the issuance of a permit to appropriate such waters."[29] If the State Engineer believes that the proposed use may prejudicially affect the public interest, he must refer the application to the State Water Resources Board for consideration before acting upon it pursuant to the Board's order.[30]

In case of proposed storage projects, primary permits are issued for reservoir construction, and secondary permits are issued to the parties who, under contract with the reservoir owner, propose to apply the stored water to beneficial use.[31] However, a 1961 enactment provides for a single application for stock ponds or other small reservoirs wherein there is no contemplated diversion of water from the reservoir nor any requirement for continued flow through the ponds.[32]

The permit authorizes the holder to proceed with construction of the necessary works and to take all steps required to apply the water to beneficial use and to perfect the appropriation.[33]

The Water Rights Act provides that the right acquired by an appropriation made thereunder shall date from the time of filing the application in the office of the State Engineer.[34] This is predicated, of course, upon proper compliance of the intending appropriator with all requirements of the statute. An appropriator who conceives a plan under which he intends eventually to develop a considerable area under irrigation, is to be allowed a reasonable time for such purpose commensurate with the magnitude of the undertaking and

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(*Continued*)
Systems—Effect of legislation and court decisions on the dual system relationship," *infra*.

[29] Oreg. Rev. Stat. § 537.130 (Supp. 1973).

[30] Similarly, the State Engineer must refer an application to the Board if the proposed use is to develop more than 100 horsepower for hydroelectric purposes. *Id.* § 537.170. See "Restrictions and preferences in appropriation of water," *infra*.

[31] Oreg. Rev. Stat. § 537.300(1) (Supp. 1973).

[32] Oreg. Laws 1961, ch. 187, Rev. Stat. § 537.300(2) (Supp. 1973).

[33] The right given by the permit is merely a contingent right which may ripen into a complete appropriation, or it may be defeated by failure of the holder to comply with the statutory requirements. *Morse* v. *Gold Beach Water, Light & Power Co.*, 160 Oreg. 301, 305, 84 Pac. (2d) 113 (1938). But in a case decided in 1932, the Oregon Supreme Court held that the law does not require extraordinary or impossible things of an appropriator; that the overriding financial difficulties of the times should be taken into account in appraising the diligence and good faith of a permittee in completing its appropriation. *In re White River & Its Tributaries*, 141 Oreg. 504, 511-518, 16 Pac. (2d) 1109 (1932).

[34] Oreg. Rev. Stat. § 537.250 (Supp. 1973).

natural obstacles to be encountered.[35] If properly planned and consummated, the doctrine of relation applies to the entire appropriation or to so much thereof as is necessary for the completed project.[36]

On completion of the authorized appropriation, the State Engineer issues to the permittee a certificate which evidences his perfected appropriation and sets forth its details.[37]

The 1909 Oregon statute declares that all waters within the State from all sources of water supply belong to the public.[38] Subject to existing rights and to certain statutory provisions, "all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise."[39]

An 1899 amendment, the substance of which has been carried over into the present law,[40] declares that the use of water of lakes and running streams for developing mineral resources and furnishing electric power for all purposes is a public and beneficial use and a public necessity, and it grants the right to appropriate the unappropriated waters under the statutory procedure.

The right to appropriate water for irrigation purposes is not limited to the watering of cultivated lands, but is recognized with respect to irrigation of wild meadowlands[41] and pasturelands.[42]

The extent of the appropriative right may be determined by the period of time of use of water, as well as by the quantity needed for the purpose of the appropriation. Hence, a prior appropriation of a definite quantity of water may be limited to use during a definite period, and a subsequent appropriator may

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[35] *Tudor* v. *Jaca*, 178 Oreg. 126, 137-138, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946).

[36] *In re Deschutes River & Tributaries*, 134 Oreg. 623, 649, 286 Pac. 563, 294 Pac. 1049 (1930). Regarding municipalities, see the discussion at notes 88-95 *infra*.

[37] Oreg. Rev. Stat. §537.250 (Supp. 1973). Under §537.270, a water rights certificate in good standing is conclusive evidence of the priority and extent of the appropriation in any court or tribunal of the State, after a 3-month period for contesting it. The Oregon Supreme Court has said "the legislative assembly intended the water right certificate, not the permit, even when followed by a beneficial use, to mark the point at which a water right becomes vested." *Green* v. *Wheeler*, 254 Oreg. 424, 458 Pac. (2d) 938, 940-941, certiorari denied, 397 U.S. 990 (1969).

[38] Oreg. Rev. Stat. §537.110 (Supp. 1973).

[39] *Id.* §537.120. See the discussion at notes 86-87 *infra* regarding the withdrawal of various waters from appropriation. Section 537.120 specifically exempts withdrawals made under chapter 538 but does not refer to withdrawals made under §536.410, discussed at note 86 *infra*. Section 537.120 also does not refer to other legislation applicable to underground waters which is discussed under "Ground Waters," *infra*. For the view that the 1909 act probably was not intended to apply to percolating ground waters, see Note, "Real Property—Water Law in Oregon—Percolating Waters," 30 Oreg. L. Rev. 257, 260-261 (1951).

[40] Oreg. Laws 1899, §1, p. 172, Rev. Stat. §541.110 (Supp. 1973).

[41] *Oliver* v. *Skinner & Lodge*, 190 Oreg. 423, 437-438, 226 Pac. (2d) 507 (1951).

[42] *In re Silvies River*, 115 Oreg. 27, 41, 237 Pac. 322 (1925).

appropriate a like quantity from the same source for use during another period.[43] So also, where water had been taken through a slough for irrigation purposes only, it was held that the right of appropriation was limited to the irrigation season for irrigation purposes and that it did not embrace the right to use the water through the slough for stockwatering or for any other purpose or at any other season of the year.[44]

The right to appropriate water pursuant to the terms of the Water Rights Act is open to any person.[45] Appropriation of water by a corporation follows the same general rule as to priority of right as though made by an individual.[46] Special provision is made for appropriations by the United States[47] and by municipalities.[48] Also noted in the statutes in various connections are appropriations made by the State of Oregon,[49] irrigation districts,[50] public agencies,[51] public utility water companies,[52] and railway corporations.[53]

An appropriation may be initiated by a person or organization or entity for a use of water to be made by or through others.[54] In such case, the initial appropriator completes the appropriation through the agency of those who actually use the water.[55]

Prior to 1971, any person aggrieved by any of the State Engineer's orders or rulings could appeal therefrom to the circuit court and thence to the supreme court, which appeal would be governed by the practice in suits in equity.[56] Another such provision pertained to appeals from orders of the State Engineer or State Water Resources Board allowing or rejecting applications to appropriate water.[57] Legislation enacted in 1971 provides that judicial review of such orders or regulations shall be as provided in the chapter regarding administrative procedures and rules of State agencies.[58]

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[43] *Oliver* v. *Skinner & Lodge*, 190 Oreg. 423, 442-443, 226 Pac. (2d) 507 (1951).

[44] *Smyth* v. *Jenkins*, 148 Oreg. 165, 168-169, 33 Pac. (2d) 1007 (1934).

[45] Oreg. Rev. Stat. § 537.130 (Supp. 1973).

[46] *In re Hood River*, 114 Oreg. 112, 131, 181, 227 Pac. 1065 (1924).

[47] Oreg. Rev. Stat. §§ 541.220 - .250 (Supp. 1973).

[48] *Id.* §§ 537.190(2), .230(1), .290, .410(2), 538.410, and 540.610(2) and (3)(Supp. 1969).

[49] Oreg. Rev. Stat. § 537.290 (Supp. 1973).

[50] *Id.* § 537.210.

[51] *Id.* §§ 537.535, .595, .605, and .615.

[52] *Id.* §§ 541.010 - .080.

[53] *Id.* § 537.310.

[54] *In re Deschutes River & Tributaries*, 134 Oreg. 623, 655, 286 Pac. 563, 294 Pac. 1049 (1930).

[55] *Nevada Ditch Co.* v. *Canyon & Sand Hollow Ditch Co.*, 58 Oreg. 517, 521, 114 Pac. 86 (1911).

[56] Oreg. Rev. Stat. § 536.060 (Supp. 1969).

[57] *Id.* § 537.200. These provisions were repealed by Oreg. Laws 1971, ch. 734, § 77 and 21, respectively.

Opinions of the Oregon Supreme Court regarding the nature and scope of such appeal proceedings are discussed in chapter 7 at notes 484, 487-489, and 922-923.

[58] With respect to "orders under ORS 537.150 to 537.190," relating to actions on

Restrictions and preferences in appropriation of water.—(1) Approval and rejection of applications. The State Engineer is required to approve applications filed under the Water Rights Act for permits to appropriate water which are made in proper form and which contemplate application of water to beneficial use unless, as indicated later, the proposed use conflicts with existing rights or with other specific requirements of the act or must first be considered by the State Water Resources Board with respect to its effect upon the public interest. Except for small flows of water (10 second-feet or less), an application must be rejected unless, within a prescribed time after notice and demand from the State Engineer, the applicant furnishes satisfactory proof of his ability to construct the proposed project and of his good faith.[59] An appropriation may be approved for less water than applied for. It must not be approved for more water than can be applied to a beneficial use. Necessary terms and conditions may be imposed in the public interest.[60]

No uniform duty of water or maximum quantity appropriable has been fixed by statute in Oregon or suggested by the courts.[61] Quantities of water awarded to appropriators in decrees of adjudication have been determined with reference to the local conditions involved.[62]

A hearing may be held on notice to the applicant and protestants if the State Engineer believes it necessary to determine whether a proposed use will conflict with existing rights or be prejudicial to the public interest.[63] An application filed under the Water Rights Act for a permit to appropriate water must be referred by the State Engineer to the State Water Resources Board for consideration if, in the State Engineer's judgment, the proposed use may prejudicially affect the public interest.[64] The Board holds a hearing on the application, after notice to the applicant and to objectors, if there are any. If the Water Resources Board determines that the proposed use would impair or

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applications for permits, see Oreg. Laws 1971, ch. 734, §80, Rev. Stat. §537.185 (Supp. 1973). With respect to "orders or regulations of the State Engineer," see §536.065. Both sections provide that judicial review shall be as provided in §§183.310 - .500. See especially §183.480.

[59] Oreg. Rev. Stat. §537.170 (Supp. 1973).

[60] *Id.* §537.190.

[61] *Little Walla Walla Irr. Union* v. *Finis Irr. Co.*, 62 Oreg. 348, 351, 124 Pac. 666, 125 Pac. 270 (1912).

[62] For some judicial views of determining factors, see *Hough* v. *Porter*, 51 Oreg. 318, 417-420, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909); *Donnelly* v. *Cuhna*, 61 Oreg. 72, 76, 119 Pac. 331 (1911); *In re Rogue River*, 117 Oreg. 477, 481, 244 Pac. 662 (1926); *Low* v. *Schaffer*, 24 Oreg. 239, 246, 33 Pac. 678 (1893); *Porter* v. *Pettengill*, 57 Oreg. 247, 250, 110 Pac. 393 (1910); *In re Schollmeyer*, 69 Oreg. 210, 212, 216, 138 Pac. 211 (1914).

[63] Oreg. Rev. Stat. §537.180 (Supp. 1973).

[64] Even if the State Engineer does not refer the matter to the Board, he apparently must conform to the Board's statements of water resources policy and his actions in that regard may be subject to notification requirements and its review and action, as discussed in note 10 *supra.*

be detrimental to the public interest so far as the coordinated, integrated State water resources policy[65] is concerned, it enters an order rejecting the application or requiring its modification to conform to the public interest. The application is then referred back to the State Engineer for further proceedings not inconsistent with the Board's order.[66]

In determining the foregoing question of detriment to the public interest, the Board is directed to have due regard for (a) conserving the highest use of water for all purposes;[67] (b) maximum economic development of the waters; (c) control of waters for all beneficial purposes including drainage, sanitation, and flood control; (d) amount of water available for appropriation; (e) prevention of wasteful and other undesirable uses; (f) all vested and inchoate rights in the waters of the State and means necessary to protect them; and (g) the State water resources policy.[68]

In two cases decided early in the history of the Oregon water code the Oregon Supreme Court had occasion to consider the provision for referring these questions of public interest to the Board of Control, which then performed the function in question. In one of these, the court observed that the Board of Control had the duty of refusing an application if, after full hearing, it appeared that the public interest demanded it.[69] In the other, the court cautioned that it was only when the contemplated use was a menace to the safety and welfare of the public that the application should be referred to the Board for consideration.[70] The current directive of the legislature is so detailed and all-embracing that the Board of Water Resources is perforce vested with a broad discretion in applying policy to practice in reaching its conclusions.

(2) Beneficial use limitation. The statute declares that beneficial use shall be the basis, the measure, and the limit of all rights to use water in the State.[71] The courts have long concurred in the now axiomatic rule that the purpose for which an appropriation of water might be made must be useful or beneficial,[72] and they have repeated it from time to time under varying circumstances.[73]

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[65] This policy is mentioned at note 10 *supra* and some of its elements are described at notes 77-78 *infra.*

[66] Oreg. Rev. Stat. §537.170 (Supp. 1973).

[67] Specifically named in the law are irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, and scenic attraction. *Id.*

[68] *Id.* §537.170.

[69] *Cookinham* v. *Lewis*, 58 Oreg. 484, 487-497, 114 Pac. 88, 115 Pac. 342 (1911).

[70] *In re Schollmeyer*, 69 Oreg. 210, 215, 138 Pac. 211 (1914).

[71] Oreg. Rev. Stat. §540.610 (Supp. 1969).

[72] *Simmons* v. *Winters*, 21 Oreg. 35, 42, 27 Pac. 7 (1891); *Low* v. *Rizor*, 25 Oreg. 551, 556-557, 37 Pac. 82 (1894).

[73] See, e.g., *Allen* v. *Magill*, 96 Oreg. 610, 615-616, 189 Pac. 986, 190 Pac. 726 (1920);

Specific purposes of use have been declared to be beneficial in many decisions of the Oregon Supreme Court; but in the *Deschutes River* adjudication it was held that an allowance of 30 cubic feet per second for the purpose of carrying off debris during the irrigation season would not be a beneficial use of the water, because it would be equivalent to depriving about 1,600 acres of water for irrigation.[74]

(3) Some provisions regarding preferential uses. A statute first enacted in 1893[75] provides that when waters of a natural stream are not sufficient for all who desire their use, users for domestic purposes—"subject to such limitations as may be prescribed by law"—have preference over all other claimants, and agricultural users are similarly preferred over those who use water for manufacturing (section 540.140).

Another provision, enacted in 1955, includes the following declaration of policy which the State Water Resources Board is directed to consider in formulating the coordinated program and policy for use and control of the State water resources, referred to earlier;[76] "When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them," preference shall be given first to human consumption, second to livestock consumption, and thereafter other beneficial uses in an order consistent with the public interest under the existing circumstances [section 536.310(12)].[77] No reference was made to the earlier enactment.

Tudor v. *Jaca*, 178 Oreg. 126, 143, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946).

[74] *In re Deschutes River & Tributaries*, 134 Oreg. 623, 665-668, 286 Pac. 563, 294 Pac. 1049 (1930). Such use during the nonirrigating season when the waters of the river were not desired for storage purposes was believed to be, on the other hand, a beneficial use of the water.

[75] Oreg. Laws 1893, p. 150, § 3, Rev. Stat. § 540.140 (Supp. 1973).

[76] See the discussion at notes 10 and 65 *supra*.

[77] Oreg. Laws 1955, ch. 707, § 13, Rev. Stat. § 536.310(12) (Supp. 1973).

Other subsections of § 536.310 include various other declarations of policy. These include, *inter alia*, a declaration that "The maintenance of minimum perennial stream flows sufficient to support aquatic life and to minimize pollution shall be fostered and encouraged if existing rights and priorities under existing laws will permit." *Id.* § 536.310(7).

Other legislation with respect to designated "scenic waterways" (§§ 390.805-.925, enacted in 1971 and amended in 1973) provides, *inter alia*: "(1) It is declared that the highest and best uses of the waters within scenic waterways are recreation, fish and wildlife uses. The free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses. No dam, or reservoir, or other water impoundment facility shall be constructed or placer mining permitted on waters within scenic waterways. No water diversion facility shall be constructed or used except by right previously established or as permitted by the State Engineer, upon a finding that such diversion is necessary to uses designated in subsection (12) of ORS 536.310, and in a manner consistent with the policies set forth under ORS 390.805 to 390.925.

(*Continued*)

Another provision, also enacted in 1955 [section 536.340(3)], provides, as amended in 1963, that the Board may, subject to existing rights and priorities and the foregoing statutory preferential uses, in section 536.310(12), "prescribe preferences for the future" for particular uses and quantities of uses of any source of water supply in aid of highest and beneficial use thereof. Consideration must be given to the natural characteristics and economy of the area, water requirements, type of proposed use as between consumptive and nonconsumptive uses, and other pertinent data.[78]

So far as has been ascertained, none of the foregoing sections has been construed by the Oregon Supreme Court.[79] But in a recent case, the Oregon Court of Appeals appears to have concluded that sections 540.140 and 536.310(12) have only a limited effect in a controversy between appropriators during times of shortages.[80] With respect to the 1893 statutory provision (section 540.140), it stated that the 1909 Oregon Water Act had substituted "priority based on time of appropriation for the pre-1909 statutory preference (ORS 540.140) based on the nature of the uses."[81] However, the court said, "It may be that ORS 540.140 still has viability as to rights which were perfected prior to 1909 or as to rights bearing the same effective date. Since neither is involved in the case at bar, we need not consider those possibilities here."[82]

The court also said:

(*Continued*)

The State Engineer shall administer and enforce the provisions of this subsection.

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"(4) The State Water Resources Board shall carry out its responsibilities under ORS 536.210 to 536.590 with respect to the waters within scenic waterways in conformity with the provisions of this section." *Id.* §390.835. (Sections 536.210 - .590 pertain to the Board's formulation of the coordinated water resources program and policy mentioned above at note 76.)

[78] Oreg. Laws 1955, ch. 707, §10(6), Laws 1963, ch. 414, Rev. Stat. §536.340(3) (Supp. 1973).

[79] However, from a proper construction of another provision authorizing approval of applications for municipal water supplies "to the exclusion of all subsequent appropriations" (§537.190), the court in 1914 thought it apparent that "priorities of appropriation constitute a species of property in the proprietor which cannot be taken from him except by the right of eminent domain upon suitable compensation first assessed and tendered." *In re Schollmeyer*, 69 Oreg. 210, 215, 138 Pac. 211 (1914), discussed at note 89 *infra*.

[80] It did not specifically deal with §536.340(3).

[81] *Phillips* v. *Gardner*, 469 Pac. (2d) 42, 44 (Oreg. App. 1970). The court added, "Although the 1909 Act did not directly state that priorities should be based on priority in time and not on nature of use, the whole thrust of the Act clearly indicates such a purpose." *Id.* The court also said, "The Act, §73, provides 'All laws and parts of laws so far as in conflict or inconsistent with the provisions of this Act are hereby repealed.'" *Id.* at 43.

[82] *Id.* at 44.

ORS 536.210, et seq., enacted in 1955, establish a water resources board, direct it to develop comprehensive programs for conserving and augmenting water resources for all purposes, and outline factors to be considered by the board in formulating a water resources program. It is clear from a reading of these sections that it was not intended that they supersede the previously prescribed laws governing the issuance and priority of water rights certificates. In fact, ORS 536.320 specifically provides:

"The board shall not have power:

"* * *.

"(2) To modify, set aside or alter any existing right to use water or the priority of such use established under existing laws * * *.

"* * *."[83]

The appropriative rights involved in the case were domestic-use rights with 1947 priority dates and an irrigation right with a 1919 priority date.[84] From its language quoted above, the court appears to have also concluded that the 1955 preference provision in section 536.310(12)[85] did not apply to such previously existing appropriative rights. But the question of its application to later acquired rights, whether as between competing applicants or between appropriators during time of shortage, appears to have been left unresolved.

(4) Withdrawal of unappropriated water from appropriation. The State Water Resources Board may order unappropriated waters withdrawn from appropriation when deemed necessary to insure compliance with the State water resources policy or to otherwise serve the public interest. The order of withdrawal, issued after notice and hearing, particularly specifies the waters withdrawn, uses for which withdrawn, duration of withdrawal, and reasons therefor. The order may be modified or revoked at any time. While the order is in effect, no application to appropriate the waters withdrawn for the specified uses will be received.[86]

By a series of enactments, the Oregon Legislature has withdrawn certain waters from appropriation, for purposes, among others, of "maintaining and perpetuating the recreational and scenic resources of Oregon," for public park purposes, and for protection and propagation of game fish.[87]

(5) Some provisions specifically applicable to municipalities. Applications to appropriate water for municipal water supplies may be approved to the

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[83] *Id.*

[84] The junior appropriator's claim of superiority for their domestic use was rejected. *Id.* at 43-44.

[85] The junior appropriators had cited, *inter alia,* §536.310 as additional authority for claiming superiority for their domestic use (*id.*), although neither they nor the court expressly mentioned the preference provision in section 536.310(12).

[86] Oreg. Rev. Stat. §536.410 (Supp. 1973).

[87] *Id.* §§538.110 - .300.

exclusion of all subsequent appropriations, if the exigencies of the case require, on consideration and order by the State Engineer.[88] As construed by the Oregon Supreme Court, this provision does not authorize advancement of priority of an appropriation for a municipal water supply over that of a prior claimant.[89]

All rights to lake, river, and stream water acquired before enactment of the 1909 water code for municipal water supply are specially confirmed, and are not to be impaired by rights thereafter acquired. The State Engineer is directed to reject, or to grant subject to municipal use, all applications leading to appropriations which in his judgment would impair municipal water supplies. On request of the State Engineer, municipal corporations are required to advise him of their water supplies and future needs.[90] Also especially confirmed is the right of all municipalities to acquire rights in unappropriated waters for (a) all reasonable and usual municipal purposes, (b) such future reasonably anticipated needs, and (c) cases of emergency.[91] Aside from the general appropriation procedure, the legislature has granted rights in certain water sources to certain municipalities (and an irrigation district).[92] Several of these are exclusive rights to use a certain source, subject to certain preexisting rights and, in some instances, other exceptions or limitations.[93]

Exemptions are accorded to municipalities from provisions of the Water Rights Act relating to the time of beginning construction work[94] and cancellation of permits for failure to commence or complete construction within the prescribed time.[95]

Some aspects of the Oregon appropriative right.—(1) Public domain. As noted earlier under "Recognition of doctrine of prior appropriation," the Oregon Supreme Court recognized the earliest appropriative rights as having vested on the public domain under the Act of Congress of 1866,[96] prior to any State legislation authorizing appropriations of water. The effect of the congressional Act of 1877[97] upon the development of water law in this

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[88] *Id.* §537.190(2).

[89] *In re Schollmeyer*, 69 Oreg. 210, 214-215, 138 Pac. 211 (1914). From a proper construction of this section, the court thought it apparent that "priorities of appropriation constitute a species of property in the proprietor which cannot be taken from him except by the right of eminent domain, upon suitable compensation first assessed and tendered." 69 Oreg. at 215.

[90] *Id.* §538.410. See also note 132 *infra* regarding the municipal exemption from forfeiture.

[91] Oreg. Rev. Stat. §540.610(3) (Supp. 1969).

[92] Oreg. Rev. Stat. §§538.420 - .450 (Supp. 1973).

[93] One such provision expressly provides that all of the waters of a certain source are withdrawn from future appropriation by others, with one exception. *Id.* §538.430.

[94] *Id.* §537.230(1).

[95] *Id.* §537.410.

[96] 14 Stat. 253, §9 (1866).

[97] 19 Stat. 377 (1877).

jurisdiction will be mentioned later in discussing the riparian doctrine and its relationship with the appropriation doctrine in Oregon.

(2) Appurtenance to land. Water used for any purpose remains appurtenant to the premises on which it is used, subject to changes under the statutory procedures,[98] as noted later under "(8) Changes in exercise of right." The Oregon Supreme Court has recognized that this is a valid exercise of the legislative power to regulate use of State waters.[99]

A grant of land with its appurtenances is sufficient to pass a water right actually appurtenant thereto and necessary for its beneficial utilization.[100] But whether a water right passes as an appurtenance depends, not only on its actual appurtenancy, but also on whether it was intended to pass.[101] It may likewise be sold and transferred separately from the land.[102]

(3) Natural stream overflow. In various decisions the Oregon Supreme Court recognized that valid appropriative rights could originate in the use of natural stream overflow in time of flood, priorities therefor dating from the time shown by the evidence at which honest efforts were made to use both land and water for beneficial purposes.[103] However, the continued practice came to be recognized as wasteful—as not a right, but a privilege to be tolerated only while no injury resulted to others and to be changed to a control system within a reasonable time. And in 1959 the Oregon Supreme Court held squarely that the time had come when the method of diversion of water by way of natural overflow in Warner Valley was a privilege only and could not be insisted upon if it interfered with appropriation by others of the waters for a beneficial use.[104]

(4) Sale or rental of water. An early statute, still in effect as amended, provides that use of water for general rental or sale for purposes of irrigation, household and domestic consumption, and watering livestock on dry land is a public use, and that the right to collect rates therefor is a franchise subject to

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[98] Oreg. Rev. Stat. § § 540.510 - .550 (Supp. 1969).

[99] *Broughton* v. *Stricklin*, 146 Oreg. 259, 272, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934).

[100] *Beisell* v. *Wood*, 182 Oreg. 66, 72-73, 185 Pac. 570 (1947). See also *Skinner* v. *Silver*, 158 Oreg. 81, 97-100, 75 Pac. (2d) 21 (1938).

[101] *Dill* v. *Killip*, 174 Oreg. 94, 98, 147 Pac. (2d) 896 (1944). Compare *Dressler* v. *Isaacs*, 217 Oreg. 586, 343 Pac. (2d) 714 (1959).

[102] *Haney* v. *Neace-Stark Co.*, 109 Oreg. 93, 115, 216 Pac. 757 (1923).

[103] This is discussed in chapter 9 at notes 24-28.

[104] *Warner Valley Stock Co.* v. *Lynch*, 215 Oreg. 523, 537-541, 336 Pac. (2d) 884 (1959). This does not mean that the appropriators in this case had no vested right to use the quantity of water they had appropriated from Hart Lake. They no longer had the privilege of a natural overflow *method* of diversion; but they were entitled to pump their appropriated quantity provided it would overflow if no water (other than water appropriated under a prior right) were withdrawn from the lake or prevented from reaching it.

public regulation.[105] The Oregon Supreme Court held that when a public service corporation complies with all provisions of the statute and supplies water for general sale or rental, such corporation—not the owner of the land supplied—acquires the right to use the water and is the appropriator.[106]

The exercise of this right of appropriation of water for sale and use on a public utility basis is entirely different from an attempt to sell surplus water out of an individual appropriation during a time when the appropriator does not need the water. This the appropriator cannot do. It is his duty during such time to release the surplus water for other appropriators entitled to use from the common water supply.[107]

(5) Relative rights of appropriators. The historic, fundamental facet of the prior appropriator's right—which is still valid except where statutory exceptions intervene—is that the right first in time is paramount on the stream.[108]

Waters of a natural stream are subject to successive appropriations, and relative locations of appropriative diversions thereon have no bearing whatsoever upon the respective priorities of such rights. The first one who appropriates water has a right prior to that of all those who locate subsequently either above or below him on the stream.[109] The first appropriator may use the water to the full extent of his original appropriation, without diversion or interruption by other claimants, except in case of a mere temporary or trivial irregularity which does not cause him sensible injury.[110] He may take the entire stream if he has appropriated it and if he has need therefor for his proper purposes.[111]

Junior appropriators have rights as against their seniors. They may appropriate surplus water over the quantities that attach to proper exercise of the rights of prior appropriators.[112]

The right of a prior appropriator with respect to a later one does not extend

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[105] Oreg. Laws 1891, p. 52, Rev. Stat. §541.010 (Supp. 1973).
In this regard, see, in chapter 8, "Elements of the Appropriative Right—Sale, Rental, or Distribution of Water."

[106] *In re Walla Walla River*, 141 Oreg. 492, 496-498, 16 Pac. (2d) 939 (1932).

[107] *In re North Powder River*, 75 Oreg. 83, 94-96, 144 Pac. 485 (1914), 146 Pac. 475 (1915); *Hutchinson* v. *Stricklin*, 146 Oreg. 285, 297-303, 28 Pac. (2d) 225 (1933). See *In re Hood River*, 114 Oreg. 112, 188, 227 Pac. 1065 (1924).

[108] *In re Rogue River*, 102 Oreg. 60, 65, 201 Pac. 724 (1921).

[109] *McCall* v. *Porter*, 42 Oreg. 49, 57, 70 Pac. 820 (1902), 71 Pac. 976 (1903).

[110] *Carson* v. *Hayes*, 39 Oreg. 97, 102, 65 Pac. 814 (1901). Junior appropriators were required to deliver water into a lake, in which senior appropriators held rights, to compensate for losses by seepage and evaporation in the lake and to facilitate pumping therefrom. *Warner Valley Stock Co.* v. *Lynch*, 215 Oreg. 523, 541-542, 336 Pac. (2d) 884 (1959).

[111] *Caviness* v. *La Grande Irr. Co.*, 60 Oreg. 410, 421, 119 Pac. 731 (1911). See *Nault* v. *Palmer*, 96 Oreg. 538, 547, 190 Pac. 346 (1920).

[112] *Tudor* v. *Jaca*, 178 Oreg. 126, 141, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946); *In re Willow Creek*, 74 Oreg. 592, 647, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *In re Hood River*, 114 Oreg. 112, 188, 227 Pac. 1065 (1924).

to use a wasteful method of diversion or ditches and structures that are not in good serviceable condition.[113] The same principles of efficiency of diversion and distribution systems apply equally to methods of use of water under appropriative rights.[114] If a considerable loss of water occurs between diversions of an upstream junior appropriator and a downstream senior appropriator, the former is not required to release water that would be of little or no benefit to the latter.[115]

A holder of several priorities may not interchange them to the detriment of one who holds an intermediate priority.[116] One who desires to increase his existing uses of water must make a new appropriation which will be inferior to all intervening rights.[117]

(6) Rotation in use of water. Holders of water rights may agree to rotate the use of a water supply to which they are collectively entitled.[118]

The Oregon Supreme Court has approved imposition, by trial courts, of systems of rotation upon water rights claimants when others are not injured.[119] Provisions made by the State Board of Control for rotation systems in determination of water rights under the water code were likewise approved by the Oregon Supreme Court.[120]

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[113] *Warner Valley Stock Co.* v. *Lynch*, 215 Oreg. 523, 536-542, 336 Pac. (2d) 884 (1959); *In re Hood River*, 114 Oreg. 112, 188, 227 Pac. 1065 (1924). No person should be allowed more water than is necessary when applied by means of a proper system. *In re Willow Creek*, 74 Oreg. 592, 622, 144 Pac. 505 (1914), 146 Pac. 475 (1915). Use of a water wheel in lifting water from a stream to irrigated land is not unreasonable *per se*, nor is it unlawful in Oregon if done subject to prior rights. Oreg. Rev. Stat. §541.410 (Supp. 1973). However, withholding five or six times the quantity of water applied for irrigation purposes for the sole purpose of activating the water wheel is unreasonable. *In re Owyhee River*, 124 Oreg. 44, 46-48, 259 Pac. 292 (1927).

[114] *Tudor* v. *Jaca*, 178 Oreg. 126, 141-143, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946); *Bolter* v. *Garrett*, 44 Oreg. 304, 308, 75 Pac. 142 (1904). Wasteful use is not a right but merely a privilege, tolerable only while others are not injured. *Hough* v. *Porter*, 51 Oreg. 318, 420, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

[115] Equity is not served by wasting water for no other or better purpose than to vindicate a barren right. *Washington* v. *Oregon*, 297 U.S. 517, 522-523 (1936).

[116] *Nault* v. *Palmer*, 96 Oreg. 538, 547, 190 Pac. 346 (1920).

[117] *Tudor* v. *Jaca*, 178 Oreg. 126, 158, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946).

[118] Oreg. Rev. Stat. §540.150 (Supp. 1969). This is also discussed at note 245 *infra*.

[119] *Hutchinson* v. *Stricklin*, 146 Oreg. 285, 302-303, 28 Pac. (2d) 225 (1933); *McCoy* v. *Huntley*, 60 Oreg. 372, 376, 119 Pac. 481 (1911); *Cantrall* v. *Sterling Min. Co.*, 61 Oreg. 516, 526, 122 Pac. 42 (1912); *Krebs* v. *Perry*, 134 Oreg. 290, 303-304, 292 Pac. 319, 293 Pac. 432 (1930). In *McCoy* v. *Huntley, supra*, 60 Oreg. at 376, the supreme court said that an appropriator has only the right to use so much water as his needs require and at the time this requirement occurs; if these needs are satisfied by use of the whole flow every other day, or every alternate week, he ought not to be heard to complain.

[120] *In re Willow Creek*, 74 Oreg. 592, 629, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *In re North Powder River*, 75 Oreg. 83, 96, 144 Pac. 485 (1914), 146 Pac. 475 (1915).

(7) Substitution of water. A subsequent appropriator has the right to deliver to a prior appropriator water from a different source in return for stream water to which the latter is entitled, of like quantity and quality and at such place as will enable the senior to make full use without any injury.[121] The Oregon Supreme Court went on to say that substitution of impounded water of equivalent quantity and quality for normal streamflow is not a trespass or infringement of lower rights, but that it cannot be given the effect of altering relative priority rights.

(8) Changes in exercise of right. The place of use, point of diversion, or character of use of appropriated water may be changed on application to and approval by the State Engineer if the proposed change can be made without injury to existing rights. Notice of hearing generally must be published.[122] If objections are filed, the hearing must be held, but it need not be held if there are no objections.

If a certificate has been issued previously, a substitute certificate shall be issued preserving the priority of rights established in connection with the previous one.[123] The statute specifically provides that upon compliance with the applicable provisions, such changes may be made "in all cases without losing priority of the right theretofore established."[124]

On various occasions through the years, the Oregon Supreme Court has acknowledged the right to make such changes in the exercise of water rights when they can be made without prejudice to rights of others.[125]

The Oregon Supreme Court held that no change in place of use or character of use of water could be made without strict compliance with the statute;[126] and that an appropriator has no right to change his "manner, method, and period of irrigation" without permission of the State Engineer.[127] As to preservation of priority on making a change in the exercise of a right, the court

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[121] *Dry Gulch Ditch Co.* v. *Hutton*, 170 Oreg. 656, 675, 681, 133 Pac. (2d) 601 (1943). Regarding the interpretation of a contract providing for exchange of return flow and drainage water for stored water or natural flow, see *United States* v. *Warmsprings Irr. Dist.*, 38 Fed. Supp. 239 (D. Oreg. 1940).

[122] However, no notice need be published on applications for changes in place of use or point of diversion of less than one-fourth mile, if there are no interveneing diversions between the old and new diversions.

[123] Oreg. Rev. Stat. § § 540.520 and .530 (Supp. 1969).

[124] *Id.* § 540.510, referring to § § 540.520 and .530.

[125] Following are a few examples: Point of diversion, *In re Silvies River*, 115 Oreg. 27, 49, 237 Pac. 322 (1925); point of diversion, inchoate right, *In re Deschutes River & Tributaries*, 134 Oreg. 623, 642, 286 Pac. 563, 294 Pac. 1049 (1930); place of use, *Haney* v. *Neace-Stark Co.*, 109 Oreg. 93, 116, 216 Pac. 757 (1923); place of use, inchoate right, *In re Umatilla River*, 88 Oreg. 376, 396-397, 168 Pac. 922 (1917), 172 Pac. 97 (1918); purpose of use, *Blanchard* v. *Hartley*, 111 Oreg. 308, 312, 226 Pac. 436 (1924). See chapter 9 at notes 211 and 212 regarding the *In re Silvies River* and *In re Umatilla River* cases.

[126] *Hutchinson* v. *Stricklin*, 146 Oreg. 285, 296-297, 300, 28 Pac. (2d) 225 (1933).

[127] *Oliver* v. *Skinner & Lodge*, 190 Oreg. 423, 448-449, 226 Pac. (2d) 507 (1951).

cited authorities and approved the principle that a change in point of diversion made without intent to abandon a prior appropriation and without injury to others does not waive any part of the original appropriation.[128]

(9) Loss of water right. (a) Abandonment. This is a voluntary relinquishment of a known right, requiring concurrence of acts and intent.[129] The intent must be ascertained from the conduct and declarations of the appropriator.[130] True abandonment does not depend upon a lapse of time but may take place instantly.[131]

(b) Statutory abandonment (forfeiture). It is provided by statute that when the owner of a perfected water right fails to use the water for a period of 5 successive years, the right ceases and the failure to use is *conclusively presumed* to be an abandonment of the water right. The water reverts to the public and becomes open to appropriation, subject to existing priorities. Cities and towns are exempted.[132]

Conclusive presumption rules out the element of intent and leaves only two factors to be considered—nonuse and lapse of time. These are the essential ingredients of forfeiture, not of abandonment. Hence, although this may purport to be an abandonment statute, it is in effect a forfeiture statute.[133]

The original section was added to the water code in 1913, following a decision in which the Oregon Supreme Court stated that to constitute abandonment of a water right by nonuse alone, such nonuse must have been continuous for a period equal to the statute of limitations: 10 years.[134]

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[128] *In re Deschutes River & Tributaries*, 134 Oreg. 623, 639-640, 286 Pac. 563, 294 Pac. 1049 (1930). See *Broughton* v. *Stricklin*, 146 Oreg. 259, 276-277, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934); *In re Hood River*, 114 Oreg. 112, 130, 134-135, 227 Pac. 1065 (1924); *In re Silvies River*, 115 Oreg. 27, 49, 237 Pac. 322 (1925). A statement made in *In re North Powder River*, 75 Oreg. 83, 92, 144 Pac. 485 (1914), 146 Pac. 475 (1915), if taken at face value, appears to suggest a conflicting viewpoint; but in view of later decisions and opinions of the court, it is believed that this broad statement should be limited to the facts there under consideration. 75 Oreg. at 84-96.

[129] *In re Willow Creek*, 74 Oreg. 592, 664, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

[130] *Pringle Falls Elec. Power & Water Co.* v. *Patterson*, 65 Oreg. 474, 485, 128 Pac. 820 (1912), 132 Pac. 527 (1913).

[131] *In re Umatilla River*, 88 Oreg. 376, 382, 168 Pac. 922 (1917), 172 Pac. 97 (1918).

[132] Oreg. Laws 1913, ch. 279, Rev. Stat. §540.610 (1969).

Time of nonuse due to withdrawal of land under Federal soil bank programs shall not be considered. *Id.* §540.615.

In 1952, the supreme court stated that while cities and towns were excepted from the abandonment statute (and special provision was made for them in view of their need to anticipate supplies for population growth), the State of Oregon was not, and that the legislation must be held to apply to the State as well as to any private owner of a water right. *Withers* v. *Reed*, 194 Oreg. 541, 558-559, 243 Pac. (2d) 283 (1952).

[133] See the discussion in chapter 14 at notes 333-335, regarding confusing statements about abandonment and the statutory period of nonuse made in two Oregon cases in the 1930's compared with a subsequent holding and statements made in a 1965 case.

[134] *Hedges* v. *Riddle*, 63 Oreg. 257, 259, 127 Pac. 548 (1912).

Administrative procedure for cancelling abandoned water rights was provided in 1955. This shall be done by order of the State Engineer if requested and certified by the owner of a perfected and developed water right that such right has been abandoned and he desires its cancellation.[135] It may also be done if the State Engineer has reason to believe that such a water right has been abandoned. In this event, notice is given to the owner and occupant of land to which the water right is appurtenant. If no protest is received, the State Engineer may enter an order of cancellation. If there is a protest, a hearing is held and an order entered cancelling the water right in whole or in part, or modifying it, or declaring that the water right shall not be cancelled or modified.[136]

(c) Adverse use. In *Ebell* v. *Baker*, the State supreme court held that title to a water right by adverse possession may be acquired against one by another by actual possession or use in an open, notorious, exclusive, and hostile manner and under claim of right, exclusive of any other rights, for a continuous and uninterrupted period of 10 years.[137] However, some years after the *Ebell* decision, the court stated by *dictum* that it was a debatable question whether after adoption of the water code an appropriation of water could be initiated by adverse use or in any manner other than under the statutory procedure, which was declared to be exclusive.[138] And in 1957, the court indulged in further questioning by evincing grave doubts as to the possibility of acquiring title to water by prescription under the water code and after a blanket adjudication of water rights by the courts, as the intent of the statute appeared to be hostile thereto.[139] But the court held it unnecessary to decide the question in the instant case and so refrained from overruling the *Ebell* decision.

In a 1965 case, without specifically deciding this issue and without mentioning any previous Oregon cases in this regard, the court said, among other things:[140]

> Plaintiffs further contend that even if it should be found that they did not secure any statutory rights by appropriation or that they lost such rights by nonuse, they nevertheless have water rights to Walker Creek by prescriptive use. Assuming water rights could have been acquired by prescription at the time claimed, plaintiffs do not have prescriptive rights. As is true in other instances of adverse possession, the use establishing the right must be adverse.

(d) Estoppel. To constitute an equitable estoppel, or estoppel by conduct,

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[135] Oreg. Laws 1955, ch. 670, Rev. Stat. §540.621 (Supp. 1969).

[136] *Id.* §§540.631-.650.

[137] *Ebell* v. *Baker*, 137 Oreg. 427, 438-440, 299 Pac. 313 (1931).

[138] *Tudor* v. *Jaca*, 178 Oreg. 126, 152, 164 Pac. (2d) 680 (1945), 165 Pac. (2d) 770 (1946).

[139] *Calderwood* v. *Young*, 212 Oreg. 197, 206-208, 315 Pac. (2d) 561 (1957).

[140] *Day* v. *Hill*, 241 Oreg. 507, 406 Pac. (2d) 148, 149 (1965). See the more detailed discussion in chapter 14 at notes 794-800.

the Oregon Supreme Court said, there must be a false representation; it must have been made with knowledge of the facts, the other party must have been ignorant of the truth, it must have been made with the intention that it should be acted upon by the other party, and the other party must have been induced to act upon it.[141]

(10) Some eminent domain provisions. In 1924, the Oregon constitution was amended to add, in a section providing that private property shall not be taken for public use without just compensation, a proviso declaring, among other things, that the use of all waterways for transporting water for beneficial use or drainage is necessary to the State welfare and is a public use;[142] and in 1927 the legislature implemented the declaration.[143] Existing legislation provides that the United States, the State, or any person, firm, cooperative association, or corporation may acquire a right of way across public, private, and corporate lands or other rights of way for necessary waterworks for irrigation or drainage, under the laws of eminent domain.[144]

Other legislation provides that corporations organized in whole or in part for constructing ditches for conveying water for irrigation, domestic, or stock purposes, or canals for navigation or manufacturing purposes, may condemn waterways or water rights for such purposes.[145]

Authority to condemn a right of way over the land of another for the purpose of obtaining a particular supply of water depends upon the applicant's right to make a lawful appropriation of such water.[146]

The Riparian Doctrine[147]

Recognition of the riparian doctrine.—In 1876, the Oregon Supreme Court

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[141] *Bennett* v. *Salem*, 192 Oreg. 531, 541, 235 Pac. (2d) 772 (1951). See *Staub* v. *Jensen*, 180 Oreg. 682, 689, 178 Pac. (2d) 931 (1947).

[142] Oreg. Const. art. I, §18.

[143] Oreg. Laws 1927, ch. 166.

Some opinions of the Oregon Supreme Court preceeding and subsequent to the 1924 constitutional amendment, including *Smith* v. *Cameron*, 123 Oreg. 501, 262 Pac. 946 (1928), and *Port of Umatilla* v. *Richmond*, 212 Oreg. 596, 321 Pac. (2d) 338 (1958), are discussed in Gross, A. D., "Condemnation of Water Rights for Preferred Uses—A Replacement for Prior Appropriation?" 3 Williamette L. J. 263, 280-282 (1965).

[144] Oreg. Rev. Stat. §772.305 (Supp. 1971). For some other extant provisions relating to entering upon and crossing lands of others in connection with water enterprises, see Oreg. Rev. Stat. §§537.320, 541.020, .030, .120, .130, and .240 (Supp. 1973). The right to enlarge existing canals or ditches of others by compensating the owner for damages, if any, caused by the enlargement, is also provided for. Oreg. Rev. Stat. §772.310 (Supp. 1971).

[145] Oreg. Rev. Stat. §772.035 (Supp. 1971).

Section 225.050 provides that cities and towns may condemn rights of way, water, or water rights. Oreg. Rev. Stat. §276.236 (Supp. 1974) grants similar powers to the State Department of General Services for supplying public buildings and grounds with water and water power.

[146] *Henrici* v. *Paulson*, 134 Oreg. 222, 224, 226, 293 Pac. 424 (1930).

[147] Much of the material summarized under this topic and under the immediately following

(*Continued*)

first recognized the riparian doctrine by stating that every proprietor of land through which a stream of water flows has a right to use the water flowing in its natural channel, without diminution or obstruction.[148] This elemental concept was subsequently modified to subject the continuous flow right to a right of legal use by each riparian proprietor, while passing through his premises, for domestic use, stock, and reasonable irrigation;[149] and to acknowledge further that each landowner usually has the right to enjoy the flow for the ordinary purposes of life—drinking, use for culinary purposes, and watering animals.[150] It was conceded, however, that a surplus over the quantity of water required for these needs could be legitimately employed for irrigation, equitably divided among the several proprietors.

A decade after its first recognition by the Oregon Supreme Court, the common law riparian doctrine with its approved limitations was expounded somewhat more fully.[151] The supreme court stated that the riparian owner was entitled to the flow of the water and to the momentum of its flow on his own land; that he might use the water while it crossed his land, but could not unreasonably detain it or give it another direction; and that his right of use must be reasonably exercised, the question of reasonableness necessarily depending upon the facts of the case. To hold that there could be no diminution whatever as a result of the proprietor's use of the water would be to deny him any valuable use of it; hence each landowner is allowed a reasonable consumptive use of the common supply.

Some aspects of the riparian right.—(1) Relative rights of riparians. As among riparian proprietors, the supreme court held that each is entitled to enough water for his natural wants—domestic and stockwatering purposes—even if this requires the entire flow of the stream; and all are equally entitled to reasonable use of the surplus for irrigation purposes.[152] The reciprocal relationships of riparians were declared or acknowledged in a considerable number of decisions of the Oregon Supreme Court.[153]

(2) Accrual of right. The riparian right accrued when title was obtained from

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(*Continued*)
one entitled "Interrelationships of the Dual Systems" was first developed in considerable detail by the author in Hutchins, W. A., "The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification," 36 Oreg. L. Rev. 193 (1957). Permission to draw upon this material was granted by Oregon Law Review.

[148] *Taylor* v. *Welch*, 6 Oreg. 198, 200 (1876). See *Shively* v. *Hume*, 10 Oreg. 76, 77 (1881).

[149] *Coffman* v. *Robbins*, 8 Oreg. 278, 282 (1880).

[150] *Shook* v. *Colohan*, 12 Oreg. 239, 244, 6 Pac. 503 (1885).

[151] *Weiss* v. *Oregon Iron & Steel Co.*, 13 Oreg. 496, 498-502, 11 Pac. 255 (1886).

[152] *Caviness* v. *La Grande Irr. Co.*, 60 Oreg. 410, 420-421, 119 Pac. 731 (1911).

[153] For some examples, in addition to those previously cited, see *Low* v. *Schaffer*, 24 Oreg. 239, 245-246, 33 Pac. 678 (1893); *Jones* v. *Conn*, 39 Oreg. 30, 34, 36-37, 44-46, 64 Pac. 855, 65 Pac. 1068 (1901); *In re Sucker Creek*, 83 Oreg. 228, 234-235, 163 Pac. 430 (1917).

the government, the actual time of accrual relating back to the date of settlement provided the entryman ultimately obtained a patent for his land.[154] But priority in time of settlement of land gives the owner no priority in use of the water as against other riparians.[155]

(3) Riparian land. In *Jones* v. *Conn*, the Oregon Supreme Court concluded that the owner of land contiguous to a stream is entitled to the rights of a riparian proprietor without regard to the actual extent of his land, or from whom or when he acquired title.[156] One riparian proprietor in this controversy made a ditch to tap the river some distance above his property to irrigate a tract separated from the river by a bluff. It was the court's view that the fact that the landowner purchased the particular riparian tract at one time, and the adjoining tract subsequently, would not make him any less a riparian proprietor, nor should it alone be a valid objection to his using the water on the latter tract.

(4) Nonriparian use. There apparently has not been a direct holding in Oregon regarding a grant to use water on nonriparian land and some seemingly inconsistent language has been employed in some cases. The Oregon Supreme Court, in a 1959 case, said, "Although there is a conflict of authority as to whether the grant to a nonriparian owner of the riparian owner's rights is effective as against other riparian owners * * * it is clear that as between the parties to the conveyance the grantor is bound by his grant."[157]

(5) Usufruct. Water flowing in a natural stream is public property, the individual right to which is a simple usufruct, not a property in the water itself.[158]

(6) Means of diversion. In one of its earliest water rights decisions the Oregon Supreme Court recognized that in diverting water for irrigation, the riparian proprietor should have the right to take his quota from the stream by any suitable means that he might employ.[159] Several years later the legislature enacted a statute, still extant, giving the owner or possessor of land adjacent to a lake or natural stream the right to employ "wheels, pumps, hydraulic engines, or other machinery" for lifting water to the level required to irrigate any land belonging to him, provided that the use should not conflict with the "better or prior right" of anyone else.[160]

(7) Adverse use. In the *Norwood* case, the supreme court stated, that the

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[154] *Norwood* v. *Eastern Oregon Land Co.*, 112 Oreg. 106, 111, 227 Pac. 1111 (1924); *Morgan* v. *Shaw*, 47 Oreg. 333, 337, 83 Pac. 534 (1906); *Faull* v. *Cooke*, 19 Oreg. 455, 464, 26 Pac. 662 (1890).

[155] *Williams* v. *Altnow*, 51 Oreg. 275, 299, 95 Pac. 200, 97 Pac. 539 (1908).

[156] *Jones* v. *Conn*, 39 Oreg. 30, 39-41, 64 Pac. 855, 65 Pac. 1068 (1901).

[157] *Fitzstephens* v. *Watson*, 218 Oreg. 185, 344 Pac. (2d) 221, 228 (1959). See the more extended discussion of this and other relevant Oregon cases in chapter 10 at notes 712-717.

[158] *In re Hood River*, 114 Oreg. 112, 181, 213, 227 Pac. 1065 (1924).

[159] *Shook* v. *Colohan*, 12 Oreg. 239, 244, 6 Pac. 503 (1885).

[160] Oreg. Laws 1893, p. 150, Rev. Stat. § 541.410 (Supp. 1973).

right of a riparian owner could be infringed and proportionately diminished by adverse use by an upper riparian owner continuing for the statutory period of limitations.[161]

Interrelationships of the Dual Systems

Earlier judicial modification of the riparian doctrine.—In the landmark case of *Hough* v. *Porter*, the Oregon Supreme Court construed the Act of Congress of 1866[162] as a recognition of preexisting rights and accordingly a recognition of and assent to the appropriation of water in contravention of the common law rule as to continuous flow.[163] Previously the court had observed that settlers on the public lands would have common law riparian rights *unless* a local custom gave the first possessor a vested appropriative right in accordance with the statute;[164] and that in the Pacific Coast States the common law doctrine had been much modified in favor of a new rule under which the first appropriator on the public domain acquired a right superior to that of every other claimant except the United States.[165] The riparian right was held to be superior to later appropriative rights on the public domain, but subject to appropriative rights already accrued.[166]

In *Hough* v. *Porter*, the Oregon Supreme Court construed the congressional acts of 1866, 1870, and 1877[167] as dedicating to the public all rights of the Government with respect to the waters and purposes named, which excluded domestic and associated stockwater uses, and as abrogating the modified common law rules, except with respect to the excepted purposes, so far as applicable to all public lands—not only desert lands—entered after March 3, 1877.[168] The United States Supreme Court agreed.[169]

Incompatibility of a right of prior appropriation and a rule of riparian proprietorship was stressed by the Oregon Supreme Court.[170] The former contemplates a tenancy in severalty, whereas the latter is analogous to a tenancy in common.[171] And the principle was established that a riparian

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[161] *Norwood* v. *Eastern Oregon Land Co.*, 112 Oreg. 106, 111, 227 Pac. 1111 (1924).

[162] 14 Stat. 353, §9 (1866).

[163] *Hough* v. *Porter*, 51 Oreg. 318, 383-386, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

[164] *Lewis* v. *McClure*, 8 Oreg. 273, 274-275 (1880).

[165] *Carson* v. *Gentner*, 33 Oreg. 512, 515-516, 52 Pac. 506 (1898).

[166] *Brown* v. *Baker*, 39 Oreg. 66, 68-70, 65 Pac. 799, 66 Pac. 193 (1901); *Morgan* v. *Shaw*, 47 Oreg. 333, 337, 83 Pac. 534 (1906). See *Britt* v. *Reed*, 42 Oreg. 76, 80, 70 Pac. 1029 (1902).

[167] 14 Stat. 353, §9; 16 Stat. 218; 19 Stat. 377, 43 U.S.C. §321 (1970).

[168] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

[169] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 160-163 (1935). This case is also discussed at notes 179-182 *infra*.

[170] *North Powder Mill Co.* v. *Coughanour*, 34 Oreg. 9, 22, 54 Pac. 223 (1898).

[171] *Caviness* v. *La Grande Irr. Co.*, 60 Oreg. 410, 420-421, 119 Pac. 731 (1911).

proprietor who claims a right to use water both as a riparian proprietor and as an appropriator must choose between them.[172] See "Statutory adjudication of riparian rights," below.

Legislative modification of the riparian doctrine.—In 1909, the Oregon Legislature enacted what became known as the water code (see "Appropriation of Water of Watercourses," above), the appropriation procedure in which supplanted that of earlier legislation and is still in effect.[173] Section 70 of this act of 1909 related primarily to the definition, preservation, and limitation of vested water rights of riparian proprietors and declared that nothing in the act should impair any vested right to the use of water.[174]

Section 70 provided that actual application of water to beneficial use prior to passage of the act, by or under authority of any riparian proprietor or his predecessors in interest, should be deemed to create in him a vested right to the extent of actual application of water to beneficial use, provided the use had not been abandoned for a continuous period of 2 years. It provided further that if, at the time of enactment, the riparian or his predecessor was in good faith constructing works for applying water to beneficial use, and if his works were completed and water diverted to beneficial use within a reasonable time thereafter, the right to take and use such water should be deemed vested in him. Administration of these provisions was vested in the Board of Control, now the State Engineer. The statute was not to be held to bestow riparian rights where none previously existed. It was further provided that all rights granted or declared by the statute should be adjudicated and determined in the manner and by the tribunals provided therein. See the later discussion, "Determination of Conflicting Water Rights."

In summary, the water code undertook to recognize, but to limit, the vested right of a riparian who had actually applied water to beneficial use prior to the enactment, to the extent thereof; to recognize a similarly limited right respecting uncompleted works if completed within a reasonable time thereafter;[175] and to bring adjudication of such rights within the procedures newly set up in the statute.

The question of claiming prior, beneficially used riparian rights as protected "vested rights" under the 1909 water code has been discussed in chapter 10.[176] Any specific quantity apparently must generally be so claimed as an "appropriative right."

Validity of legislative modification of the riparian doctrine.—The legislation in the water code of 1909 defining and limiting the vested right of a riparian proprietor has been construed by both State and Federal courts. Its validity has been sustained by the courts that have passed upon it on the several points

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[172] See, e.g., *Williams* v. *Altnow*, 51 Oreg. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908).

[173] Oreg. Laws 1909, ch. 216, Rev. Stat. chs. 536-542 (Supp. 1973).

[174] Oreg. Rev. Stat. §539.010 (Supp. 1973).

[175] But the act does not affect priorities of parties to previous decrees or pending court actions prior to its passage. *Id.*

[176] See the discussion in chapter 10 at notes 513-515. See also chapter 13 at and in note 55. And see "Statutory adjudication of riparian rights," *infra.*

presented for determination.

(1) Oregon Supreme Court. In the 1915 *Willow Creek* adjudication, validity of the water code was sustained after consideration of all objections, including the claim that due process of law was not provided for.[177] Fifteen years after enactment of the water code the supreme court, in the *Hood River* case, by a vote of four to three, construed the legislation as having validly abrogated the common law riparian rule as to "continuous flow" of a stream except where the water had been actually applied to beneficial use.[178] As the common law had been adopted by statute, said the court, it was plain that the common law rule as to "continuous flow" of a stream, or riparian doctrine, might be changed by statute except as such change might affect some vested rights; and it was within the province of the legislature to define a vested riparian right or to establish a rule as to when or to what extent it should be deemed to be created.

(2) United States Court of Appeals. Validity of the 1909 riparian legislation was subsequently attacked in the Federal courts in the *California-Oregon Power Company* case.[179] The Court of Appeals, 9th Circuit, disagreed with the interpretation placed upon the Desert Land Act by the Oregon Supreme Court in *Hough* v. *Porter*[180] and concluded that the State was not required by that Act to abandon the rule of "continuous flow" as to *all* riparian lands thereafter passing to private ownership. But by a vote of two to one, the court held that the modification of riparian rights in the State water code did not violate the constitutional requirement of due process of law. Its conclusion was that the riparian owner's right to natural streamflow substantially undiminished had been validly abrogated by the water code as construed by the Oregon Supreme Court in the *Hood River* case.[181]

(3) Unites States Supreme Court. The *California Oregon Power Company* case was taken to the United States Supreme Court on a writ of certiorari.[182]

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[177] *In re Willow Creek*, 74 Oreg. 592, 610-620, 625-628, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

[178] *In re Hood River*, 114 Oreg. 112, 173-182, 227 Pac. 1065 (1924); *Pacific Power & Light Co.* v. *Bayer*, 273 U.S. 647 (1926), dismissed for want of jurisdiction for want of a final judgment. The Oregon Supreme Court was sharply divided as to the effect of the water code on riparian rights. All three minority justices wrote dissenting opinions which together occupy 46 pages in the Oregon State report.

[179] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 73 Fed. (2d) 555, 562-569 (9th Cir. 1934). The land title on which the riparian right in litigation was claimed was derived by a predecessor in interest in 1885—by patent under the Homestead Act of 1862—therefore after passage of the Desert Land Act of 1877.

[180] *Hough* v. *Porter* is discussed at notes 162-168 *supra.*

[181] Judge Wilbur dissented in part. His conclusion was that the water code did not and could not wholly destroy riparian rights that had not been beneficially used, solely because of such nonuse.

[182] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155-165 (1935).

The lower court's decree that assertion of a common law riparian right could not be sustained was affirmed, but on a different ground.

The Supreme Court approved of the Oregon court's decision in *Hough* v. *Porter* that the effect of the language used in the 1877 Desert Land Act was to abrogate the common law riparian rule as to *all* public lands thereafter settled upon or entered in the desert land States, not solely desert land entries. The Act did not have the effect of curtailing the power of the States to legislate respecting water and water rights. On the contrary, following that Act, if not before, the States to which the Act applied had the right to determine for themselves to what extent the appropriation or riparian rule should obtain within their boundaries. A patent issued thereafter for land in any desert land State or Territory did not carry with it, *of its own force*, any common law right to water flowing through or by the land conveyed.[183]

As to the question on which the decision of the court of appeals rested—whether the common law right in controversy had been validly modified by State legislation as construed by the State supreme court—the highest Court expressed no opinion.

Statutory adjudication of riparian rights.—As the common law riparian rule does not provide for apportionment of fixed quantities of water to different persons or different tracts of land, the Oregon Supreme Court held that such rule cannot be applied in statutory adjudication proceedings,[184] which are discussed later under "Determination of Conflicting Water Rights." In the *Deschutes River* case, the court held that a claim denominated as "a riparian right," but which asked for a decree of a specific quantity of water for use in the future, "was, in substance, that of an appropriator." As the right of the claimant must be protected, it was adjudicated with a date of priority and for a definite quantity of water—in other words, on a basis of prior appropriation.[185]

The question of claiming prior beneficially used riparian rights as protected "vested rights" under the 1909 water code has been discussed in chapter 10.[186] Any *specific* quantity apparently must generally be so claimed as an "appropriative right."

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[183] See also the related discussions in chapter 10 at notes 67-75 and in chapter 6 at notes 61-74.

[184] *In re Hood River*, 114 Oreg. 112, 162, 227 Pac. 1065 (1924), approved in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 73 Fed. (2d) 555, 558-559 (9th Cir. 1934).

[185] *In re Deschutes River & Tributaries*, 134 Oreg. 623, 692-693, 703-706, 286 Pac. 563, 294 Pac. 1049 (1930), discussed in more detail in chapter 10 at and in note 512. But in a 1959 case, the court appears to have held that grantees of riparian land burdened with a contractual agreement could assert no conflicting rights, as against this agreement, on the strength of an appropriative-rights permit they had subsequently obtained. *Fitzstephens* v. *Watson*, 218 Oreg. 185, 226-229, 344 Pac. (2d) 221 (1959). Hence, they apparently had no option to assert conflicting appropriative rights as against such contractual rights.

[186] See the discussion in chapter 10 at notes 513-515. See also chapter 13 at and in note 55.

Effect of legislation and court decisions on the dual system relationship.—At and following the turn of the century, the legislature and the courts of Oregon worked together in overcoming the previous emphasis of the common law riparian decisions and thereby made the doctrine of prior appropriation more workable, more nearly exclusive, and less hampered by claims of unused vested riparian rights.

Now, in Oregon, the measure of a vested riparian right as against an appropriator for irrigation, power, or other artificial purposes is actual application of water to beneficial use prior to passage of the 1909 water code or within a reasonable time thereafter. The right became vested when the water was applied to beneficial use—not before. Aside from use of water for domestic and associated stockwatering purposes on riparian lands, no land that passed from public to private ownership after the congressional Act of 1877[187] can successfully claim, as against an appropriator, rights of use on a strict riparian basis for any purpose, and none can be adjudicated under the statutory procedure except on a basis of prior appropriation. One who asks for an adjudication of a claimed riparian right, but for a specific quantity of water and a fixed date of beginning use, generally assumes the character of an appropriator and waives his riparian claims for the purpose of such adjudication.

It has sometimes been said that in Oregon the riparian doctrine is now little more than a legal fiction. For practical purposes in most controversies between riparian and appropriative claimants over uses of water, that sweeping summary may be valid. However, in a decision rendered in 1959, the Oregon Supreme Court had occasion to reexamine the dual system relationship with respect to its effect upon rights in use of water of a small tributary of Rogue River, and therein reached important conclusions as to the vitality of the riparian doctrine in this State.[188]

Briefly, in *Fitzstephens* v. *Watson*, the supreme court made, among other things, the following points:

Admittedly, very little vestige of the riparian doctrine remains in Oregon insofar as it may be asserted against those who base their claims to use of water on priority of appropriation under the water code,[189] although occasionally riparian rights are still recognized in adjudication proceedings. It is not correct to say that the statutory system of appropriation abrogates the riparian doctrine in Oregon. It is correct to say that if the statute is controlling in the particular circumstances, the interest of a permittee is superior to that of a claimant who asserts a riparian right in that water. And if in the particular

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[187] This act is discussed at notes 167 and 183 *supra.*

[188] *Fitzstephens* v. *Watson*, 218 Oreg. 185, 344 Pac. (2d) 221 (1959). This was decided after the author's article, mentioned in note 147 *supra*, was published in the Oregon Law Review.

[189] Citing Hutchins, *supra* note 147.

circumstances the statute would not be applicable, the riparian doctrine would be operative. To describe the 1909 water code as a *modification* only of the law of riparian ownership was regarded by the court as the more accurate way of viewing the effect of the Oregon statutory law in superimposing the prior appropriation system upon the law of riparian rights.

The result of this harmonized legislative and judicial modification of the common law riparian doctrine in Oregon has been to substantially reduce that doctrine. So far as rights to the use of water for beneficial purposes are concerned, and except for certain vested rights chiefly for domestic and stockwatering purposes,[190] very little vestige of the doctrine remains as against appropriative rights under the water code, although it may apply in situations not controlled by the water code.

Ground Waters

Some pre-1955 court decisions.—The early case of *Taylor* v. *Welch* concerned alleged interruption of the source of a spring.[191] The Oregon Supreme Court stated that every proprietor of land through which a stream of water flows has a right to the use of such flow in its natural channel without diminution, and that the same rule applies to water flowing in a well-defined and constant stream below the surface; but that this does not apply to ground water in an unknown and undefined channel.

A case decided a half-century later, *Hayes* v. *Adams*, involved a controversy over the right of owners of land in a canyon to abstract ground water from the streambed by means of a trench and thus to injure other parties to whom they had conveyed rights to a spring situated near the mouth of the canyon.[192] All elements of an underground stream were said to be present. Its existence and location were reasonably ascertainable from the surface without exploration. The channel was clearly marked by the bed and banks of the canyon; the streambed contained porous soil resting on an impervious substratum; and the flow was constant and of sufficient volume to indicate that it came from a considerable distance from the spring. It was the court's conclusion that a subsurface watercourse existed here, and that the rules of law pertaining to percolating waters were not controlling. The decision in *Hayes* v. *Adams*, that water flowing underground in a known and well-defined channel is not percolating water but constitutes a watercourse and is governed by the law applicable to surface streams, was approved in *Bull* v. *Siegrist*, decided in 1942.[193]

It was recognized in the early case of *Taylor* v. *Welch* that rights in

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[190] See Hutchins, *supra* note 147, at 218-219, which includes a discussion of questions regarding these domestic and stockwatering purposes.

[191] *Taylor* v. *Welch*, 6 Oreg. 198, 200-201 (1876). Plaintiff failed to prove that the waters supplying the spring were not percolating waters, and so was not entitled to recover.

[192] *Hayes* v. *Adams*, 109 Oreg. 51, 58-61, 218 Pac. 933 (1923).

[193] *Bull* v. *Siegrist*, 169 Oreg. 180, 186, 126 Pac. (2d) 832 (1942).

percolating ground waters were not subject to the rules applicable to rights in watercourses and subterranean streams. The court stated the maxim that every person may use his own property as he pleases provided such use does not cause injury to another.[194] In *Hayes* v. *Adams*, in 1923, the court concluded that an underground stream existed and the law of percolating waters had no application. In this case the court said:

> Defendants justify their interference with, and diversion of, the waters which supply the spring in question upon the ground that the intercepted waters are subterranean, percolating waters, the course of which is unknown and unascertainable. They invoke the rule recognized by all the authorities, that such waters are a constituent part of the land, and belong to the owner of the land, with the right in such owner to make any reasonable use thereof, including a use which, either by reason of its character or the manner of its exercise, cuts off or diverts the flow of percolating waters from his neighbor's spring and renders the same dry and useless.[195]

In *Bull* v. *Siegrist*, in 1942, the court said:

> The rule applicable thereto is stated by Farnham on Water and Water Rights, vol. 3, 1904 ed., section 936, as follows: "The rule that one may make such reasonable use of his own property as he chooses, regardless of the effect on the percolating water, operates with full force although the effect is to destroy a spring on a neighbor's land, unless the spring is supplied by water flowing in a known channel."[196]

Ground Water Act of 1955.—This act is a comprehensive law which superseded a previous ground water appropriation statute, first enacted in 1927 and amended and enlarged from time to time until 1955.[197] The 1955 law applies to any water, except capillary moisture, under the land surface or under the bed of any stream, lake, reservoir, or other body of surface water, whatever may be the geological formation in which it occurs.[198]

The act declares, among other things, that "the right to reasonable control of all water within this state from all sources of water supply belongs to the public."[199]

Under the act, rights to ground water already in existence through permits or actual use within the previous 2 years are protected.[200] But failure of those

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[194] *Taylor* v. *Welch*, 6 Oreg. 198 (1876).

[195] *Hayes* v. *Adams*, 109 Oreg. 51, 57, 218 Pac. 933 (1923).

[196] *Bull* v. *Siegrist*, 169 Oreg. 180, 186, 126 Pac. (2d) 832 (1942).

[197] Oreg. Laws 1927, ch. 410, repealed, Laws 1955, ch. 708, Rev. Stat. §§537.505-.795 (Supp. 1973). The 1927 legislation is discussed in Hutchins, W. A., "Selected Problems in the Law of Water Rights in the West" 241-242 (1942).

[198] Oreg. Rev. Stat. §537.515(3) (Supp. 1973).

[199] *Id.* §537.525.

[200] *Id.* §§537.575 and .585. If work was underway, a reasonable time could be fixed by the State Engineer within which to apply the water to beneficial use. *Id.* §537.595.

basing their claims on actual prior use to file a claim with the State Engineer within 3 years after August 3, 1955, created a rebuttable presumption of abandonment. A petition requesting the opportunity to rebut this presumption could be filed by May 29, 1962. The act provided for the issuance of certificates of registration to such prior users. Such a certificate created a prima facie right, but this is not a final determination of the right and is subject to the act's provisions for determination of water rights discussed below.[201]

Except for stockwatering and certain limited domestic, lawn, garden, and industrial or commercial uses,[202] anyone wishing to initiate or enlarge a ground water right after the effective date of the act is required to apply to the State Engineer for a permit and to receive a permit before withdrawing or using water.[203]

Any owner or claimant of a right to appropriate ground or surface water may file a protest. A hearing may be held, after notice, if deemed necessary to determine whether or not the application will conflict with existing rights to appropriate ground or surface water.[204]

> When an application discloses the probability of wasteful use or undue interference with existing wells or that any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water by others, the State Engineer may impose conditions or limitations in the permit to prevent the same or reject the same after hearing, or, in his discretion, initiate a proceeding for the determination of a critical ground water area * * *.
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> An application may be approved for less ground water than applied for or may be approved upon terms, conditions and limitations necessary for the protection of the public welfare, safety and health. In any event the application shall not be approved for more ground water than is applied for or than can be applied to a beneficial use. No application shall be approved when the same will deprive those having prior rights of appropriation for a beneficial use of the amount of water to which they are lawfully entitled.[205]

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[201] *Id.* § 537.605 and .610.

[202] The excepted uses include water for a ½-acre lawn or noncommercial garden, no more than 15,000 gallons a day for a single or group domestic use, and no more than 5,000 gallons a day for a single industrial or commercial use. Beneficial use for any of the exempt purposes "constitutes a right to appropriate ground water equal to that established by a ground water right certificate issued under ORS 537.700," discussed at note 206 *infra*. *Id.* § 537.545.

[203] *Id.* § 537.615.

[204] *Id.* § 537.622.

[205] *Id.* § § 537.620(3) and (4). Critical ground water areas are discussed at notes 208-209 *infra*.

Incidentally, § 537.135 provides that appropriations of surface waters may be granted for recharging ground water basins or reservoirs if the State Engineer determines they are surplus waters which, if not diverted, would run to waste. The holders of such appropriations may also be granted appropriations to withdraw the recharged ground water.

The permitted well or other works shall be completed within a reasonable time fixed in the permit, not to exceed 2 years, with an allowable extension for good cause shown. Upon perfecting the appropriation, a ground water right certificate shall be issued, setting forth the priority date, extent and purpose of the right and, if for irrigation, the land to which it is appurtenant.[206] The priority date is the date on which the application was filed.[207]

The State Engineer, on his own motion or on receipt of proper petition, may initiate a proceeding to establish a critical ground water area whenever he has reason to believe: (1) ground water levels in the area are declining, or have declined excessively; (2) the wells of two or more claimants within the area substantially interfere with each other; (3) the available ground water supply within the area is overdrawn or is about to be overdrawn; or (4) the purity of the water in the area is about to be harmed.[208]

If, after public hearing, the evidence discloses that any of the circumstances described above actually exist, and that public health, welfare, and safety require controls, the State Engineer shall, by order, declare the area to be a critical ground water area. This order may include any one or more of the following provisions: (1) closing the area to further appropriation; (2) determining total withdrawals each day, month or year and, insofar as possible, apportioning such withdrawals among appropriators within the area in accordance with priority dates; (3) establishing water-use preferences, irrespective of time priorities, with domestic and livestock use given first preference; (4) reducing the permissible withdrawal by one or more appropriators or wells; (5) adjusting total withdrawal by one appropriator owning two or more wells, or forbidding completely his use of one or more of the wells; (6) requiring the abatement or sealing of any well polluting the ground water; (7) requiring a system of rotation of use; or (8) any other provisions necessary to protect public health, welfare, and safety.[209]

The 1955 act provides that the State Engineer or his assistant shall proceed as rapidly as possible to define tentatively the characteristics of each ground water reservoir. Before making any final determination of a reservoir's boundaries and depth, he shall make a final determination of the rights to appropriate the water of the reservoir. Moreover, a determination of the rights in any reservoir may be made on his own motion or upon petition by one or

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[206] *Id.* §§537.630 and .700 referred to in §537.630.

[207] *Id.* §537.625(2). Any defective application corrected within the prescribed time shall not lose its priority of filing on account of such defect. *Id.* §537.620(2).

[208] *Id.* §537.730.

This same proceeding may also be undertaken in connection with the determination of rights in ground water reservoirs, discussed below at notes 210-213 (*id.* §537.675), or if an application for a permit to appropriate ground waters shows probability of wasteful use or undue or substantial interference with existing wells or surface water rights, discussed above at note 205. *Id.* §537.620(3).

[209] *Id.* §537.735.

more of the appropriators. Notice of such determination shall be published and delivered to each claimant to appropriate water from the ground water reservoir or any surface water in the area. Claimants shall be given forms upon which to state their claims. A hearing shall be conducted in the same manner as for the determination of rights in a surface stream (discussed later under "Determination of Conflicting Water Rights"). The order of determination establishing the several appropriative rights shall also include, among other things, the lowest permissable water level in each reservoir, rules for controlling the use of each reservoir and well, the nature and maximum permissable use of each well, the place of use, and the priority of each use. The State Engineer's findings of fact and order of determination are filed in court for final proceedings in the same manner as for the final adjudication of rights in a surface stream.[210] The determination, as confirmed or modified by the courts, shall be a conclusive adjudication as to all claimants included within the order. Ground water right certificates shall be issued to those determined to have appropriative rights, setting forth the priority date, extent and purpose of the right and, if for irrigation, the land to which it is appurtenant.[211]

All ground water used in the State for any purpose shall remain appurtenant to the premises upon which it is used, but changes in use or place of use may be made without loss of priority in the manner (as nearly as possible) provided for making changes in water rights, described earlier.[212]

In administering the act, the State Engineer may encourage and recognize voluntary agreements among ground water users from the same reservoir.[213]

Whenever any well, including the exempt limited-use wells mentioned earlier,[214] is causing wasteful use or is unduly interfering with other wells or is polluting ground or surface water supplies contrary to the act, the State Engineer may order its discontinuance or impose remedial conditions on disuse.[215]

Determination of Conflicting Water Rights

Statutory adjudication procedures.—Under the procedures established by the 1909 water code, upon the petition to the State Engineer by one or more

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[210] This is discussed later under "Determination of Conflicting Water Rights."

[211] Oreg. Rev. Stat. §§537.665-.700 (Supp. 1973). But no ground water right certificate shall be required for certain exempt limited uses described in note 202 *supra. Id.* §537.545.

[212] See the discussion at notes 122-128 *supra.* Oreg. Rev. Stat. §537.705 (Supp. 1973), referring to §§540.520-.530.

[213] *Id.* §537.745.

[214] See the discussion at note 222 *supra.*

[215] Oreg. Rev. Stat. §537.775 (Supp. 1973). See also §537.720 regarding violations of permits and certificates of registration, §537.780(1) regarding the State Engineer's power to require all flowing wells to be capped or equipped with valves, and §537.780(5) regarding his power to prosecute actions and suits to enjoin violations of the act.

water users of any stream requesting a determination of the relative right of the various claimants, the State Engineer shall make a determination of the rights if in his opinion the circumstances justify it.[216] Notice of the investigation is to be published in a newspaper instructing all claimants to file a notification of intention to file a claim and to state, among other things, whether the right "to be claimed" is described in a permit or certificate issued by the State Engineer under the appropriation statutes. A similar notice is to be sent by registered mail to each owner or person in possession of land bordering on and having access to the stream or its tributaries, insofar as they can be reasonably ascertained.[217] The State Engineer or his representative then examines the stream system and works diverting water therefrom used in connection with water rights issued prior to February 24, 1909, for which notification of intention to file a claim was filed. The State Engineer makes various measurements, gathers such data and information as may be necessary to properly understand the relative rights of the interested parties, and prepares a map or plat indicating the diversion point and location of lands being irrigated.[218]

Following this examination, notice is published, setting a date to take testimony, and notice is sent by registered mail to all who filed a notification of intention to file a claim.[219] Thereafter, a hearing is held and testimony is taken.[220] Any interested party may contest any of the evidence and a hearing shall be held on the contested evidence by the State Engineer.[221] Based upon the data and evidence, the State Engineer makes findings of fact and issues an order determining and establishing the various water rights.[222]

A certified copy of the State Engineer's order and findings of fact, the evidence, and data are filed with the clerk of the circuit court wherein the determination is to be heard.[223] In the court proceedings, which in general are like those of a suit in equity, interested parties may file written exceptions to the findings and order of determination. If no exceptions are filed, the court is required to enter a decree affirming the State Engineer's determination. If exceptions are filed, a hearing is held thereon, after which the court enters a decree affirming or modifying the State Engineer's order, subject to appeal to the supreme court,[224] and transmits a certified copy of the decree to the State Engineer.[225]

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[216] Oreg. Laws 1909, ch. 216, §§11-35, Rev. Stat. §539.020 (Supp. 1971).
Regarding the question of adjudicating riparian rights in these statutory proceedings, see notes 184-186 *supra*.

[217] Oreg. Rev. Stat. §§539.030(1) and (2) (Supp. 1971).

[218] *Id.* §539.120.

[219] *Id.* §539.040.

[220] *Id.* §539.070.

[221] *Id.* §§539.100 and .110.

[222] *Id.* §539.130(1).

[223] *Id.*

[224] *Id.* §539.150.

[225] *Id.* §539.160.

Upon the final determination, the State Engineer shall issue to each person represented therein a certificate stating, among other things, the date of priority, the extent and purpose of the right, and a legal description of any irrigated land to which the water right is appurtenant.[226]

The statute provides that the determination of the State Engineer, as confirmed or modified by the court, shall be conclusive as to all prior rights and rights of all existing claimants lawfully embraced in the determination.[227] In the determination of water rights it is the duty of all claimants interested therein to appear and submit proof of their claims. Any claimant who fails to so appear and submit such proof "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by him."[228] Any person interested in the determination of the rights to use water of a stream who did not receive notice and had no actual knowledge of such proceedings may, within 1 year after the entry of the State Engineer's determination, intervene in the proceedings upon such terms as may be equitable.[229]

The Oregon Supreme Court has indicated that "The water code does not seek to make an adjudication thereunder conclusive upon the rights of persons who have received no notice."[230]

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[226] *Id.* §539.140.

A section of the statutes enacted in 1905 provides that the certified copy of the decree filed in the State Engineer's office "shall declare, as to the water right adjudged to each party, whether riparian or by appropriation, the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right." Oreg. Rev. Stat. §541.320 (Supp. 1973).

With respect to the appropriations initiated before Feb. 24, 1909, the State Engineer, under various circumstances and subject to appeal, shall "prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use." In doing so he "shall grant a reasonable time after the construction of the works," after considering specified factors. "For good cause shown" he may extend the time. Oreg. Rev. Stat. §539.010 (Supp. 1971). In this regard, see *Broughton's Estate* v. *Central Oreg. Irr. Dist.*, 165 Oreg. 435, 101 Pac. (2d) 425, 108 Pac. (2d) 276 (1940); *Appleton* v. *Oregon Iron & Steel Co.*, 229 Oreg. 81, 366 Pac. (2d) 174 (1961); *Alexander* v. *Central Oreg. Irr. Dist.*, 528 Pac. (2d) 582 (Oreg. App. 1974). In the latter case, the State Engineer had granted extensions until 1950. 528 Pac. (2d) at 585-587.

With respect to the question of vested riparian rights, see chapter 13 at and in note 55, chapter 10 at notes 509-515, and the discussion at notes 173-176 and 184-186 *supra.*

[227] Oreg. Rev. Stat. §539.200 (Supp. 1971). See also §537.270 (Supp. 1973).

[228] *Id.* §539.210.

[229] *Id.*

[230] The court added "even if they had actual knowledge thereof." *Staub* v. *Jensen*, 180 Oreg. 682, 178 Pac. (2d) 931, 933-934 (1947), criticized in the latter regard in Eakin, M., "Adjudication Provisions Under the 1909 Water Code—Survey of Case Law and

(*Continued*)

Whenever rights to waters of any stream have been determined in different proceedings, all proofs or evidence of rights to water and the State Engineer's findings in relation thereto may be opened by the State Engineer to public inspection. Any person may then contest the proofs or evidence and findings in the manner provided for contesting the State Engineer's original determination, provided that contests may not be made between claimants who were parties to the same adjudication proceedings in the original hearings.[231]

Chapter 539 of the Oregon statutes, which includes this special procedure for determination and adjudication of water rights in stream systems, is entitled "Determination of Water Rights Initiated Before February 24, 1909," although the body of the chapter does not expressly so limit its application. In a 1959 case, the Oregon Supreme Court said, "We note first a division in the Oregon Revised Statutes between the procedure set out in Ch. 539 for the determination of water rights initiated before the adoption of the water code on February 24, 1909, and the procedure incident to the granting, denying and cancellation of permits after that date."[232]

An informational pamphlet issued by the State Engineer states, among other things:

> The adjudication proceeding is principally for the purpose of determining rights initiated prior to the passage of the water code, February 24, 1909. * * * The water code enacted in 1909 provided that thereafter all water rights must be initiated by the filing of an application with the State Engineer and the securing of a permit to appropriate the water.
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> Those having rights under such permits or under certificates issued by the State Engineer, may appear and file claims in the adjudication proceeding. By so doing they become eligible to contest claims of other parties to such proceeding.
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> * * * *
>
> If you claim a right prior to February, 1909, failure to make an appearance in the adjudication proceeding and file proof of your claim will bar the subsequent assertion of a right by you.[233]

(*Continued*)

Proposals for Legislative Amendment," 50 Oreg. L. Rev. 664, 695-697 (1971).

The court quoted an earlier opinion which stated *inter alia* that such determinations are conclusive only upon "those upon whom service of notice has been made pursuant to the statute," or "those who have been duly served with process." 178 Pac. (2d) at 934, quoting *In re Willow Creek*, 74 Oreg. 592, 144 Pac. 505, 514-515 (1914).

See also *Beisell* v. *Wood*, 182 Oreg. 66, 185 Pac. (2d) 570, 572 (1947), and *Alexander* v. *Central Oreg. Irr. Dist.*, 528 Pac. (2d) 582, 590 (Oreg. App. 1974).

[231] Oreg. Rev. Stat. §539.220 (Supp. 1971).

[232] *Warner Valley Stock Co.* v. *Lynch*, 215 Oreg. 523, 548, 336 Pac. (2d) 884 (1959). The court, however, did not directly deal with the question of whether the application of chapter 539 is limited to the determination of water rights initiated before February 24, 1090.

The procedure regarding water permits is contained in chapter 537 of the statutes.

[233] "Information Relative to Statement of Intention to File Claim In Connection With

Both Federal and State courts have upheld the validity of the Oregon adjudication procedure as not violating the constitutional prohibition against denial of due process of law.[234]

The Ground Water Act of 1955 provides for the adjudication of rights to use ground water. This was discussed earlier under "Ground Waters."

Court transfer procedure.—When a suit is brought in the circuit court for determination of rights to use water, the case may, at the court's discretion, be transferred to the State Engineer for determination under the statutory adjudication procedure.[235]

Early water rights.—In any suit brought for protection of water rights acquired under the law of 1891,[236] the plaintiff may join as parties all persons who have diverted water from the same source. Any interested person not made a party may become so; and the court on its own motion may require all claimants to be brought in. All relative priorities may be determined in one decree.

Administration of Water Rights and Distribution of Water

The State Engineer administers State laws govering the distribution of water.[237] He divides the State into water districts, as the necessity therefor arises, in order to secure the best protection to the claimants and the most economical public supervision of the water.[238] For each district he may appoint a watermaster[239] who, under his general direction,[240] regulates the

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Adjudication of Water Rights" pp. 2-3 (no date).

In the "Notice to Water Users" of the Santiam and South Santiam Rivers and their tributaries (excluding the North Santiam River and its tributaries) situated in Linn and Marion Counties, dated April 12, 1971, it was stated: "The owners of land benefited by a permit or water right certificate acquired after February 24, 1909, are not required to enter this proceeding to maintain the use evidenced by the permit or certificate. However, they must appear and file in this proceeding to become a party hereto in order to contest the claims of those exerting a right hereunder."

[234] *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 454 (1916), affirming 217 Fed. 95, 98 (D. Oreg. 1914); *In re Hood River*, 114 Oreg. 112, 162, 227 Pac. 1065 (1924); *In re Willow Creek*, 74 Oreg. 592, 620, 144 Pac. 505 (1914), 146 Pac. 475 (1915); *Oregon Lumber Co.* v. *East Fork Irr. Dist.*, 80 Oreg. 568, 572-573, 157 Pac. 963 (1916).

For a discussion of this and some other judicial views regarding the statutory adjudication procedure, see chapter 15 at notes 309-315.

[235] Oreg. Rev. Stat. §539.020 (Supp. 1971).

Another statute, originally enacted in 1905 and still extant, provides that in any suit for the determination of stream water rights wherein the State is a party, the court is directed to call upon the State Engineer for a complete hydrographic survey of the stream system. All claimants must be made parties. Oreg. Laws 1905, ch. 228, §4, Rev. Stat. §541.310 (Supp. 1973).

[236] Oreg. Laws 1891, pp. 52-60, Rev. Stat. §541.080 (Supp. 1973).

[237] Oreg. Rev. Stat. §540.030(2) (Supp. 1969).

[238] *Id.* §540.010.

[239] *Id.* §540.020.

[240] *Id.* §540.030(1).

distribution of water within the district among those entitled to receive it.[241] The watermaster, subject to the approval of the State Engineer, may appoint assistants.[242] The watermaster or his assistants have the power to make arrests for statutory violations.[243]

Whenever any water users are unable to agree upon the distribution of water, a majority of them may apply to the watermaster for a just distribution.[244] Distribution schemes may be altered by parties who enter into written agreements to rotate the use of water which the watermaster shall distribute accordingly.[245]

The watermaster is required to so regulate the use of water within his district by closing or partially closing control works as to prevent the waste of water, or its use in excess of the quantity to which the water right owner is rightfully entitled.[246]

The Ground Water Act of 1955 contains certain provisions pertaining to the administration of rights to use ground water. This act is discussed earlier under "Ground Waters."

Injunction will not lie to restrain the watermaster from enforcing provisions of a decree of adjudication where the complaint is not that he failed to carry the decree into effect, but is, on the contrary, that he has been enforcing it.[247] Such a suit in equity was brought by persons who contended that they had acquired prescriptive rights superior to those granted by the decree, and that the watermaster should, to that extent, be enjoined from following the decree. The Oregon Supreme Court held that if adverse possession could upset the decree it must be by virtue of events occurring after its issuance. The fact that injunction could not be issued in this case, said the court, did not imply that there were not other remedies for enforcement of plaintiffs' rights if they had any. Expressed differently, the plaintiffs' error was in seeking to try title to a water right in a suit to enjoin the watermaster, a public official, from doing his clear statutory duty.

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[241] *Id.* § 540.040.

[242] *Id.* § 540.080.

[243] *Id.* § 540.060.

[244] *Id.* § 540.100. See also § § 540.210-.270 containing similar provisions relating to the distribution of water by a watermaster from a ditch or reservoir. These provisions are not applicable to works of irrigation districts or district improvement companies, unless the watermaster has been requested by the district to distribute the water.

[245] *Id.* § 540.150.

[246] *Id.* § 540.040(5).

This, said the Oregon Supreme Court, is a continuing duty. If there is any unreasonable waste of water by a party who holds a decreed water right, it is the watermaster's duty to stop it. *Bennett* v. *Salem*, 192 Oreg. 531, 545, 235 Pac. (2d) 772 (1951). Hence, any time a water user does not need the quantity of water to which his right relates, the watermaster should withhold it from him. *In re Deschutes River & Tributaries*, 148 Oreg. 389, 396, 36 Pac. (2d) 585 (1934). See also *Squaw Creek Irr. Dist.* v. *Mamero*, 107 Oreg. 291, 302-304, 214 Pac. 889 (1923).

[247] *Calderwood* v. *Young*, 212 Oreg. 197, 203-206, 315 Pac. (2d) 561 (1957).

The statutory provision to the effect that water shall be distributed in conformity with the order of determination of the State Engineer, pending court adjudication, unless stayed by a stay bond,[248] have been held by the United States Supreme Court as not arbitrary and not otherwise offensive to a right conception of due process.[249]

South Dakota

Governmental Status

The Territory of Dakota was established March 2, 1861.[1] Both South Dakota and North Dakota were created out of the Territory of Dakota on the same day but by separate acts of Congress. South Dakota was admitted to statehood on November 2, 1889.[2]

State Administrative Agency

Prior to 1973, the statutes provided that the Water Resources Commission

> [S]hall possess all of the powers, perform all of the duties, and carry out all of the functions assigned by law as set forth in this title, and shall have general supervision of the waters of the state, including the measurement, appropriation and distribution thereof, and shall have all other powers, functions and duties as the Legislature may, from time to time, require.
>
> The full control of all waters in the definite streams of this state is vested in the commission.
>
> The commission shall regulate and control the development, conservation and allotment of waters of the state according to the principles of beneficial use and priority of appropriation established by this title.[3]

In 1973, the Water Resources Commission was renamed the Water Rights Commission and placed under the direction and supervision of the newly created Department of Natural Resource Development. The statute provides, however, that the Commission

> [S]hall retain the quasi-judicial, quasi-legislative, advisory, other nonadministrative and special budgetary functions * * * relating to the

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[248] Oreg. Rev. Stat. § 539.130(1) (Supp. 1971).

[249] *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 454-455 (1916). See the discussion in chapter 15 at note 309.

[1] 12 Stat. 239 (1861).

[2] 26 Stat. 1549 (1889).

[3] S. Dak. Comp. Laws Ann. § § 46-2-9 to 46-2-11 (1967).

In 1955, all powers, duties, and functions relating to the supervision of waters of the State previously exercised by the State Engineer had been transferred to and vested in the then created Water Resources Commission. S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. § § 46-2-1 and 46-2-9 (1967).

granting of water rights, the regulation of water use, and the resolution of any conflicts concerning water rights or use, otherwise vested in it, and shall exercise those functions independently of the secretary of natural resource development.[4]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—An early water use statute enacted by the Dakota Territorial Legislature recognized the appropriation doctrine's existence in the jurisdiction and provided for initiation of rights by diverting water and posting and filing certificates of claims. It also granted landowners the right to use water for specific purposes, but stipulated that such use should not interfere with prior rights or claims by persons who had complied with the law. And the statute recognized that water rights had been acquired prior to its passage and declared that the enactment should not prejudice those in good standing.[5]

In 1888, the Territorial supreme court rendered a decision in which, as affirmed by the United States Supreme Court, both the appropriation and riparian doctrines were recognized.[6] One of the findings of fact, as set forth in the opinion of the United States Supreme Court on appeal, was: "8th. That the custom existing and which has existed in Lawrence County ever since its settlement recognizes and acknowledges the right to locate water rights and to divert, appropriate and use the waters of flowing streams for purposes of irrigation when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto." Further recognition of the appropriation doctrine was accorded in decisions rendered by the State supreme court at the turn of the 20th century.[7]

Procedure for appropriating water.—(1) Prestatutory. Prior to enactment of the Territorial appropriation law of 1881, there was no statutory law in Dakota on the subject. Appropriations of water were made by diversion and use, with no prescribed formality. Many of the early settlers in the far western valleys of what is now South Dakota came from Montana, with knowledge of water uses and customs in effect there, and proceeded to file water claims almost as soon as they took out their land claims. Many of them came in the late 1870's.[8]

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[4] S. Dak. Laws 1973, ch. 2, § § 3(a) and 124, Comp. Laws Ann. §46-2-1.1 (Supp. 1974).

[5] Terr. Dak. Laws 1881, ch. 142.

[6] *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541 (1890). This case is discussed further under "The Riparian Doctrine," *infra.*

[7] *Deadwood Cent. R. R.* v. *Barker*, 14 S. Dak. 558, 563, 572-574, 86 N.W. 619 (1901); *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 524-526, 91 N.W. 352 (1902); *Lone Tree Ditch Co.* v. *Rapid City Elec. & Gas Light Co.*, 16 S. Dak. 451, 454-456, 93 N.W. 650 (1903); *Stenger* v. *Tharp*, 17 S. Dak. 13, 18-23, 94 N.W. 402 (1903).

[8] Lea, S. H., "Irrigation in South Dakota," U.S. Dept. Agr., O.E.S. Bull. 210, pp. 28-29 (1909).

Even before the 1881 statute was enacted, customs of posting and filing claims of water locations were introduced into the new western area and were followed voluntarily, because the value of recording water claims, in the event of later controversy, was appreciated.

In the early 1920's the Supreme Court of South Dakota had occasion to consider the validity of nonstatutory appropriations of water made before the appropriation law of 1881 was enacted. At the first hearing in *Cook* v. *Evans*, a contention was made that an appropriation instituted prior to February 28, 1877 (when the treaty with the Great Sioux Nation opening up the Black Hills country to settlement was ratified), had no validity, inasmuch as prior to that date locators in the area were necessarily trespassers. The supreme court agreed that such an attempted appropriation could not confer any valid water right before the date in question, but concluded that the acts of appropriation were not idle if continued thereafter. It was held specifically that all appropriations initiated prior to February 28, 1877, and carried on by customary acts after that date became effective as of that date.[9]

On petition for rehearing in *Cook* v. *Evans*, the State supreme court stated that whether prescribed by statute or by a well-recognized custom, intending appropriators of water usually gave warning of their intention by posting notices at or near the intended points of diversion which, however, were not indispensable to validity of such appropriations. Notice was intended to be the first act toward appropriation. When completed with reasonable diligence, the appropriation related to such act and was paramount to appropriations commenced after notice. Actual appropriation without notice was valid as against riparian proprietors and later appropriators. Because of rights of the public, the court held, the same limitations and restrictions applied to appropriations made before the 1881 law was enacted as to those made under it.[10]

(2) Original statutory method. The Dakota Territory statute of 1881 declared that owners of mineral or agricultural lands were entitled to the usual enjoyment of stream waters for mining, milling, agricultural, or domestic purposes, provided that such use should not interfere with prior rights lawfully acquired.[11]

Some other provisions of the 1881 law were that water rights for the above named purposes should be determined by dates of appropriation. Within 20 days after location of a water right, a certificate had to be filed with the register of deeds in the county in which located and a copy posted at or near the place of diversion. Failure to commence construction within 60 days after location and to prosecute work to completion without unnecessary delay constituted abandonment. The act was not to be construed as impairing

[9] *Cook* v. *Evans*, 45 S. Dak. 31, 39, 185 N.W. 262 (1921).
[10] *Cook* v. *Evans*, 45 S. Dak. 43, 45-46, 186 N.W. 571 (1922).
[11] Terr. Dak. Laws 1881, ch. 142.

previously acquired rights; but if no work was performed for 1 year immediately preceding the enactment, the water right would be deemed abandoned and forfeited.

The 1881 Territorial law was carried over into the laws of the State of South Dakota, as were other laws of the Territory in force when the State was admitted to the Union.[12] It was in effect until 1905, when the first water administration law of South Dakota was enacted.[13]

(3) Current method. Appropriations of water are now governed by the provisions of a statute enacted in 1955.[14] The law of 1881 was replaced by a water administration statute enacted in 1905, which in turn was replaced in 1907 by another act substantially identical in many respects to its immediate predecessor, but which abbreviated or amplified some items and also introduced important new provisions which became known as the "dry draw law."[15] The 1907 statute was reenacted in subsequent codes including that of 1939. The 1955 statute specifically repealed all sections of the Code of 1939 pertaining to rights in definite streams, and it substituted therefor newly enacted sections.

The 1955 statute begins with a statement of "General State Policy."[16] This is

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[12] S. Dak. Laws 1890, ch. 105, provided that laws of the Territory of Dakota in force at the date of admission of the State, if not inconsistent with the State constitution, should continue in full force and effect until futher action by the legislature.

[13] With respect to these preadministration appropriations of water, statutory and nonstatutory, a statement prepared in 1907-08 by Samuel H. Lea, then South Dakota State Engineer, *supra* note 8, at 46-47, included the following observations:

"Considerable placer mining in the Black Hills required use of flowing water. For this purpose appropriations could be made by posting a notice on a post or tree; and they became matters of record if copies were filed in the court house. Most of the placer workings had been abandoned and the water rights had lapsed because of nonuse, but there was nothing of record to show which ones were still valid. The State Engineer had secured from county offices copies of all notices filed for appropriation of water for various purposes, but they showed nothing as to what was done toward completing the appropriations; and the engineer had examined locations covered by some filings and found that no work had been done there. Prior to enactment of the 1905 State law, a water right could be acquired by usage, without conforming to the posting and filing procedure, the appropriator being entitled to enjoyment of such quantity of water as he actually applied to beneficial use. All such water rights acquired before 1905, if kept alive by proper exercise, were recognized by the State administrative agency as valid."

[14] S. Dak. Laws 1955, ch. 430, Comp. Laws Ann. §46-1-1 *et seq.* (1967).

[15] S. Dak. Laws 1881, ch. 142, Laws 1905, ch. 132, Laws 1907, ch. 180. The "dry draw" provisions of the 1907 statute were §§31A, 31B, 31C, and 31D. Section 60 of the 1907 act repealed all laws and parts of laws in conflict therewith. Laws 1909, ch.174, specifically repealed the 1905 statute "for the purpose of giving full effect" to chapter 180 of Laws 1907 and acts amendatory thereof.

[16] S. Dak. Comp. Laws Ann. §§46-1-1 to 46-1-5 (1967), as amended. This policy statement contains a declaration similar in many respects to that in the California constitutional amendment of 1928 (Cal. Const. art. XIV, §3, described in the California State summary), but it differs in making no mention of riparian rights.

(Continued)

discussed later under "Restrictions and preferences in the appropriation of water."

Any person intending to appropriate water shall, prior to commencing construction of works or before taking water from constructed works, apply to the Water Resources Commission for a permit to appropriate it.[17] If, after notice and hearing, the Commission finds that its approval is indicated, such approval is endorsed on the application, which thereupon becomes a permit to appropriate the water.[18] The Commission issues to the permittee a certificate of construction when the constructed works are found in a satisfactory condition, and a license to appropriate water when it has been applied to beneficial use.[19]

The procedures under discussion apply to "all waters flowing in definite streams of the state," subject to vested rights and prior appropriations.[20]

The South Dakota statute does not particularize the purposes for which water may be appropriated, but it gives particular attention to some of them, including domestic and municipal uses as discussed later under "Restrictions and preferences in appropriation of water." It also provides "Any person or persons desiring to make reasonable use of water from any source for domestic purposes may do so without obtaining a permit from the commission for such use."[21] Under "Procedure for appropriating water: Original statutory method," above, there is noted the early custom of appropriating water for placer mining in the Black Hills. Appropriative rights involved in litigation have pertained to various purposes of use.[22]

Any person, association, or corporation, public or private, may make an appropriation of water.[23] "Person" is defined as "a natural person, a partnership, an association, a corporation, a municipality, the state of South Dakota and any political subdivision thereof, and agency of the federal government."[24]

Riparian rights that conform to the definition of "vested rights" under §46-1-9 are protected by §§46-1-10 and 46-5-5.

[17] S. Dak. Comp. Laws Ann. §46-5-10 (1967), as affected by Comp. Laws Ann. §46-2-1.1 (Supp. 1974) (reorganization).

[18] S. Dak. Comp. Laws Ann. §§46-5-17 (Supp. 1974) and 46-5-18 to 46-5-21 (1967).

[19] S. Dak. Comp. Laws Ann. §§46-5-29 and 46-5-30 (1967).

[20] *Id.* §46-5-5. See also §46-5-10 regarding surface waters. Prior to the 1955 reenactment, the provision subjecting certain waters to appropriation contained the phrase "except navigable waters." S. Dak. Code §61.0101 (1939). This exception does not appear in the current statute.

[21] S. Dak. Comp. Laws Ann. §46-5-8 (1967).

[22] For example, irrigation, domestic, development of hydroelectric power: *Lone Tree Ditch Co.* v. *Rapid City Elec. & Gas Light Co.*, 16 S. Dak. 451, 454-455, 93 N.W. 650 (1903); mining, milling, manufacturing, agricultural, domestic: *Butte County* v. *Lovinger*, 64 S. Dak. 200, 201-202, 266 N.W. 127 (1936).

[23] S. Dak. Comp. Laws Ann. §46-5-10 (1967).

[24] Id. §46-1-6(1). There are special provisions for appropriation of water by the United States. *Id.* §§46-5-41 to 46-5-45.

"As between appropriators, the first in time is the first in right;" and priority dates from the time of filing the application with the Commission.[25] Failure to make changes required by the Commission in the process of completing works may cause postponement of priority.[26]

Appeal may be taken by an applicant to the circuit court from an unfavorable decision of the Commission respecting his application to appropriate water, or from any other decision which denies a substantial right. In the absence of appeal, the Commission's decision is final.[27]

(4) Dry draw law. An important feature of the South Dakota appropriation statute is the "dry draw law."[28] A dry draw is any ravine or watercourse not having an average daily flow of water from May 1 to September 30 of at least 0.4 cubic feet per second (20 miner's inches). This does not, however, apply to a natural or publicly owned lake.[29]

Any holder of agricultural land may appropriate floodwater of a dry draw for irrigation or livestock purposes, may dam the channel, and may have a right of way across any land for conveying the water to the place of use. A location notice must be filed in the county records, and copies must be posted at or near the head of the ditch and mailed to the Commission; and construction must be commenced within 60 days after posting. The holder of the right is not, in the first instance, under the Commission's jurisdiction; but if he desires a location certificate, he must petition the Commission therefor. Such certificate is declared by the legislature to be a water right, accepted in all courts as *prima facie* evidence of full compliance with the law. Upper owners have first priority for domestic use; but they may not build new works depriving lower owners, whose rights have been approved, of water to which they are entitled.

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[25] *Id.* §46-5-7.

[26] *Id.* §46-5-28. There are statutory limitations on the permissable time for completing the work; but limited extensions may be granted by the Commission for the completion of construction or application to beneficial use due to delays caused by "physical or engineering difficulties which could not have been reasonably anticipated, or by operation of law beyond the power of the applicant to avoid." *Id.* §§46-5-21, 46-5-25, and 46-5-26.

[27] *Id.* §46-5-23.

[28] *Id.* §§46-4-1 to 46-4-8.

[29] *Id.* § 46-1-6(3)

As discussed earlier, at note 20, the appropriation statute (which includes the dry draw law) applies to "waters flowing in definite streams."

Under the circumstances of two cases, the South Dakota Supreme Court held that runoff from melting snow and rains, running for comparatively brief periods down coulees—definite channels or natural drainways—retained its character as mere diffused surface water and did not become, within the meaning of the law, a definite stream. *Benson* v. *Cook*, 47 S. Dak. 611, 201 N.W. 526 (1924); *Terry* v. *Heppner*, 59 S. Dak. 317, 239 N.W. 759 (1931). In the latter case, the supreme court held that the dry draw law did not and could not constitutionally enable a locater under its terms to establish a valid claim to diffused surface water. 59 S. Dak. at 390.

Restrictions and preferences in appropriation of water.—The statutory water right is specifically based upon and limited by beneficial use[30] and reasonable needs of the appropriator.[31] Quantitively, it must not exceed 1 cubic foot per second for each 70 acres, or its equivalent, or 3 acre-feet per acre delivered on the land, for a specified time in each year, except when floodflow "is much in excess of" that required for recorded valid rights.[32]

Each appropriation is subject to vested rights and prior appropriations.[33] Before approving an application, the Commission must determine if unappropriated water is available and, if it finds in the negative, must reject the application.[34] At its discretion, the Commission may approve an application for less water than requested, or it may vary the periods of annual use. Publication of notice must be declined if an applicant fails to comply with requirements of the statute and with rules and regulations promulgated thereunder. Also, the Commission may reject an application if in its opinion approval would be contrary to the public interest.[35]

The statute provides that an appropriation of water shall not constitute absolute ownership of such water, but shall remain subject to the principle of beneficial use.[36] The water appropriation statute defines "beneficial use" as any use of water (1) that is reasonable, useful, and beneficial to the appropriator and (2) at the same time is consistent with public interest in the best utilization of water. And it adopts the western principle that beneficial use

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[30] S. Dak. Comp. Laws Ann. §46-1-8 (1967).

[31] *Id.* §46-5-5.

[32] *Id.* §46-5-6.

[33] *Id.* §46-5-5.

[34] *Id.* §§46-5-20 to 46-5-22.

In *Belle Fourche Irr. Dist.* v. *Smiley*, 84 S. Dak. 701, 176 N.W. (2d) 239, 246 (1970), the State supreme court said, *inter alia*, "It is thus a prerequisite to the determination of the availability of unappropriated waters in approving applications for water right permits to recognize existing water rights. It is the contention of interveners that in the allotment of unappropriated waters the commission must necessarily make determinations of existing water rights including extent of vested rights. While rights may be regulated and supervised by administrative process for the protection of appropriators of water, we do not think that such process can operate to divest rights that have already vested." Earlier in its opinion the court said, "It is clear that the commission * * * in regulating and controlling irrigation perform ministerial duties only and must give full recognition and effect to existing vested rights as defined by the statute. From its decisions there is a right of appeal and review to the circuit court." 176 N.W. (2d) at 245.

[35] S. Dak. Comp. Laws Ann. §§46-5-18 and 46-5-21 (1967).

Legislation in 1974 specifies procedures for preparing environmental impact statements for public information prior to a State agency's taking any major action involving the issuance of a permit, license, certificate or other entitlement of use which may have a significant effect on the environment, and for making certain findings if it approves an action which has been the subject of such a statement. S. Dak. Laws 1974, ch. 245, Comp. Stat. Ann. §§11-1A-1 to 11-1A-13 (Supp. 1974).

[36] S. Dak. Comp. Laws Ann. §46-5-5 (1967).

is the basis, the measure, and the limit of the right to use water subject to appropriation.[37] Under the present statute, the license to appropriate water is issued "to the extent and under the conditions of the actual application thereof to beneficial use, but in no manner extending the rights described in the permit."[38] Viewed prospectively, said the South Dakota Supreme Court, a water right evidenced by judicial decree is subject to aspects of the doctrine of beneficial use. The theory is that an appropriation is consummated by applying the water to a beneficial use, and that its ultimate measure is the extent to which the water is needfully and beneficially used within a reasonable time after initiating the appropriative procedure.[39]

In enacting the water appropriation statute, the 1955 legislature declared it to be the established policy of the State that because of conditions prevailing in the State, the general welfare requires the fullest beneficial use of the State's water resources, prevention of waste or unreasonable method of use of water, and the highest exercise of water conservation in the interest of the people and for the public welfare. The statement (1) further limits water rights in natural streams or watercourses to quantities of water reasonably required for beneficial use, to the exclusion of waste or unreasonable use or unreasonable method of diversion; (2) asserts ownership of all water by the people, while allowing acquisition of rights of use by appropriation; and (3) emphasizes the paramount interest of the people in all water, on and under the surface, and their vital concern in public protection and effectuation of water developments.[40] The statement concludes by declaring the established State policy to be that domestic use is the highest use of water, taking precedence over all appropriative rights;[41] and that municipal rights for existing and future uses shall be protected to the fullest extent necessary therefor within the declared State policy forbidding waste and commanding reasonable beneficial use.[42]

"A state institution, facility or property, municipality or conservancy subdistrict" may appropriate water for contemplated future reasonable needs under the procedure applicable to existing needs. Others may make temporary appropriations of part or all of the surplus above existing needs pending the

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[37] *Id.* §§46-1-6(6) and 46-1-8.

[38] *Id.* §46-5-30.

[39] *Cundy* v. *Weber*, 68 S. Dak. 214, 222-223, 300 N.W. 17 (1941). See also note 26 *supra.* Despite a claim of appropriation of 1,000 miner's inches, plaintiff was limited to the 50 miner's inches which he had actually appropriated to beneficial use. *Henderson* v. *Goforth*, 34 S. Dak. 441, 446, 148 N.W. 1045 (1914). See also *Cook* v. *Evans*, 45 S. Dak. 31, 40, 185 N.W. 262 (1921); *Stenger* v. *Tharp*, 17 S. Dak. 13, 23, 94 N.W. 402 (1903).

[40] S. Dak. Comp. Laws Ann. §§46-1-1 to 46-1-4 (1967). In 1972, a provision was added to §46-1-2 regarding ground water usage. See the discussion at note 141 *infra.*

[41] This was amended in 1972 by adding the proviso, "if such use is exercised in a manner consistent with public interest as provided in SDCL 46-1-2," described immediately above. S. Dak. Comp. Laws Ann. §46-1-5(1) (Supp. 1974).

[42] S. Dak. Comp. Laws Ann. §46-1-5(2) (1967).

time such public entity is ready to use it. The temporary permit is effective only until the date of beginning use by such public entity, of which 6 months' advance notice must be given the Commission.[43]

The Commission may withdraw certain unappropriated waters (except from a "dry draw") from further appropriation pending the making of investigations regarding their most complete utilization.[44]

The 1955 legislation recognizes the existence of vested rights and defines them. They include (1) domestic use of water as defined;[45] (2) beneficial use of water made by riparian owners (a) at the time the act was passed, or (b) within the immediately preceding 3 years, or (c) where works under construction when the act was passed were completed and water applied to beneficial use within a reasonable time thereafter; (3) rights previously granted by court decree; and (4) water uses under diversion and application prior to enactment of the 1907 law and not abandoned or forfeited.[46] All vested rights acquired before the effective date of the present act (effective July 1, 1955) are "in all respects validated."[47] Appropriative rights granted since the date of the 1907 statute remain in full force and their priority is retained "according to valid legal records."[48] And appropriations of water in definite streams are authorized "Subject to vested rights and prior appropriations."[49]

Some aspects of the South Dakota appropriative right.—The appropriation statute declares that water used for irrigation in this State remains appurtenant to the land on which used. Transfer of title to land carries with it all rights to water appurtenant thereto for irrigation purposes. Irrigation water rights may not be transferred apart from the land, except in the manner especially provided by law. If it proves impracticable to irrigate the land beneficially or economically, and if detriment to other rights is not involved, all or part of the right may be severed, transferred to, and become appurtenant to other land without loss of priority.[50]

Any appropriator may change the purpose of use for which the right was acquired, or the place of diversion, storage, or use. Conditions are that the change can be made without detriment to existing rights, and that it has the prior approval of the Commission. A special provision regarding irrigation is noted above. The Commission's approval must be preceded by publication of notice, and is subject to judicial review.[51]

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[43] *Id.* §§46-5-38 to 46-5-40.
[44] *Id.* §46-5-41. A "dry draw" is defined at note 29 *supra.*
[45] Its definition is set out in note 114 *infra.*
[46] S. Dak. Comp. Laws Ann. §46-1-9 (1967).
[47] *Id.* §46-1-10.
[48] *Id.* §46-5-4.
[49] *Id.* §46-5-5.
[50] *Id.* §§46-5-33 and 46-5-34. But with respect to pre-1907 appropriations, see *Jewett* v. *Redwater Irrigating Assn.*, ____ S.D. ____, 220 N.W. (2d) 834 (1974).
[51] *Id.* §§46-5-31 to 46-5-35. See also §46-5-24.

The South Dakota Supreme Court expressed its approval of imposition of a plan of rotation of combined water supplies where the circumstances indicated its desirability, declaring that the trial court has the right and should take into consideration methods of handling water to produce best results for all appropriators.[52] The supreme court indicated that if the quantity of water to which a small tract is entitled is not enough to produce a stream of practicable size in irrigating, the trial court should allow such appropriator the use of an adequate stream and limit the time of use, the overall plan providing that certain ditches shall divert water on certain days only and others on only other days; and the trial court should retain jurisdiction to accomplish equitable adjustments when needed. In a later case the supreme court referred with approval to this approach to the difficult problem of defining and enforcing relative appropriative rights in a community; and it added the now well-recognized limitation that determination of the problem as to whether rotation may be safely imposed to produce efficiency turns on whether superior rights may be properly safeguarded.[53]

It is provided by statute that a person may turn water to which he is entitled into a watercourse and divert it below, subject to existing rights. Due allowance is to be made for losses as determined by the Commission.[54]

The owner of works in which water is stored or carried in excess of his needs under his appropriation must deliver the surplus at reasonable rates for the service, determined by the Commission, to anyone entitled to its use.[55]

Ways in which an appropriative right may be lost include:

(1) Abandonment. In all cases abandonment is a question of intention. Neither mere nonuse of water nor mere lapse of time alone is sufficient to establish abandonment.[56] It results from concurrence of intention to surrender the right and actual relinquishment thereof; and it should not be lightly implied. *Prima facie* showing of intent to abandon a particular quantity of water may be made by evidence of failure to apply such quantity to beneficial use for an unreasonable period of time.[57] Abandoned water becomes public water, subject to general appropriation.[58]

(2) Statutory forfeiture. A statute partially entitled "Forfeiture for nonuse" provides, "When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was

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[52] *Cook* v. *Evans*, 45 S. Dak. 31, 42-43, 185 N.W. 262 (1921).

[53] *Cundy* v. *Weber*, 68 S. Dak. 214, 226-227, 300 N.W. 17 (1941).

[54] S. Dak. Comp. Laws Ann. §46–5-14(1967).

[55] *Id.* §46-7-1.

[56] *Edgemont Improvement Co.* v. *N. S. Tubbs Sheep Co.*, 22 S. Dak. 142, 145, 115 N.W. 1130 (1908).

[57] *Cundy* v. *Weber*, 68 S. Dak. 214, 224-226, 300 N.W. 17 (1941). If, as contended in this case, some measure of a water right had never been applied to beneficial use since 1894, the evidence required an adjudication of an implied abandonment of a portion of the right. Hence, part of a right may be abandoned.

[58] S. Dak. Comp. Laws Ann. §46-5-36 (1967).

appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water."[59]

(3) Adverse possession and use. A prescriptive right to the use of water, superior to and barring an appropriative right in the same water, is acquired by continuous adverse use of the water for the statutory prescriptive period. It is not adverse, hostile, and exclusive when enough water is available to supply both the appropriator against whom the adverse claim is asserted and the one who asserts the adverse claim.[60]

(4) Estoppel. An estoppel arises where, by conduct or acts, a party has been induced to alter his position or do that which he would not otherwise have done, to his prejudice.[61] Silence can never be the basis of an estoppel unless there is a duty to speak.

The United States, the State of South Dakota, any person, or any private or public corporation may condemn any property or rights necessary for applying water to beneficial uses, including the right to enlarge existing structures and to use them in common with the former owner.[62] The right of way for water facilities over State lands is granted under prescribed circumstances.[63]

The Riparian Doctrine

Recognition of the riparian doctrine: Legislative.—The Dakota Territorial

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[59] *Id.* §46-5-37.

[60] Hence, in a 1914 case, when the findings of fact showed that for more than 20 years plaintiff (appropriator) and defendants had each actually diverted and used their full quantity of water, and that not until 1911 had plaintiff been deprived of his full flow by defendants, it was error for the trial court to conclude as a matter of law that defendants' diversion and use of water was a continuous, open, peaceable, notorious, exclusive, uninterrupted use under color of title, and was an invasion of plaintiff's appropriative right, which was thus rendered junior and inferior to the prescriptive rights of defendants. *Henderson* v. *Goforth*, 34 S. Dak. 441, 446-451, 148 N.W. 1045 (1914).

[61] *Willadsen* v. *Crawford*, 75 S. Dak. 161, 164-165, 60 N.W. (2d) 692 (1953). See factual basis of estoppel in *Homes Dev. Co.* v. *Simmons*, 75 S. Dak. 575, 581-582, 70 N.W. (2d) 527 (1955).

An early decision of the South Dakota Supreme Court involved a controversy between an appropriator of water from a creek, and the successor of the settler Rosenbaum whose preemption right postdated the appropriator's location. *Scott* v. *Toomey*, 8 S. Dak. 639, 643-651, 67 N.W. 838 (1896). The appropriator's ditch was built across the Rosenbaum land after the date of preemption location; but the acts, conduct, and silence of Rosenbaum for 15 years were held to estop him and his successor from disturbing in any way the appropriator's main ditch. The court said, "The acts, conduct and silence of Rosenbaum, and his virtual recognition of defendant's title to the water and right to carry the same over his land for a period of over 15 years permitting the defendant to spend money, time and labor upon the water right and ditch, and entering into various arrangements with the defendant for the use of portions of the water during that time, as found by the court, certainly make a very strong case of laches, and constitute, under the later decisions of the supreme court of the United States, an estoppel in *pais*." 8 S. Dak. at 648.

[62] S. Dak. Comp. Laws Ann. §46-8-1(1967).

[63] *Id.* §5-4-2. See chapter 7 at note 249.

Legislature enacted what appears to have been the first western statute defining riparian rights:[64]

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue, nor pollute the same.

This act, pursuant to a general statute,[65] became a part of the laws of South Dakota. As subsequently modified, it was repealed in 1955, in the reenactment of the water appropriation law.[66]

Another Territorial statute accorded to holders of title or possessory rights in mineral or agricultural lands "the usual enjoyment" of stream waters for mining, milling, agricultural, or domestic purposes, subject to prior rights in such waters if kept in good standing before the law.[67] This law remained in effect until enactment of the first State appropriation statute in 1905. See "Appropriation of Water of Watercourses—Procedure for appropriating water: Original statutory method," above.

Recognition of the riparian doctrine: Judicial.—The first judicial recognition of riparian rights in the Dakotas was in *Sturr* v. *Beck*, by both the Territorial supreme court and the United States Supreme Court.[68] Some discussion of this case appears earlier under "Appropriation of Water of Watercourses—Recognition of doctrine of prior appropriation."

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[64] Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code § 255 (1877).

[65] S. Dak. Laws 1890, ch. 105.

[66] S. Dak. Laws 1955, ch. 430. With modifications, it became part of the now repealed S. Dak. Code § 61.0101 (1939). Its form at the time of its repeal in 1955 is set out in *Knight* v. *Grimes*, 80 S. Dak. 517, 127 N.W. (2d) 708, 709 (1964).

[67] Terr. Dak. Laws 1881, ch. 142.

[68] *Sturr* v. *Beck*, 6 Dak. 71, 50 N.W. 486 (1888), affirmed, 133 U.S. 541 (1890).

Briefly, the factual situation in *Sturr* v. *Beck* involved two adjacent homesteads (through which False Bottom Creek flowed), and the respective land entrymen. Defendant's grantor Smith settled on the upper tract, and a few months later plaintiff settled on the lower one. Several years later, without any grant from Smith, plaintiff went upstream and located an appropriative right on Smith's tract pursuant to the 1881 law and conducted the water to his own land; this was before any water had been used on the upper land. The Territorial court held that notwithstanding the prior nonuse of water by defendant's predecessor, he was the prior appropriator of the water right. In agreeing to this holding and in affirming the judgment, the United States Supreme Court went into some detail in supporting its conclusion that lawful riparian occupancy with intent to appropriate the upper land constituted a prior appropriation of both land and water—that it attached to the tract on entry, and could not be subsequently invaded by an attempt to take the water only. The Court quoted several legislative provisions, including the Territorial declarations of 1866 and 1881 noted under the immediately preceding subtopic. The riparian proprietor, said the Court, "has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors."

In two of its opinions, the South Dakota Supreme Court construed the Dakota statute of 1866 concerning the landowner's rights in a definite stream flowing across his land, which became section 278 of the South Dakota Revised Civil Code of 1903. This Territorial act, said the court, was a literal copy of section 256 of the proposed Civil Code for the State of New York, and was a concise statement of the common law doctrine applicable to the rights of riparian owners.[69] Several years later the supreme court repeated its statement to the effect that the South Dakota Revised Civil Code section 278 was the same as section 256 of the New York Civil Code as proposed by the New York Civil Code commissioners, and said: "There is no suggestion in the report of the commissioners of an intention to change the common law respecting riparian rights. Therefore section 278 of our Civil Code should be regarded as merely declaratory of the common law as understood by the commissioners when their report was prepared."[70]

Accrual and character of the riparian right.—(1) Accrual of right. When private title to riparian land was acquired from the Government, it carried with it in South Dakota whatever rights are accorded by law to the owner of such land; and by relation, this incident of ownership of the land belonged thereto from the date of settlement thereupon, provided that the physical entry upon the land with intent to make formal entry under the public land laws was followed through to acquisition of title.[71] This principle was derived from the opinion of the United States Supreme Court in *Sturr* v. *Beck*, wherein the Court cited with approval a ruling of the Land Department to the effect that "if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of the actual settlement;" and held that lawful riparian occupancy with intent to appropriate the land should have the effect of vesting in the riparian owner the right to the flow of water in common with upper proprietors.[72] Recognition of the principle has appeared in other decisions as well.[73]

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[69] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 525-527, 91 N.W. 352 (1902), construing S. Dak. Comp. Laws 1887, § 2771, which became § 278 of the code of 1903.

[70] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 474, 128 N.W. 702 (1910).

[71] *Cook* v. *Evans*, 45 S. Dak. 31, 37, 185 N.W. 262 (1921), 45 S. Dak. 43, 45, 186 N.W. 571 (1922); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487, 128 N.W. 702 (1910).

[72] *Sturr* v. *Beck*, 133 U.S. 541, 547-548, 551 (1890), affirming 6 Dak. 71, 50 N.W. 486 (1888).

[73] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 521-522, 91 N.W. 352 (1902), 26 S. Dak. 307, 308-309, 128 N.W. 596 (1910); *Stenger* v. *Tharp*, 17 S. Dak. 13, 20, 94 N.W. 402 (1903); *Redwater Land & Canal Co.*, v. *Jones*, 27 S. Dak. 194, 203-204, 130 N.W. 85 (1911); *Driskill* v. *Rebbe*, 22 S. Dak. 242, 250-252, 117 N.W. 135 (1908).

(2) Riparian lands and proprietors. The State supreme court said, "Legally defined, a riparian owner is an owner of land bounded by a water course or lake or through which a stream flows,"[74] and it is a fundamental principle that riparian rights depend upon location of the land with reference to the stream or other source of water supply.[75]

The court held it to be a generally recognized rule that the riparian owner has no legal right to use the water beyond his riparian land, any such use being an infringement of the rights of lower proprietors.[76] It was held that land not within the watershed of a stream is not riparian thereto, even though it be part of an entire tract which does extend to the stream.[77]

(3) Property nature of the riparian right. Riparian rights were said to be property which are incident to the ownership of upland and materially enter into the actual value of the estate.[78] The court has held this right to be inseparably annexed to the soil, not as an easement or appurtenance, but as part and parcel of the land itself—a vested property right entitled to protection to the same extent as property rights generally.[79]

The South Dakota Supreme Court has said that the riparian proprietor's right does not depend upon use; that it is an incident of ownership which can be separated from the land only by adverse prescriptive right, grant, or actual abandonment.[80] And in a 1913 case, the court said that use does not create the right, nor can disuse destroy or suspend it.[81]

Concerning ownership of the water, the court said that the riparian proprietor has no property in the water itself while it is flowing in the stream, but a simple usufruct while it passes along.[82] In the 1913 case the court observed that "In a certain limited sense water flowing in a natural stream belongs to the public," but that the right to the use thereof is the subject of private property and ownership by riparian owners and lawful appropriators.[83]

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[74] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594, 245 N.W. 390 (1932).

[75] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 475, 128 N.W. 702 (1910); *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266, 143 N.W. 124 (1913).

[76] *Sayles* v. *Mitchell*, 60 S. Dak. 592, 594-595, 245 N.W. 390 (1932).

[77] 60 S. Dak. at 594-595. On demurrer, the court held that the city, which appeared to be outside the natural watershed of the stream, could not divert water therefrom to supply its nonriparian residents without compensating the lower riparian owner.

[78] *Parsons* v. *Sioux Falls*, 65 S. Dak. 145, 151, 272 N.W. 288 (1937).

[79] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-267, 143 N.W. 124 (1913); *Stenger* v. *Tharp*, 17 S. Dak. 13, 23-24, 94 N.W. 402 (1903).

[80] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487, 128 N.W. 702 (1910); *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 203-204, 130 N.W. 85 (1911); *Stenger* v. *Tharp*, 17 S. Dak. 13, 23-24, 94 N.W. 402 (1903). But see the discussion in chapter 10 at notes 228-229 regarding the question of abandonment.

[81] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 268, 143 N.W. 124 (1913).

[82] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 474-475, 128 N.W. 702 (1910).

[83] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 268, 143 N.W. 124 (1913).

(4) Elements of the riparian right: (a) Diversion of water. The court indicated that it is not necessary in all cases that the riparian owner shall divert water from the stream onto his riparian land. He cannot divert water at a point above his riparian land in violation of the rights of any intermediate proprietor, nor can he construct his ditch across other land without the owner's consent. But as to an appropriator whose point of diversion is lower down on the stream, the court indicated it was immaterial whether the upper riparian proprietor takes the water to which he is entitled at a point above the boundaries of his riparian premises or within the same, so long as he does not thereby divert an excessive quantity of water.[84] Whether the diversion is made by means of a ditch or a hydraulic engine is immaterial so long as the rights of others are not thereby impaired.[85]

(b) Purpose of use: Domestic and irrigation. In one of its earliest water rights decisions the South Dakota Supreme Court considered the question of use of riparian water for irrigation purposes, and concluded that the common law seemed to have recognized the riparian owner's right to use a reasonable quantity of water therefor, aside from whatever was required for domestic purposes. In view of the fact that in the Black Hills region the successful raising of crops required irrigation, the court adopted the principle that riparian owners should be permitted to use a reasonable quantity of water flowing over or along their lands for irrigating the same.[86]

This position that the riparian was entitled to use water for irrigation—as well as for domestic purposes—was maintained throughout the first two decades of the 20th century. In 1913 the State supreme court reaffirmed the principle that the riparian right of use for domestic and reasonable beneficial irrigation purposes was a vested property right, entitled to protection in the courts and within the purview of a constitutional provision against taking propery for public use without compensation.[87] A year later, however, the court stated that it was not then called upon to determine the effect of the proviso in the Desert Land Act of 1877[88] concerning prior appropriation of water on the public domain, nor to consider the court decisions construing the same.[89]

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[84] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 475-477, 128 N.W. 702 (1910). In *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 202, 130 N.W. 85 (1911), the court held that a riparian owner acted lawfully in diverting his water on adjoining upstream land by consent of the owner.

[85] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 476, 128 N.W. 702 (1910).

[86] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 526-530, 91 N.W. 352 (1902), approved on rehearing, 26 S. Dak. 307, 309, 128 N.W. 596 (1910).

[87] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 267, 143 N.W. 124 (1913). See *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 475, 487-491, 128 N.W. 702 (1910); *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 202-208, 130 N.W. 85 (1911); *Henderson* v. *Goforth*, 34 S. Dak. 441, 452-453, 148 N.W. 1045 (1914).

[88] 19 Stat. 377 (1877).

[89] *Henderson* v. *Goforth*, 34 S. Dak. 441, 446, 148 N.W. 1045 (1914).

The trend was interrupted in 1921, when the court decided in *Cook* v. *Evans* that it was then called upon to decide for the first time the effect of the Act of 1877, and concluded that in its previous riparian decisions it had not correctly applied the congressional mandate. But the trend was resumed in 1940 when the court decided, in *Platte* v. *Rapid City*, that it had been in error in *Cook* v. *Evans*. At the first hearing in *Cook* v. *Evans*,[90] the South Dakota Supreme Court expressed its agreement with the Oregon Supreme Court in *Hough* v. *Porter*[91] to the effect that by the Desert Land Act of 1877, Congress severed from all public lands not then entered all rights to the use of waters adjacent thereto except the riparian right of use for domestic purposes; and that the Government thereby dedicated all remaining waters to the public for appropriation for irrigation, mining, manufacturing, and other proper purposes in accordance with existing and future laws and customs.

Between the date of the South Dakota decision in *Cook* v. *Evans* and that of its reversal in *Platt* v. *Rapid City*[92] the United States Supreme Court decided the case of *California Oregon Power Company* v. *Beaver Portland Cement Company*, wherein the Court said that following the Act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the desert land States and Territories, "with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."[93] That authoritative high court interpretation, said the South Dakota court in *Platt* v. *Rapid City*, clearly showed that in this respect it had been in error in *Cook* v. *Evans*, because before that the South Dakota decisions had established the principle that rights in streams, including the right to irrigate, were open to acquisition as riparian rights through settlement on riparian land, and through appropriation under the Territorial Act of 1881. The ruling in *Cook* v. *Evans*, the South Dakota court went on to say, did not create an established rule of property because interpretation of the Desert Land Act in this respect could not be said to have been settled until passed upon by the Supreme Court of the United States.[94]

(c) Purpose of use: Natural and artificial. The South Dakota Supreme Court approved the division of riparian rights into two classes, dependent upon use of the water. These are variously denominated "ordinary" or "extraordinary," and "natural" or "artificial."[95] Ordinary or natural uses comprise domestic and

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[90] *Cook* v. *Evans*, 45 S. Dak. 31, 38-39, 185 N.W. 262 (1921).

[91] *Hough* v. *Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083, 102 Pac. 728 (1909), discussed in the Oregon State summary at notes 162-168, and 183.

[92] *Platt* v. *Rapid City*, 67 S. Dak. 245, 248-250, 291 N.W. 600 (1940).

[93] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935).

[94] Regarding other related aspects of these cases, see the discussion in chapter 10 at notes 67-72.

[95] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 311-313, 128 N.W. 596 (1910).

stockwatering; extraordinary or artificial uses include such uses as manufacturing, mining, and irrigation.

The court indicated that upstream owners have, as against those downstream, the right to use for domestic and stock purposes, if necessary, all water in the stream to the exclusion of the other proprietors.[96] With respect to extraordinary or artificial uses, however, there is no preference among riparian owners owing to upstream or downstream location of lands, and no one riparian owner would have the right to divert all the water of a creek for irrigating his land, to the exclusion of all other riparian owners.[97]

(d) Measure of the riparian right. The court indicated that the riparian right to use water is limited to the actual needs of the proprietors, with the least possible injury to other interested parties on the stream, whether they be other riparian owners or appropriators. Moreover, no riparian can successfully claim more water than he actually uses; and what he does use must be for a beneficial purpose, without unnecessarily interfering with the rights of others.[98] This limitation was otherwise expressed as reasonable beneficial use of the water, not only as among riparians themselves,[99] but as against appropriators as well.[100]

Where riparian proprietors only are concerned, the law recognized no riparian rights as gained through prior settlement or appropriation; that is, the owner's rights were the same whether his possession of land antedates or is later than the possession of other riparian claimants. The supreme court stated that these riparian rights were appurtenant to the land, to be called into use whenever a lawful possessor of the land should see fit to exercise the water right.[101]

The principle of reasonable beneficial use became the standard for measuring relative riparian rights. The court indicated that the actual quantity of water to which a particular riparian owner may be entitled for irrigating his land may vary from one growing season to another, and it may and usually does differ for different crops.[102] And the quantity of water required for irrigation is not necessarily determined by the size of the tract, for the fact of equal acreage

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[96] This was apparently as against domestic or other riparian uses. *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 128 N.W. 596, 598 (1910).

[97] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 528-529, 91 N.W. 352 (1902).

[98] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 475-476, 487, 128 N.W. 702 (1910).

[99] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 526-528, 91 N.W. 352 (1902); *Stenger* v. *Tharp*, 17 S. Dak. 13, 20, 94 N.W. 402 (1903); *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-267, 143 N.W. 124 (1913).

[100] *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 204, 207, 130 N.W. 85 (1911); *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-267, 143 N.W. 124 (1913).

[101] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 311-313, 128 N.W. 596 (1910).

[102] *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 205-206, 130 N.W. 85 (1911).

does not raise a presumption that the riparian rights of several parties are equal.[103] Hence it was error for the trial court to conclude, as a matter of law, that because the acreages of five claimants were substantially equal, their riparian rights were equal and that each was entitled to one-fifth of the total water supply for irrigating his land.

(5) Effect of early legislation upon the riparian doctrine. The South Dakota Supreme Court held that the Territorial water appropriation statute of 1881[104] did not repeal the 1866 statute[105] declaring the rights of landowners to the use of streams flowing over or under their lands. But it was repealed in 1955. See "Recognition of the riparian doctrine: Legislative," above.[106] The court also held that vested property rights in waters, whether held as riparian or under prior appropriation, could not be confiscated or interfered with by the State water appropriation law of 1907.[107]

Interrelationships of the Dual Systems

Rules applied in early supreme court decisions.—In South Dakota, said the supreme court in 1902, two water rights systems prevailed: One for acquiring the right to use water for irrigation purposes by appropriation; the other, the common-law right to the use of water, not so legally appropriated for irrigation purposes, by the riparian owner.[108] While appreciating the difficulties involved in adjusting riparian rights on a basis of beneficial use, the supreme court believed that the trial court, after full consideration of all circumstances connected with use of the streamflow, and the various rights of different owners, would be able to properly adjust these rights. Under this view of the statute, said the court, the rights of prior appropriators of stream water are fully protected.

Essential to consideration of these interrelationships are the respective times of accrual of rights under the two systems. The appropriative right accrues as of the date of priority of the right; this may be the time of taking the first step in making the appropriation, or it may be the time of completion—or perhaps some other time—depending upon the facts that determine relation back and advancement or postponement of priority under the circumstances of the particular case. The riparian right, on the other hand, was held by the South Dakota courts to have accrued at the time the riparian owner or his predecessor settled on the riparian tract of public land with the intention of claiming the

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[103] *Henderson* v. *Goforth*, 34 S. Dak. 441, 452-453, 148 N.W. 1045 (1914).

[104] Terr. Dak. Laws 1881, ch. 142.

[105] Terr. Dak. Laws 1865-1866, ch. 1, § 256, Civ. Code, § 255 (1877).

[106] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 524-526, 91 N.W. 352 (1902), 26 S. Dak. 307, 308-309, 128 N.W. 596 (1910). The court said that "such statute could not take away or destroy such vested rights."

[107] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 266-268, 143 N.W. 124 (1913).

[108] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 527-530, 91 N.W. 352 (1902).

same as a preemption or homestead entry and to which he finally acquired title from the Government.[109]

Where only appropriators were involved, their respective rights were determined by the respective dates of priority. Where only riparians were in controversy among themselves, there was no priority of right as among them so far as artificial uses are concerned, regardless of when the rights accrued. But on a stream the waters of which were claimed by both appropriators and riparians, the superiority of rights of any appropriator as against any riparian proprietor, or vice versa, depended upon their respective times of accrual.

Thus, if an appropriative right was located prior to the settlement of riparian land, the appropriative right was held superior.[110] But a riparian right having accrued at the time of settlement of land, and being therefore a vested right from then on, was held superior to an appropriative right subsequently located.[111] Hence, as against an appropriator, who is necessarily limited by the terms of his appropriative right, it was held that each riparian who can connect his title with a settlement made earlier than the time of the appropriative accrual has the right to use all the water required for domestic purposes and for proper irrigation of his riparian land.[112] The supreme court rejected a contention that the riparian could claim only so much water as needed to irrigate so much of his riparian land as was under actual irrigation at the time of accrual of the appropriation.[113] The court stated that the riparian right does not depend upon its exercise; it affords to the proprietor the use of all water needed at any time to irrigate all his riparian land. It is the surplus flow of a

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[109] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. Dak. 519, 521-522, 91 N.W. 352 (1902); *Stenger* v. *Tharp*, 17 S. Dak. 13, 20, 94 N.W. 402 (1903); *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 203-204, 130 N.W. 85 (1911). See also chapter 10, note 89.

[110] *Driskill* v. *Rebbe*, 22 S. Dak. 242, 250-252, 117 N.W. 135 (1908); *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 490-491, 128 N.W. 702 (1910).

[111] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. Dak. 307, 308-311, 128 N.W. 596 (1910). To illustrate, under the facts of a litigated case, *A* and *B* settled on separate riparian tracts along False Bottom Creek in Lawrence County in 1877; *C* located an appropriative right on the creek in January 1878; and *D* and *E* made riparian settlements thereon in April 1878 and in 1879, respectively. In ordering a new trial, the supreme court pointed out that by reason of the foregoing facts, *C*'s rights under his appropriative location were inferior to those of *A* and *B* as riparian owners, but were superior to those of *D* and *E*. *Henderson* v. *Goforth*, 34 S. Dak. 441, 451-452, 148 N.W. 1045 (1914). The trial court did not determine the relative rights of plaintiff *C* and of the four defendants as appropriators or riparians, but decided the controversy on the theory of prescription. In overruling the judgment, the supreme court stated that with elimination of the question of prescription, the final determination must rest on the water location rights of plaintiff as affected by the dates of settlement of the respective riparian defendants.

[112] *Redwater Land & Canal Co.* v. *Reed*, 26 S. Dak. 466, 487-490, 128 N.W. 702 (1910).

[113] *Redwater Land & Canal Co.* v. *Jones*, 27 S. Dak. 194, 203-204, 130 N.W. 85 (1911).

stream over what might be legally used by riparians and prior appropriators that is subject to appropriation.[114]

Legislation of 1955 and its effect.—In enacting the current appropriation law regarding watercourses in 1955, the South Dakota Legislature undertook to define and to protect vested rights to the use of water so far as they pertain to beneficial use. The section on definitions of terms used in the act, unless the context plainly requires otherwise, includes the following subsection:[115]

> "Vested Rights":
> (a) The right of a riparian owner to continue the use of water having actually been applied to any beneficial use on March 2, 1955 or within three years immediately prior thereto to the extent of the existing beneficial use made therefor.
> (b) Use for domestic purposes as that term is defined in §46-1-6.[116]
> (c) The right to take and use water for beneficial purposes where a riparian owner is engaged in the construction of works for the actual application of water to a beneficial use on March 2, 1955, provided such works shall be completed and water is actually applied for such use within a reasonable time thereafter.
> (d) Rights granted before July 1, 1955 by court decree.
> (e) Uses of water under diversions and applications of water prior to the passage of the 1907 water law and not subsequently abandoned or forfeited.

For the protection of vested rights, the legislature further declared: "All vested rights as defined in §46-1-9 acquired before July 1, 1955, are hereby in all respects validated."[117]

The legislature also declared: (1) "Subject to vested rights and prior appropriations, all waters flowing in definite streams of the state may be appropriated as herein provided;"[118] (2) it "is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation in the manner provided by law;"[119] (3) "beneficial use is the basis, the measure and the limit of the right

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[114] *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 268, 143 N.W. 124 (1913).

See also the discussion at notes 98-100 *supra* regarding "least possible injury" and "reasonable beneficial use" limitations on riparians as against appropriators.

[115] S. Dak. Comp. Laws Ann. §46-1-9 (1967).

[116] Domestic use is defined as "the use of water by an individual, or by a family unit or household, for drinking, washing, sanitary, culinary purposes, and other ordinary household purposes; and irrigation of a family garden, trees, shrubbery or orchard not greater in area than one half acre. Stockwatering shall be considered a domestic use." S. Dak. Comp. Laws Ann. §46-1-6(4) (Supp. 1974). Certain provisions regarding ground water were added by amendments in 1972 and 1973. These are discussed in note 132 *infra*.

[117] S. Dak. Comp. Laws Ann. §46-1-10 (1967).

[118] *Id.* §46-5-5.

[119] *Id.* §46-1-3.

to use of waters described in this title;" and (4) "the use of water for domestic purposes is the highest use of water, and takes precedence over all appropriative rights."[120]

In a 1973 decision, the State supreme court stated that "as a riparian owner, the defendant has a vested right to take and use water" from a river "for domestic use" as defined by the statute which, as provided, "takes precedence over all appropriative rights."[121]

The court held that, in view of the 1955 act, "the mere ownership of land contiguous to a stream no longer carries with it a vested right to divert water from a stream for irrigation," and indicated that a riparian claimant's vested rights for nondomestic purposes consist of those defined in the act.[122] The definition of vested rights, quoted above, limits nondomestic riparian rights not previously decreed by a court to those which were beneficially used at the time the 1955 act was passed or within 3 years prior thereto or where works were under construction when it was passed, provided they are completed within a reasonable time thereafter. The court upheld its previous 1970 decision in the same case in which it had upheld the validity of the 1955 act in this regard.[123]

In the 1970 decision, the court noted that in a 1913 decision[124] it had declared the 1907 water appropriation statute to be unconstitutional to the

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[120] *Id.* §46-1-5(1).

The original 1866 Civil Code section, which had been included in amended form in the general State appropriation statute, was repealed by the 1955 act as discussed at notes 64-66 *supra*. New provisions were added which were largely a modification of other parts of the repealed section. S. Dak. Laws 1955, ch. 430, §1, Code §61.0137 (Supp. 1960), now Comp. Laws Ann. §§46-5-1 to 46-5-3 (1967). These provide that a landowner may not prevent, pursue, nor pollute the natural flow of a stream or spring which arises on his land and flows into a natural stream, except that an owner of land crossed by a nonnavigable stream may place a dam across it if the course of the water is not changed, vested rights are not interfered with, or land of someone else is not flooded unless an easement exists therefor. An owner of land on which a natural spring rises and which flows into a definite stream may acquire a right to appropriate the unappropriated flow from the spring in the manner provided by law. These provisions, as incorporated in the 1955 legislation, apparently have not been construed by the State supreme court.

[121] *Belle Fourche Irr. Dist.* v. *Smiley*, 87 S. Dak. 151, 204 N.W. (2d) 105, 108 (1973).

[122] 204 N.W. (2d) at 107-108.

[123] 204 N.W. (2d) at 107, affirming 84 S. Dak. 701, 176 N.W. (2d) 239 (1970). The court upheld a determined priority date of May 1, 1953. In the 1970 opinion, the court said that the "Decision in the Knight case concerned with underground waters is equally applicable to surface waters." 176 N.W. (2d) at 245, citing *Knight* v. *Grimes*, 80 S. Dak. 517, 127 N.W. (2d) 708 (1964), discussed at notes 134-135 *infra*. With respect to the question of specifying the quantity of use as a vested riparian right, which was not considered in the *Belle Fourche* opinions, see the discussion in chapter 10 at notes 516-518.

[124] *St. Germain Irrigating Co.* v. *Hawthorne Ditch Co.*, 32 S. Dak. 260, 143 N.W. 124 (1913).

extent it infringed vested rights and that riparian rights to make reasonable beneficial use of stream water for domestic and irrigation purposes was a vested property right. But in the 1970 decision the court said, "The act there considered [in the 1913 decision] contained no provisions comparable to existing statutory provisions defining, determining and protecting vested rights * * *."[125]

Ground Waters

Earlier statutes and court decisions.—The Territorial act of 1866,[126] the text and legislative history of which were given earlier under "The Riparian Doctrine—Recognition of the riparian doctrine: Legislative," declared among other things that the owner of land owned water flowing over or *under* the surface but not forming a definite stream; that water running in a definite natural stream over or *under* the surface might be used by him while it remained there, but that he might not prevent the natural flow of the stream, nor of the spring from which it commenced its definite course, nor pursue nor pollute the same. This early Territorial law had the attention of the South Dakota Supreme Court on various occasions, as noted heretofore in discussing rights to the use of surface waters. It also entered into the decision of controversies respecting rights of use of ground waters and of springs fed thereby. For example, in a very early water rights decision, the supreme court stated that pursuant to the statute, subterranean water not flowing in a defined course or channel is a part of the realty; and that the authorities distinguished between springs fed by percolating water and those formed by the breaking out upon the surface of definite underground watercourses, the latter being governed by the same rules of law as surface streams.[127]

In 1901, the court had occasion to pass upon the essential characteristics of a definite underground stream, and to decide whether or not such a stream existed under the facts before it.[128] After reviewing authorities, the court held it to be quite clear that the stream contemplated therein is a running stream, having well-known and defined banks. Such subterranean streams spoken of in text books and decisions, the court said, refer mainly to streams of water in the arid region, which flow partly on and partly beneath the surface, but always in a well-defined channel and within well-defined banks. Hence, the trial court was in error in finding that water found seeking a lower level in gravel, on or just above bedrock, with no fissure in the bedrock and no well-defined banks, constituted a running stream within the meaning of the statute, providing that the owner of land owns the water flowing under its surface but not forming a definite stream.

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[125] 176 N.W. (2d) at 244. See also the discussion in chapter 14 at notes 186-187 regarding statutory forfeiture provisions.

[126] Terr. Dak. Laws 1865-1866, ch. 1, §256, Civ. Code §255 (1877).

[127] *Metcalf* v. *Nelson*, 8 S. Dak. 87, 89, 65 N.W. 911 (1895). See also *Madison* v. *Rapid City*, 61 S. Dak. 83, 87-88, 246 N.W. 283 (1932).

[128] *Deadwood Central R. R.* v. *Barker*, 14 S. Dak. 558, 565-570, 86 N.W. 619 (1901).

The substance of the 1866 Territorial law, which, as amended, constituted part of a section of the South Dakota Code of 1939, was repealed in the enactment of the surface water appropriation statute of 1955 and was replaced by a new section. New provisions were added which were largely modifications of other parts of the repealed section.[129] These provisions state certain limitations upon and privileges of landowners with respect to natural streams and natural springs which contribute water to their flow, but they say nothing about ground waters that supply the springs, or about ground waters generally.

The Ground Water Act of 1955.—In a companion measure to the surface water appropriation statute of 1955, the South Dakota Legislature enacted a new statute repealing most sections of the Code of 1939 respecting ground water rights and substituting new sections therefor.[130] Ground water is defined as "water under the surface, whatever may be the geologic reservoir in which it is standing or moving."[131] The apparent effect of this was to disregard distinctions formerly made in the court decisions of South Dakota between percolating waters and definite underground streams.

Under the 1955 Ground Water Act, future appropriations are subject to vested rights which include rights based on beneficial use of ground water made before February 28, 1955, or where works were then under construction which were completed and the water put to use within a reasonable time thereafter. No application for a permit need be made for domestic use of water.[132] Those wishing to initiate appropriations of ground water shall provide certain data in applications to the Commission and otherwise must follow the procedures under the general appropriation statute so far as practicable.[133]

The constitutionality of this act as applied to percolating waters was challenged in a 1964 case on the theory of its taking rights vested by the early

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[129] See the discussion in note 120 *supra*.

[130] S. Dak. Laws 1955, ch. 431, Comp. Laws Ann. §46-6-1 *et seq.* (1967), as amended.

[131] S. Dak. Comp. Laws Ann. §46-1-6(7) (1967).

[132] *Id.* §§46-6-1 to 46-6-3. But, as amended in 1972 and 1973, this exception does not apply if the domestic user is a "municipality or a nonprofit rural water supply company as defined in §10-36A-1 and sanitary districts as defined in chapter 34-17." S. Dak. Comp. Laws Ann. §46-6-3 (Supp. 1974). The definition of "domestic use" in the general appropriation statute (set out at note 116 *supra*) also was amended in 1972 and 1973 so as to include use of ground water by municipal systems and, except for irrigation, use by nonprofit water supply companies and sanitary districts as defined in §10-36A-1 and ch. 34-17, respectively, except where ground water and water in flowing streams constitute the same source of supply. *Id.* §46-1-6(4).

[133] S. Dak. Comp. Laws Ann. §46-6-3 (Supp. 1974), referring to chapter 46-5. Those procedures are discussed at notes 17-27 *supra*. See also the provisions of chapter 46-5 discussed at notes 31-36, 38, 43-44, 48-51, 54, 58-59 *supra*. As amended in 1972, approved information shall be required recognizing that any proposed irrigation from a well is feasible and will not permanently injure the soil. S. Dak. Comp. Laws. Ann. §46-6-3 (Supp. 1974). Any well not put to beneficial use for a period of time determined by the Commission is declared abandoned and shall be plugged. *Id.* §46-6-18 (1967).

"ownership" statute without compensation.[134] The court held that the earlier statute actually granted a right to use, rather than a classic property ownership, and that such rights could be taken without compensation when necessary for the public welfare. It held that South Dakota's semi-arid conditions required the maximum protection and utilization of its water supply and that the 1955 act was constitutional.[135]

The 1955 act provides that should any public or private well be located so near any other well already completed or in process as to be likely to interfere with it, any person may complain in writing to the Commission which shall determine whether in its judgment, there would be undue interference and, if so, shall change its location.[136] Due regard shall be given to the proper distribution of any artesian and shallow wells located in townships with established public or private wells, to properly equalize the flow of the wells and minimize their interference with each other.[137] Certain other restrictions are included regarding the waste of artesian or other ground waters.[138]

It is provided that an owner may change the location of his well or the use of the water, but only upon notice to the Commission.[139]

The 1955 act provides that the Commission may adopt rules and regulations controlling the location and capacity of irrigation, industrial, municipal, and other large capacity wells to ensure and protect water for domestic use. As amended in 1972, such regulations are to protect reasonable domestic use without requiring artesian-head pressure in a domestic use well, and are to control the use of large capacity wells so as to maintain adequate depths of water for reasonable domestic needs and prior appropriators. Such regulations also shall provide, among other things, for a reasonable life for all wells and a minimal wastage or deterioration of ground water through surface or ground water leakage.[140]

Another 1972 amendment provides that when and where a shortage of ground water exists, the Commission shall require the output of all such large capacity wells, without regard to priority of appropriation, to be "reduced equally in the area of the shortage except that the output of wells directly

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[134] *Knight* v. *Grimes*, 80 S. Dak. 517, 127 N.W. (2d) 708 (1964).

[135] 127 N.W. (2d) at 711-714. See also the 1970 and 1973 decisions of the court in the *Belle Fourche* case regarding surface watercourses, discussed at notes 121-125 *supra*.

[136] "[B]ut when permanent buildings have been located on any farm prior to the sinking of any artesian well on any adjoining farm, this section shall not be construed as prohibiting the sinking of any artesian well at or near such buildings without reference to the proximity of any other artesian well." S. Dak. Comp. Laws Ann. §46-6-7 (1967).

[137] *Id.* §46-6-5.

[138] *Id.* §46-6-10 *et seq.* Sections 46-6-21 to 46-6-23 apparently are derived from the 1939 code.

[139] *Id.* §46-6-4.

[140] S. Dak. Comp. Laws Ann. §46-6-6.1 (Supp. 1974).

contributing to a shortage of water supplies for domestic purposes may be reduced to a greater extent."[141]

Special Statutory Adjudication Procedures

The Attorney General is required to bring suit on behalf of the State to determine conflicting water rights, when, in the judgment of the Water Rights Commission, the public interests require such action,[142] and may bring suit in any court having jurisdiction over any part of the stream system.[143]

In any action for the determination of water rights of any stream system, all those whose claims to use such waters are of record, and all other claimants who can be ascertained with reasonable diligence shall be made parties.[144] When any such action has been begun, the court is directed to request the Water Rights Commission to make or furnish a complete hydrographic survey; and whenever legislative appropriations are available, it is the Commission's duty to proceed with such survey. All costs are charged proportionately against private parties who, however, are not required to bear any part of the State or hydrographic survey costs without their express consent.[145]

If, in the judgment of the Water Rights Commission, the public interests require action adverse to any party in a determination action, the Commission may call upon the Attorney General to intervene in such action and the Attorney General shall appear on behalf of the State.[146]

In any such adjudication case, the judgment shall declare as to the water right adjudged to each party: The priority of the right; amount, purpose, periods, and place of use of water; as to water used for irrigation, the specific tracts of land to which it shall be appurtenant; and such other conditions as may be necessary to define the right and the extent of its priority. A certified copy of the judgment shall be filed with the Commission.[147]

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[141] *Id.* §46-6-6.2. An irrigation well owner or user shall be fined at least $500 per day per well for refusal to obey an order to so reduce its use. *Id.*

The general water appropriation statute also was amended in 1972 by including a legislative declaration that it is "in the best public interest that the quantity of water withdrawn annually from a ground water source, shall not exceed the quantity of the average estimated annual recharge of water to such ground water." *Id.* §46-1-2.

[142] S. Dak. Comp. Laws Ann. §46-10-1 (1967), as affected by Comp. Laws Ann. §46-2-1.1 (Supp. 1974) (reorganization).

[143] The court in which any water rights adjudication action may be brought shall have exclusive jurisdiction over all matters necessary for the adjudication. S. Dak. Comp. Laws Ann. §46-10-2 (1967).

[144] *Id.* §46-10-3. This was held *not* to apply to a suit against an irrigating association by a shareholder that did not affect other water users on a stream. *Jewett* v. *Redwater Irrigating Assn.*, ____ S.D. ____, 220 N.W. (2d) 834, 839 (1974).

[145] *Id.* §46-10-4. With respect to an earlier statute allocating the costs of the hydrographic survey, see the discussion in chapter 15 n. 324.

[146] S. Dak. Comp. Laws Ann. §46-10-7 (1967).

[147] *Id.* §46-10-8. With respect to ascertaining vested rights under the 1955 water

(*Continued*)

Administration of Water Rights and Distribution of Water

The South Dakota Water Rights Commission is vested with the functions of administering water rights of the State and supervising the distribution of water to those entitled to receive it, and is vested with "full control of all waters in the definite streams."[148] The Commission approves designs of headgates or other structures for measurement and apportionment of water, and it may order their construction or installation by ditch owners under penalty of nondelivery of water if they fail to comply.[149] If a majority of the water users agree, the Commission selects a watermaster to act for them under the Commission's orders for distributing water from any stream system or water source when deemed necessary by the Commission or by the court having jurisdiction.[150] The Commission may remove watermasters for cause, or it may be required by the court to do so and to appoint successors after petition by water users, notice, and hearing.[151] The watermaster has authority to regulate and to lock headgates and measuring devices in enforcing proper distribution of water under any adjudication decree or, if none, any temporary schedule of water deliveries upon which the water users may agree.[152]

Water use control areas may be established after petition to the Water Rights Commission (by not less than 50 percent of those claiming rights in either surface or ground waters in the proposed area), investigation and public hearings by the Commission, and determination by it of the necessity and feasibility of establishing the area.[153] If the control area is established, the Commission appoints a watermaster for the area and exercises, in general, the same functions with respect to the area as it does elsewhere in the State.[154] A water use control area may be abolished in the same manner and by the same procedures as those specified for the creation of such areas.[155]

Actions of the watermaster may be appealed to the Commission and thence to the court having jurisdiction in the county wherein the irrigation works or irrigated lands are located; and actions of the Commission concerning establishment of a water use control area and administration therein may be appealed to the court having jurisdiction.[156]

(*Continued*)

appropriation statute, see the discussion in note 34 and at notes 115-125 *supra*. And with respect to vested rights to use ground water, see the discussion at note 130 *supra*.

[148] S. Dak. Comp. Laws Ann. §§46-2-9 and 46-2-10 (1967), as affected by Comp. Laws Ann. §46-2-1.1 (Supp. 1974) (reorganization).

[149] S. Dak. Comp. Laws Ann. §46-7-2 (1967).

[150] *Id.* §§46-10-9 to 46-10-12. The watermaster's salary and expenses shall be borne by the water users. *Id.* §46-10-10.

[151] *Id.* §46-10-11.

[152] *Id.* §46-10-12.

[153] *Id.* §§46-10-14 to 46-10-17.

[154] *Id.* §46-10-19 *et seq.*

[155] *Id.* §46-10-28.

[156] *Id.* §§46-10-13 and 46-10-27.

Texas

Governmental Status

The earliest non-Indian laws of this area were those of Spain, followed by those of Mexico when the latter attained independence from Spain. In 1836, the people declared their independence from Mexico and established the Republic of Texas.[1] In 1845, Texas was annexed to the United States as a full-fledged State.[2] Texas seceded from the Union in 1861.[3] The statehood of Texas was reestablished in 1870.[4]

The Reconstruction Courts of Texas

An important phase of the judicial history of Texas deals with the courts of the reconstruction era, extending from the end of the Civil War to the gubernatorial inauguration in January 1874. A law review article by Associate Justice Norvell of the Texas Supreme Court lists the three reconstruction courts as: (1) The Presidential reconstruction court established under the constitution of 1866, which represented no break with Texas tradition. (2) The military court or congressional reconstruction court, which had no Texas constitutional basis. (3) The semicolon court, established under the constitution of 1869 prior to the 1873 amendment.[5]

Through the years, decisions of the reconstruction courts have been held in pronounced disfavor in Texas, and in citations of authority they are generally ignored by the bench and bar. However, at times a reconstruction decision is cited and discussed.[6] In this discussion of the Texas laws of water rights, citations of two such decisions appear, not as authority under the rule of *stare decisis*, but as historical documents in the development of Texas water law.[7]

Early Uses and Regulation of Water in Texas

With the help of Indians, the Spaniards built acequias or ditches within the present area of Texas to provide the missions and civil settlements with water.[8] These water supply projects were important in Spain's colonization of this region. So-called "community acequias" or "public acequias" were located in Texas—as well as in some other parts of the Southwest—chiefly in this State

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[1] The Texas Declaration of Independence from Mexico was adopted March 2, 1836. 1 Rep. Tex. Laws 3 (1836); 1 Gammel, Laws of Tex. 1063 (1898).

[2] 9 Stat. 108 (1845).

[3] 3 Tex. Const. Ann. 597 (Vernon 1955).

[4] 16 Stat. 80 (1870).

[5] Norvell, J. R., "Oran M. Roberts and the Semicolon Court," 37 Tex. L. Rev. 279 (1959).

[6] Norvell, *supra* note 5, at 295-296. For examples in water rights jurisprudence, see *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 173-174, 11 S.W. 1078 (1889); *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 587-588, 86 S.W. 733 (1905).

[7] *Tolle* v. *Correth*, 31 Tex. 362, 98 Am. Dec. 540 (Military Ct. 1868); *Fleming* v. *Davis*, 37 Tex. 173 (Semicolon Ct. 1872).

[8] Dobkins, B. E., "The Spanish Element in Texas Water Law" 103-113 (1959).

along the Rio Grande below El Paso and in the vicinity of San Antonio, but also in other regions therein in connection with establishment of missions and colonies under Spanish and Mexican law.[9] Affairs of the community acequias were governed by local regulations. No general State law was particularly applicable to these local irrigation groups prior to 1852, when the Texas State Legislature passed "An Act Concerning Irrigation Property."[10] County boards were given authority to regulate irrigation works owned jointly by individuals. These early laws were not water rights statutes. They related only to public regulation of the affairs of the group enterprises in question. The Texas military court expressed the belief that by the act of 1852 the legislature "intended to carry out the principles of the Mexican laws."[11]

Between the time of enactment of the foregoing statutes and that of the appropriation act of 1889, the Texas Legislature passed a number of special acts directly concerned with uses of water, in addition to the general acts of 1875 and 1876 noted below under "Appropriation of Water of Watercourses."[12]

State Administrative Agency

In 1913, the Board of Water Engineers was created and vested with broad powers pertaining to appropriative water rights.[13] In 1962, the Board became the Texas Water Commission,[14] which in 1965 was renamed the Texas Water Rights Commission.[15]

The Commission is responsible for supervising the acquisition of appropriative rights,[16] adjudication of water rights,[17] and the administration and distribution of water.[18] Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—In a controversy between neighboring owners of land riparian to a creek, the Texas semicolon court was

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[9] Hutchins, W. A., "The Community Acequia: Its Origin and Development," 31 Southwestern Historical Quarterly 261, 279-281 (1928).

[10] Tex. Laws 1851, ch. LXXIV, p. 80, Laws 1861, ch. XV, p. 8.

[11] *Tolle* v. *Correth*, 31 Tex. 362, 364-365, 98 Am. Dec. 540 (Military Ct. 1868). Regarding the limited importance of this decision, see notes 5-7 *supra.*

[12] Walker, A. W., "Legal History of the Riparian Right of Irrigation in Texas Since 1836," Proc., Water Law Conference, Univ. of Tex., p. 41 (1959).

[13] Tex. Laws 1913, ch. 171.

[14] Tex. Laws 1962, ch. 4, §1.

[15] Tex. Laws 1965, ch. 296.

[16] V.T.C.A., Water Code §5.121 *et seq.* (1972), formerly Tex. Rev. Civ. Stat. Ann. art. 7492 *et seq.* (hereinafter cited as T.R.C.S.A. art.).

[17] *Id.* §5.301 *et seq.*, formerly T.R.C.S.A. art. 7542a. The final determination of the Commission is filed in court and the court enters a decree affirming or modifying the determination. *Id.* §§5.315, .317, and .322, formerly T.R.C.S.A. art. 7542a, §§5(f), (g), and (k).

[18] *Id.* §5.325 *et seq.*, formerly T.R.C.S.A. art. 7542a, §8.

not satisfied that principles of the common law offered the best solution of the conflict before it, but could find no satisfactory alternative.[19] So the court called the legislature's attention to the desirability of considering the enactment of irrigation laws for the arid and semiarid regions in the State. Legislation to encourage construction of canals and ditches for navigation and irrigation was enacted in 1875 and 1876.[20] These laws granted the free use of river and stream water to canal companies that complied with their provisions. They did not provide procedure for the acquisition of water rights by prior appropriation, nor did they contain any general authorization to the public to appropriate water. In addition to these general grants, a number of special legislative acts granting water rights were passed by the legislature prior to 1889, as noted earlier under "Early Uses and Regulation of Water in Texas."

The first statute in which the Texas Legislature authorized appropriation of water for beneficial purposes and provided procedure to implement the authorization was passed in 1889; and the next one, replacing the first, in 1895.[21] Each of these acts contained two sets of provisions: (1) those governing appropriation of water; and (2) those authorizing formation and operation of corporations for supplying water to consumers for irrigation and other purposes. Each statute applied only to the arid parts of the State.

The next general appropriation statute, enacted in 1913, contained some features of the 1895 law, which it replaced.[22] It was more far reaching, for it was made applicable to the entire State, it broadened the designation of appropriable waters, it enlarged the list of purposes for which water might be appropriated, and it created the State Board of Water Engineers and vested it with supervision over the acquisition of appropriative water rights and other water matters of statewide importance. This gave Texas a water administrative system of the general type that had been adopted in most of the other Western States.

The act of 1913 in turn was replaced by the 1917 law[23] which, with numerous amendments, enlargements, and deletions (including the Texas Water Code of 1971 which reenacted and revised the Texas water statutes), constitutes the current statutory appropriative water rights law of Texas.

Judicial recognition of the appropriation doctrine appeared in various decisions of the Texas courts, notably in *Motl* v. *Boyd*, decided in 1926.[24]

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[19] *Fleming* v. *Davis*, 37 Tex. 173, 196-200 (Semicolon Ct. 1872). Regarding the limited importance of this decision, see notes 5-7 *supra*.

[20] Tex. Laws 1875, ch. LXIII, Laws 1876, ch. CL.

[21] Tex. Laws 1889, ch. 88, Laws 1895, ch. 21. The 1889 act was amended by Laws 1893, ch. 44.

[22] Tex. Laws 1913, ch. 171.

[23] Tex. Laws 1917, ch. 88.

[24] *Motl* v. *Boyd*, 116 Tex. 82, 118-124, 286 S.W. 458 (1926). See the discussion at note 145 *infra*. For some previous decisions or references, see *McGhee Irr. Ditch Co.* v.

(*Continued*)

Procedure for appropriating water: Prestatutory.—Apparently there was no formal method of appropriating water, or of claiming water rights other than under legislative grants, before the 1889 statute was enacted. That is, works had been constructed and water diverted and used for irrigation, domestic, and stockwatering purposes from early times in various areas; but nothing has been learned by the author as to any general custom of performing and recording acts of appropriation, and certainly there was no general law that prescribed formalities in so doing. That prestatutory appropriations were known to exist at the time of enactment of the 1889 law is indicated in two sections of that law. One required those "which have constructed or may hereafter construct" waterworks "and taking water from any natural stream" to file in the county records sworn statements regarding the elements of their claimed rights; the other contained a proviso that failure to file the statement should not work a forfeiture of such theretofore acquired rights, nor prevent the claimants from establishing them in court.[25] This was the first legislative provision by which the recording of prestatutory appropriations of water was formalized.

Procedure for appropriating water: Original statutory method.—The first statutory procedure for appropriation of water was included in the act of 1889. It provided for the filing and recording of sworn statements in county offices, accompanied or followed by physical acts of diverting water and applying it to beneficial use. This general procedure was in effect under the 1889 and 1895 legislation until superseded by the administrative procedure under the 1913 law. The 1889 and 1895 acts required every person, corporation, or association that had constructed or that might construct waterworks to file in the records of the appropriate county a sworn statement showing details of existing or proposed appropriations.[26] Filing was to be made within 90 days after the effective date of the act, or after commencement of construction. Actual construction was to begin within 90 days after filing, and to be prosecuted diligently to completion, which meant conducting water in the main canal to the place of intended use. By such compliance, the doctrine of relation back was invoked.

Procedure for appropriating water: Current method.—The 1913 legislature made a radical change in the statutory method of appropriating water, which consisted of discarding individual filings in county records and installing

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(*Continued*)

Hudson, 85 Tex. 587, 589-592, 22 S.W. 398, 22 S.W. 967 (1893); *Borden* v. *Trespalacios Rice & Irr. Co.*, 98 Tex. 494, 508-509, 86 S.W. 11 (1905), affirmed, 204 U.S. 667 (1907); *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 589-590, 86 S.W. 733 (1905); *Imperial Irr. Co.* v. *Jayne*, 104 Tex. 395, 406-409, 138 S.W. 575 (1911); *Martin* v. *Burr*, 111 Tex. 57, 67-68, 228 S.W. 543 (1921); *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 229 S.W. 301 (1921); *Barrett* v. *Metcalfe*, 12 Tex. Civ. App. 247, 252-253, 33 S.W. 758 (1896, error refused); *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.*, 92 S.W. 1014, 1016 (Tex. Civ. App. 1906, error refused).

[25] Tex. Laws 1889, ch. 88, §§5 and 8.

[26] Tex. Laws 1889, ch. 88, §§5-9, Laws 1895, ch. 21, §§6-10.

procedures for centralized State administrative control. This procedure has been retained and strengthened in subsequent legislation.[27]

Waters declared by the legislature to be the property of the State and subject to appropriation under the statute are those of the ordinary flow and underflow and tides of every flowing river or natural stream; of all lakes, bays, or arms of the Gulf of Mexico; and the storm, flood and rainwaters of every river or natural stream, canyon, ravine, depression, and watershed within the State.[28]

No person may appropriate any State water or begin construction of any storage or diversion work without first obtaining a permit from the Texas Water Rights Commission to make the appropriation,[29] except that a permit is required for construction on one's own property of a dam or reservoir to contain no more than 200 acre-feet of water for domestic and livestock purposes.[30]

Upon receipt of a permit application, the Commission shall make a preliminary examination of the application and, if it appears that there is no unappropriated water or that the proposed appropriation should not be allowed for other reasons, the Commission may deny the application. Before approving an application, notice must be given and a hearing held, after which the Commission renders its decision approving or rejecting the application in whole or in part. A decision of the Commission to grant the application in whole or in part is followed by the issuance of a permit to make the appropriation. A permit recorded in the appropriate county is constructive notice of filing of the application, issuance of the permit, and of all rights arising thereunder.[31]

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[27] Tex. Laws 1913, ch. 171, Laws 1917, ch. 88, V.T.C.A., Water Code §5.021 *et seq.* (1972), formerly T.R.C.S.A. art. 7467 *et seq.*

[28] *Id.* §5.021(a), formerly T.R.C.S.A. art. 7467. Former related provisions regarding appropriative and riparian rights and their construction in *Motl* v. *Boyd* are discussed in note 145 *infra.*

[29] *Id.* §5.121, formerly T.R.C.S.A. art. 7492.

Before making any alterations, extensions, enlargements or other changes to any reservoir, dam, main canal, or diversion work upon which a permit has been granted or a certified filing recorded, all holders of such permits or filings shall obtain the approval of the Commission. *Id.* §5.142.

[30] *Id.* §5.140, formerly T.R.C.S.A. art 7500a(1). See also §5.141, formerly T.R.C.S.A. arts 7500a(2) to (7), which includes an alternate procedure for obtaining a permit for any such dam or reservoir used for other than domestic or livestock purposes. And see the discussion at note 192 *infra*, regarding a claim-filing requirement that applies to such other purposes.

The Texas Supreme Court held "that statute permitting landowners to construct dam on their own property without permit has no application to a stream which is navigable as defined by statute relating to navigable streams which shall not be crossed by the lines on a survey." *Garrison* v. *Bexar-Medina-Atascosa Counties W.I.D. No. 1*, 407 S.W. (2d) 771 (Tex. Sup. Ct. 1966).

[31] V.T.C.A., Water Code §§5.123-.135 (1972), formerly T.R.C.S.A. arts. 7493, 7495, 7500-7511 and 7515-7518.

Any person who willfully takes any water for any purpose without complying with all provisions of the law is guilty of a misdemeanor.[32]

The appropriation statutes have progressively broadened the purposes of use for which water may be appropriated. The current statute provides that water may be appropriated for domestic and municipal purposes, including water for sustaining human and domestic-animal life; industrial uses, including the development of power by means other than hydroelectric; irrigation; mining and mineral recovery; hydroelectric power; navigation; recreation and pleasure; stock raising; public parks; and game preserves. In a designated part of the Edwards underground reservoir, storm and floodwaters may be appropriated for the purpose of recharging the ground water supply under certain conditions.[33]

Permits are classified as (1) "regular," which are permanent and year-round in effect; (2) "seasonal," which are permanent in nature but limited to certain months or dates during the year; and (3) "temporary," which are granted for not to exceed 3 years' duration.[34] Storage permits are also provided for.[35]

The permittee must begin actual construction within times fixed by law or by the Commission, as the case may be, and must prosecute it diligently and continuously to completion. Failure to comply renders the permit subject to cancellation in whole or in part by the Commission after notice and hearing, subject to the right of appeal.[36] No appropriation of water is considered as having been perfected unless the water has been beneficially used for one or more of the purposes named in the statute, and stated in the original declaration of intention to appropriate the water or stated in the permit.[37] The permittee is required to make an annual report to the Commission of his water use operations for the preceding year. The report shall contain all the information required by the Commission to aid in administering the water law and in making an inventory of the State's water resources.[38]

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[32] *Id.* §§5.081 and .082, formerly T.R.C.S.A. arts. 7520-7522.

[33] *Id.* §5.023, formerly T.R.C.S.A. art. 7470.

[34] *Id.* §§5.136 and 5.137, formerly T.R.C.S.A. art. 7467c, under which temporary permits could not exceed 3 *months'* duration. For additional details, see the discussion in chapter 7 at notes 551-554. See also §5.1371 regarding an "emergency permit" not to exceed 30 days' duration. This provision was added by Acts 1971, ch. 612.

See the discussion in chapter 7 at note 513 regarding a former statute providing for tendering of "presentations" for certain large projects prior to making application for permit.

[35] V.T.C.A., Water Code §§5.121, formerly T.R.C.S.A. art. 7492. See also §5.138. Storage permits are discussed in chapter 7 at notes 632-634.

[36] V.T.C.A., Water Code §§5.143 and .144 (1972), formerly T.R.C.S.A. art. 7519.

[37] *Id.* §5.023, formerly T.R.C.S.A. art. 7473. See *Motl* v. *Boyd*, 116 Tex. 82, 126, 286 S.W. 458 (1926).

[38] V.T.C.A., Water Code §5.031 (1972), formerly T.R.C.S.A. art. 7612.

There are statutory limitations on the permissible time for completing construction work, but limited extensions may be granted by the Commission. *Id.* §5.143, formerly

Priority of an appropriative right evidenced by a permit dates from the time of filing the original application in the office of the Commission.[39]

A special procedure is provided for suits for review, setting aside, modification, or suspension, in the District Court of Travis County, of any ruling, order, decision, or other act of the Commission.[40]

The water appropriation act of 1913[41] provided that all who had constructed or partially constructed works and had not theretofore filed sworn statements in the county clerk's office, as required by the 1889 and 1895 laws, should do so within one year after the effective date of the act; and that within that year—later extended to March 31, 1916[42]—certified copies thereof should be filed by such appropriators in the office of the Board of Water Engineers (now Texas Water Rights Commission). As against the State, and without prejudice to individual priorities or relative rights, the sworn statement so filed carries the right to divert the quantity of water thus actually used. These filed statements are known as "certified filings."[43] This provision was not included in the 1917 law. However, the 1917 act took cognizance of these required recordations in its definition of an appropriator.[44]

Restrictions and preferences in appropriation of water.—(1) Approval and rejection of applications. Approval of an application is contingent upon its

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T.R.C.S.A. arts. 7519, 7536, 7537. With respect to forfeiture and cancellation of rights to a permit by failure to take timely action, see *Id.* §5.144, formerly T.R.C.S.A. arts. 7474 and 7519.

See also the discussion at notes 67-72 *infra* regarding forfeiture for 10 years' total or partial nonuse.

[39] V.T.C.A., Water Code §5.139 (1972), formerly T.R.C.S.A. art. 7523.

[40] *Id.* §§6.101-.105, formerly T.R.C.S.A. art. 7477, §12. One section of the amendatory act of 1953, providing that in all such suits the trial should be *de novo*, was declared unconstitutional by the Texas Supreme Court. *Southern Canal Co.* v. *State Bd. of Water Engineers*, 159 Tex. 227, 318 S.W. (2d) 619, affirming 311 S.W. (2d) 938 (Tex. Civ. App. 1958). This holding of invalidity, however, did not render invalid other sections of the act in which there remained a complete and workable law under which review of the reasonableness of the Commission's order might be secured under the substantial evidence rule.

[41] Tex. Laws 1913, ch. 171, §§12 to 14.

[42] Tex. Laws 1915, ch. 140.

[43] "As used in this subchapter [relating to cancellation of permits for nonuse] * * * 'certified filings' means a declaration of appropriation or affidavit that was filed with the State Board of Water Engineers under the provisions of Section 14 of Chapter 171, General Laws, Acts of the 33rd Legislature, 1913." V.T.C.A., Water Code §5.171(2) (1972), formerly T.R.C.S.A. art. 7519b.

[44] Tex. Laws 1917, ch. 88, §6 [V.T.C.A., Water Code §5.002(5) (1972), formerly T.R.C.S.A. art. 7473] includes in the definition of an appropriator one who made beneficial use of water in a lawful manner under any legislative act preceding the 1913 law, and who filed with the Board of Water Engineers a record of his appropriation as required by the 1913 act.

being made in proper form and in compliance with all governing provisions of the law and of the rules and regulations of the Texas Water Rights Commission. Among specific requirements, it is necessary that the proposed appropriation shall contemplate the application of water to an authorized use.

If all statutory requirements are met, it is the Commission's duty to approve the application. But since 1931, as noted below, requirements also include consideration by the Commission of preferential water uses and effectuation of maximum water conservation and utilization; and the subjection of new appropriations from streams other than the Rio Grande to the preferred appropriative rights of municipalities, without compensation.

It is the Commission's duty to reject applications and refuse to issue permits if there is no unappropriated water in the proposed source of supply; or if the proposed use will impair existing water rights, or vested riparian rights, or is detrimental to the public welfare.[45] The statute also provides, "Nothing in this code affects vested private rights to the use of water, except to the extent that provisions of Subchapter G [relating to water rights adjudication] of this chapter might affect these rights."[46]

(2) Preferential uses in appropriation of water. The "Wagstaff Act" of 1931 declared and implemented a policy respecting administrative control over appropriations of water in the interest of the public welfare.[47]

(a) General. The statute declares the public policy of the State to be that in the allotment and appropriation of water, preference and priority be given in the following order: (1) domestic and municipal—human life and life of domestic animals; (2) industrial, including development of electric power by means other than hydroelectric; (3) irrigation; (4) mining and recovery of minerals; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure; and (8) other beneficial uses.[48] This, the Federal district court at El Paso believed, simply regulates priorities prospectively in the subsequent issuance of permits, and does not affect outstanding permits duly issued.[49] The statute further directs the Texas Water Rights Commission to observe the rule that as between applicants for water rights, preference be given not only in the order of preferential uses so declared, but that preference also be given those applications the purposes for which contemplate and will effectuate the

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[45] V.T.C.A., Water Code §5.133(b) (1972), formerly T.R.C.S.A. arts. 7506 and 7507. See *Motl* v. *Boyd*, 116 Tex. 82, 126-127, 286 S.W. 458 (1926); *Clark* v. *Briscoe Irr. Co.*, 200 S.W. (2d) 674, 682-684 (Tex. Civ. App. 1947).

[46] V.T.C.A., Water Code §5.001(a) (1972), formerly T.R.C.S.A. art. 7469. See the discussion at notes 41-44 *supra*, regarding "certified filings," and at note 192 *infra*, regarding other claim-filing requirements.

[47] Tex. Laws 1931, ch. 128.

[48] V.T.C.A., Water Code §5.024 (1972), formerly T.R.C.S.A. art. 7471.

[49] *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 907-908 (W. D. Tex. 1955), affirmed in part, reversed in part but not on the matter considered here, 243 Fed. (2d) 927 (5th Cir.), certiorari denied, 355 U.S. 820 (1957).

maximum utilization of waters and prevention of their escape without contribution to a beneficial public service.[50]

(b) Supplanting by municipalities of existing appropriations for other purposes. The following exception is provided to the usual statutory rule that as between appropriators the first in time is the first in right. All appropriations or allotments of water after May 17, 1931, from the waters of any stream other than the international boundary stream with Mexico (the Rio Grande) for any purpose other than domestic or municipal shall be granted subject to the right of any city or town to make further appropriations thereof for domestic and municipal purposes without the necessity of compensating the existing appropriators. "Domestic and municipal purposes" are defined in the act as "including water for sustaining human life and the life of domestic animals."[51]

Some aspects of the Texas appropriative right.—The appropriative right is an incorporeal hereditament appurtenant to the land for the benefit of which the

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[50] V.T.C.A., Water Code §5.122 (1972), formerly T.R.C.S.A. art. 7472c. In *San Antonio* v. *Texas Water Comm'n*, 407 S.W. (2d) 752, 764 (Tex. Sup. Ct. 1966), the court said that art. 7472c "specifically admonishes the Water Rights Commission 'that as between applicants for rights to use the waters of the State, preference be given not only in the order of preferential uses declared [by Article 7471], but that preference also be given those applications the purposes for which contemplate and will effectuate the maximum utilization of waters and are designated and calculated to prevent the escape of waters without contribution to a beneficial public service.' San Antonio answers this by arguing that if Article 7472c gives the Commission discretion to ignore the priorities established in Article 7471, then Article 7472c is unconstitutional because such purpose is not contained in the caption of the Act. The question of violating the order of priority of uses is not presented in this case."

V.T.C.A., Water Code §5.033 (1972), formerly T.R.C.S.A. art. 7472b, provides, "The right to take water necessary for domestic and municipal supply purposes is primary and fundamental, and the right to recover from other uses water which is essential to domestic and municipal supply purposes is paramount and unquestioned in the policy of the state. All political subdivisions of the state and constitutional governmental agencies exercising delegated legislative powers have the power of eminent domain, to be exercised as provided by law, for domestic, municipal, and manufacturing uses, and for other purposes authorized by this code, including the irrigation of lands for all requirements of agricultural employment." The Texas Supreme Court has said, "In our opinion, Article 7472b, supra, relates solely to the exercise of the power of eminent domain for acquisition of water for domestic, municipal and irrigation purposes and was not intended by the Legislature to be a directive to the Water Rights Commission in passing on competing applications for permits. Any other construction would create a direct conflict between Article 7472b and Article 7472c," discussed immediately above. *San Antonio* v. *Texas Water Comm'n, supra* at 764.

[51] V.T.C.A., Water Code §§5.028, .024, and .027 (1972), formerly T.R.C.S.A. arts. 7471-7472. Regarding this provision and some possible limitations on its exercise, see McCall, J. D., "Rights of Impounded Water," in Proc., Water Law Conferences, Univ. Of Tex., pp. 251, 257-262 (1952, 1954). See also Swenson, R., "Municipal Water Preference Statutes: The Texas Wagstaff Act," in 4 "Contemporary Developments in Water Law" 27 (1970). (*Continued*)

appropriation was made. It is therefore a part of the freehold, and title thereto passes with title to the land.[52]

Storage of water is a part of the State water policy; this is declared in a constitutional amendment approved in 1917,[53] and the statute governing appropriation of water authorizes storage of appropriated waters and requires permits therefor.[54]

All the water appropriation statutes of Texas have declared the principle that as between appropriators the first in time is the first in right,[55] now subject to an exception mentioned earlier.[56]

(*Continued*)

In a recent case, a Federal district court indicated, *inter alia*, that a nonprofit corporation organized for furnishing domestic water was not a "city or town" and hence not entitled to the benefit of this provision of the Wagstaff Act. *Union Water Supply Corp. of Garciasville* v. *Vaughn*, 355 Fed. Supp. 211, 215 (S. D. Tex. 1972), affirmed, 474 Fed. (2d) 1396 (5th Cir. 1973).

In answer to a contention that the exclusion of waters of the Rio Grande from this provision was unconstitutional, the United States District Court at El Paso held that the statute does not reflect any arbitrary discrimination or repugnant classification and is not irrational. *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 906-907 (W. D. Tex. 1955), affirmed in part, reversed in part but not on the matter considered here, 243 Fed. (2d) 927 (5th Cir.), certiorari denied, 355 U.S. 820 (1957). But in a recent case another Federal district court, expressly without deciding the matter, said "this Court is inclined to a different view of § 5.028." *Union Water Supply Corp. of Garciasville* v. *Vaughn, supra* at 215. And compare *Wichita Falls* v. *Bruner*, 165 S.W. (2d) 480, 484-485 (Tex. Civ. App. 1942, error refused), which did not involve the Wagstaff Act.

The water appropriation statute does not, in specific terms, authorize a municipality to make a present appropriation of water for future use, but the San Antonio Court of Civil Appeals indicated its approval of the validity of such an appropriation. *Lower Nueces River Water Supply Dist.* v. *Cartwright*, 274 S.W. (2d) 199, 208 (Tex. Civ. App. 1954, error refused n.r.e.). "A city may be reasonably expected to grow and develop over a period of years, and if it does so, its demands for water, as well as other necessaries, would naturally increase." Hence, the city's failure to make immediate use of all water specified in a 1927 permit did not support a hypothesis of "willful abandonment."

The legislature has expressed its concern regarding future municipal water needs, by its forceful declarations respecting municipal water supplies and by the provision discussed immediately above. See also the discussion in note 50 *supra* of V.T.C.A., Water Code § 5.033 (1972), formerly T.R.C.S.A. art. 7472b.

[52] *Lakeside Irr. Co.* v. *Markham Irr. Co.*, 116 Tex. 65, 74-77, 285 S.W. 593 (1926).

[53] Tex. Const. art. XVI, § 59(a).

[54] V.T.C.A., Water Code § § 5.023 and .121 (1972), formerly T.R.C.S.A. arts. 7468 and 7492.

The permit exemption accorded for construction of certain small reservoirs on one's own property is discussed at note 30 *supra.*

[55] V.T.C.A., Water Code § 5.027 (1972), formerly T.R.C.S.A. art. 7472. See *Biggs* v. *Miller*, 147 S.W. 632, 636 (Tex. Civ. App., 1912); *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App., 1913); *Scoggins* v. *Cameron County W. I. Dist. No. 15*, 264 S. W. (2d) 169, 173-174 (Tex. Civ. App., 1954; error refused n.r.e.).

[56] See the discussion at note 51 *supra*. See also the discussion in note 50 *supra* of

The legislature has declared and emphasized that the appropriative right is limited not only to the amount specifically appropriated, but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation. All water not so used is considered not appropriated.[57] "Beneficial use" is defined as the "use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose."[58] Anyone who lawfully appropriates water shall conduct surplus water back to the stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so.[59]

A plan of rotating an entire streamflow or substantial portion thereof for given periods among water users may be imposed by court decree when the circumstances show that it is the most economical method and that it does not impair the water rights of the parties or of others.[60]

For the purpose of conveying stored water from the place of storage to the place of use or to the appropriator's point of diversion, the banks and beds of any natural flowing stream in the State may be used under rules and regulations prescribed by the Texas Water Rights Commission. No person may willfully appropriate or interfere with the delivery of these stored waters.[61]

Protection is afforded by statute to holders of rights to use the ordinary or storm water originating in a particular watershed from such exportation of water therefrom as will adversely affect their rights. Before any water may be so taken from any natural stream, watercourse or watershed into any other watershed, application must be made to the Texas Water Rights Commission for a permit, which is not to be issued until after notice and hearing as to rights that may be affected.[62] The Texas Supreme Court has refused to construe this

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V.T.C.A., Water Code §5.033 (1972), formelry T.R.C.S.A. art. 7472b. And see the discussion in chapter 7 at notes 652-661 of a 1969 Texas Court of Civil Appeals case applying a system of "weighted priorities" in what the court called an "unprecedented" situation. Among other things, the court indicated the case dealt with the mixing and impounding of two different classes of water—flood and ordinary flow—by the construction of dams by agencies of the national and state governments, and also a situation where there was past uncertainty regarding water rights along the lower Rio Grande, which led the court to recognize certain "equitable" rights. In the latter regard, see the discussion in note 87 *infra*.

[57] V.T.C.A., Water Code §5.025 (1972), formerly T.R.C.S.A. arts. 7542 and 7543.

[58] *Id.* §5.002(3), formerly T.R.C.S.A. art. 7476.

[59] *Id.* §5.046, formerly T.R.C.S.A. art. 7579.

[60] *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1*, 237 S.W. 584, 588 (Tex. Civ. App. 1921), reformed and affirmed, 117 Tex. 10, 295 S.W. 917 (1927). See also *Honaker* v. *Reeves County W. I. Dist. No. 1*, 152 S.W. (2d) 454, 455-456 (Tex. Civ. App. 1941, error refused); *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5*, 253 S.W. (2d) 294, 296-297 (Tex. Civ. App. 1952, error refused n.r.e.).

[61] V.T.C.A., Water Code §§5.042 and .091 (1972), formerly T.R.C.S.A. arts. 7548-7549.

[62] *Id.* §5.085, formerly T.R.C.S.A. arts. 7589-7591.

statute's language so as to "have the intolerable consequence of defeating a project promising immense benefits to the receiving region or the State as a whole upon a mere showing of a slight harm to present or future interests."[63]

Specific procedure for making changes in the point of diversion, place of use, and purpose of use of water for which appropriations have been completed is not contained in the water appropriation statute of Texas. In 1947, a court of civil appeals held that the right of an appropriator to make a change in the place or purpose of use is not an absolute one; that implicit in the constitution and statutory laws is a vesting in the Commission of the continuing duty of supervision over the distribution and use of public waters, carrying with it the requirement that any substantial change in use of water or in place of use not authorized in the original permit must have the approval of the Commission.[64] The Commission has adopted rules and regulations governing changes in points of diversion and place and purpose of use.

A statutory provision providing that an appropriation "wilfully abandoned during any three successive years" shall be forfeited (and the water shall be again subject to appropriation),[65] evinces a clear legislative purpose to integrate the appropriator's intent to abandon his water right within a definitely prescribed period of years.[66]

Under another statutory provision, enacted in 1957, the Texas Water Rights Commission is empowered to cancel permits or certified filings[67] under which *no part of* the water to which they pertain has been put to use for 10 consecutive years. Such permits or certified filings "shall be presumed to have been willfully abandoned."[68]

The Texas Supreme Court has concluded that under this provision the presumption is conclusive and intent need not be considered.[69] When the Commission's records fail to show the required beneficial use, it shall give notice of a public hearing, at which the record holder and other interested

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[63] *San Antonio* v. *Texas Water Comm'n*, 407 S.W. (2d) 752, 758-759 (Tex. Sup. Ct. 1966). This and related considerations are discussed in more detail in chapter 8 at notes 408-411.

[64] *Clark* v. *Briscoe Irr. Co.*, 200 S.W. (2d) 674, 682-685 (Tex. Civ. App. 1947). But see *Nueces County W. C. & I. Dist. No. 3* v. *Texas Water Rights Comm'n*, 481 S.W. (2d) 930, 933 (Tex. Civ. App. 1972) with respect to "certified filings," defined in note 43 *supra.*

[65] V.T.C.A., Water Codes § 5.030 (1972), formerly T.R.C.S.A. art. 7544.

[66] *Anson* v. *Arnett*, 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.), discussed in *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642, 644, 646 (Tex. Sup. Ct. 1971), in which the Texas Supreme Court said this statute "authorized the termination of water permits upon proof of three years of willful abandonment." *Id.* at 646. See also *Lower Nueces River Water Supply Dist.* v. *Cartwright*, 274 S.W. (2d) 199, 208 (Tex. Civ. App. 1954, error refused n.r.e.).

[67] Certified filings are discussed and defined at notes 41-44 *supra.*

[68] *Id.* § § 5.171-.177, formerly T.R.C.S.A. art. 7519a, § 1.

[69] *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642, 646 (Tex. Sup. Ct. 1971).

persons or organizations may appear and present evidence pro or con as to beneficial use of the water. If there is a finding of no beneficial use for 10 consecutive years next preceding the date of the cancellation proceedings, the permit or certified filing is null and void and "shall be forfeited, revoked and cancelled" by the Commission. Certain exceptions are provided in regard to facilities for conservation reservoir storage, and municipal rights under certified filings. Appeal from a Commission order of cancellation may be taken under the special procedure for judicial review of the Commission's acts.[70]

A companion statutory provision relating to *partial* loss of a water right, provides that if any portion of the water authorized to be diverted and used under a permit or certified filing is not beneficially used for 10 consecutive years, and if the holder of the right has not been diligent in applying the unused portion of the water to beneficial use and has not been justified in such nonuse or *does not have a bona fide intention of putting the unused water to beneficial use* under the terms of the permit or certified filing *within a reasonable time* after a hearing by the Texas Water Rights Commission, then the Commission shall cancel such permit or certified filing with respect to the unused portion of the water. Such water shall again be subject to appropriation.[71] The Texas Supreme Court has said that an action to partially cancel a permit or certified filing under this section "allows the defenses of bona fide *intention*, diligence, and justification."[72]

The Texas water appropriation statute contains a provision that an appropriator who makes use of the water under a permit or certified filing for a period of 3 years shall be deemed to have acquired title to the appropriation by limitation as against all other claimants and all riparian owners concerned.[73] But the courts of Texas apparently have not construed this statutory period of 3 years as a substitute for the 10-year statutory period previously accepted by analogy as controlling the vesting of prescriptive rights.[74]

An appropriator may condemn a right-of-way over private land and also land necessary for pumping plants, diversion structures, and reservoirs. If the party

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[70] V.T.C.A., Water Code §§5.171-.177, *supra* note 68. See also §§5.183-.186 and 6.101, formerly T.R.C.S.A. arts. 7519a, §2, and 7477.

See also the discussion in note 38 *supra* regarding forfeiture and cancellation of permits for failure to take timely action to construct works.

[71] *Id.* §§5.178-.186, formerly T.R.C.S.A. art. 7519a, §2.

[72] Emphasis added. *Texas Water Rights Comm'n* v. *Wright*, 464 S.W. (2d) 642, 650 (Tex. Sup. Ct. 1971). These and related matters are discussed in more detail in chapter 14 at notes 336-347.

[73] V.T.C.A., Water Code §5.029 (1972), formerly T.R.C.S.A. art. 7592.

[74] This is discussed in chapter 14 at notes 434-440. Elements necessary to establish a prescriptive right by adverse use (as indicated in various reported court decisions in the Western States, and related matters) are discussed in chapter 14. Some Texas cases are included in that discussion. Similarly, see the discussion of estoppel in that chapter.

For an earlier discussion of the subjects of prescription and estoppel in Texas, see Hutchins, W. A., "The Texas Law of Water Rights" 435-466 (1961).

seeking condemnation is not a corporation, district, city, or town, he shall apply to the Commission for condemnation. If, after a hearing, the Commission deems the condemnation necessary, it may institute condemnation proceedings in the name of the State for the use of the individuals concerned.[75]

The Riparian Doctrine

Recognition and accrual of the riparian doctrine.—The common law was adopted by the Republic of Texas in 1840.[76] The Texas law regarding the riparian doctrine of water rights grew up in a predominantly common law atmosphere. During a 70-year period extending from the decision in the first riparian rights case of *Haas* v. *Choussard*[77] to that rendered in *Motl* v. *Boyd*, in 1926,[78] the courts in discussing riparian-rights questions were concerned chiefly with the common law and had little to say about the civil law or Spanish-American colonization law.[79] In *Motl* v. *Boyd* the Texas Supreme Court, by *dictum*, broke away from this long trend and dealt at length with Mexican colonization laws and with laws and policies of the succeeding Republic and State governments as sources of riparian water rights.

Before the first appropriation law of 1889 was enacted, the Texas courts definitely leaned toward recognition of the common law riparian doctrine but with the element of reasonable use of water for irrigation where such use was beneficial to the pursuit of agriculture. Reasonableness of use depended upon the circumstances in each particular case.[80] Whether irrigation was a natural or an artificial use of water was still a moot question.[81] The 1889 appropriation act accepted the principle that the owner of land contiguous to a stream may use the water thereof for domestic purposes, but it made no mention of other riparian purposes. The 1895 act undertook to protect riparian rights in the ordinary flow and underflow of streams in the arid parts of the State against impairment without due process of law, but without otherwise defining such rights; and it specifically authorized riparian landowners to use stream water necessary for domestic purposes. The 1913 legislature declared its policy of nonrecognition of any riparian right in any land that passed from State to private ownership after July 1, 1895, but included provisions against impairment of riparian rights.[82]

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[75] V.T.C.A., Water Code §5.035 (1972), formerly T.R.C.S.A. art. 7583. See also the discussion of §5.033, formerly T.R.C.S.A. art. 7472b, in note 50 *supra*.

[76] Rep. Tex. Laws 3 (1840). Tex. Rev. Civ. Stat. Ann. art. 1 (1969).

[77] *Haas* v. *Choussard*, 17 Tex. 588 (1856).

[78] *Motl* v. *Boyd*, 116 Tex. 82, 286 S.W. 458 (1926).

[79] An early exception was *Tolle* v. *Correth*, 31 Tex. 362, 98 Am. Dec. 540 (Military Ct. 1868). See the more detailed discussion in chapter 6 at note 128 *et seq.*

[80] See, e.g., *Baker* v. *Brown*, 55 Tex. 377, 378-380 (1881).

[81] See the discussion at note 119 *infra*.

[82] See the discussion in chapter 10 at note 55.

Chief Justice Cureton's lengthy opinion in *Motl* v. *Boyd* indicated the court's conclusion, among other things, that from the Mexican decree of 1823 down to the passage of the State appropriation act in 1889, the fixed policy of the successive governments in granting lands was to recognize the right of the riparian owner to use water not only for domestic and household purposes but for irrigation as well;[83] that riparian waters were those of the ordinary flow and underflow of streams;[84] and that defendants as riparians would be entitled to the prior use of the riparian waters in litigation but for the fact that they were estopped to assert them in this case.[85] The "holding" that defendants would have riparian rights on grounds previously stated in the opinion, had they not been estopped to assert them, was obviously *dictum.*

In no decision rendered since that in *Motl* v. *Boyd*, down to the decision in the *Valmont Plantations* case in February 1962, did the Texas Supreme Court depart from or question the soundness of the holdings in Chief Justice Cureton's opinion. In a case decided in 1934, the supreme court cited *Motl* v. *Boyd* as authority for the principle that under both Mexican law and the laws of Texas, rights of riparians to use water not only for domestic and household purposes, but for irrigation as well, were vested rights, part of the grants of land when the grants were made.[86] In the *Valmont Plantations* case, however, the Texas Supreme Court affirmed the holding of the San Antonio Court of Civil Appeals that the statements in *Motl* v. *Boyd* that recognized a system of riparian irrigation rights to river waters under Mexican law were erroneous *obiter dicta*. The definitive decision of the Texas Supreme Court in the *Valmont Plantations* case was that lands in Spanish and Mexican grants on the lower Rio Grande do not have an appurtenant right to irrigate with the river waters.[87] But there was no issue in the case concerning the *common law* riparian right of irrigation, and the statements in *Motl* v. *Boyd* as to the accrual of such rights were not affected by the *Valmont Plantations* decisions.[88] Those

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[83] *Motl* v. *Boyd*, 116 Tex. 82, 99-108, 286 S.W. 458 (1926).

[84] 116 Tex. at 111-124.

[85] 116 Tex. at 127-130.

[86] *Chicago, R.I. & G. Ry.* v. *Tarrant County W. C. & I. Dist. No. 1*, 123 Tex. 432, 447-448, 73 S.W. (2d) 55 (1934).

[87] *Valmont Plantations* v. *Texas*, 163 Tex. 381, 355 S.W. (2d) 502 (1962), affirming 346 S.W. (2d) 853 (1961).

This is discussed in more detail in chapter 6 at notes 112-119 and in chapter 10 at notes 65-66. Nevertheless, see chapter 7 at notes 657-659 regarding certain "equitable" rights of riparians recognized in a 1969 Texas Court of Civil Appeals case under what the court called "unprecedented" circumstances in which it applied a system of "weighted priorities." See chapter 7 at note 652 *et seq. State* v. *Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W. (2d) 728, 748-749 (Tex. Civ. App. 1969). This connected case also cites other connected cases. A later connected case is *Union Water Supply Corp. of Garciasville* v. *Vaughn*, 355 Fed. Supp. 211 (1972), affirmed 474 Fed. (2d) 1396 (1973).

[88] The opinion of the court of civil appeals in the *Valmont Plantations* case specifically

(*Continued*)

statements in *Motl* v. *Boyd* were that after 1840—in which year the common law was adopted by the Republic of Texas—under the colonization acts of the Republic and subsequent acts of the Republic and State, the rights of owners of lands bordering on streams must be determined in the light of the common law and in the light of legislative enactments; that so determined, all grantees of public lands became invested, by reason of the lands granted, with riparian rights to the waters of streams to which they were contiguous; that down to the passage of the appropriation act of 1889, the fixed policy of the Republic and the State was to recognize the riparian right of irrigation as well as of domestic use; and that such riparian rights to the use of stream waters for irrigation were a part of the grants of land when the grants were made.[89] According to this, riparian rights attached only to lands granted by the Republic after adoption of the common law in 1840, or to lands granted by the State prior to the appropriation enactment in 1889. According to the legislature's own declaration in enacting the appropriation law of 1913—from which policy it has not receded—nothing contained in the act was to be construed as a recognition of any riparian right in the owner of any lands the title to which passed out of the State after July 1, 1895.[90]

Some aspects of the riparian doctrine.—The following discussion primarily includes some general principles regarding the nature of and relative rights of riparians in Texas that have been indicated in various reported court opinions. Riparian-appropriative adjustments and legislation in 1967 restricting the exercise of riparian rights, except for domestic and livestock purposes, are discussed later under "Interrelationships of the Dual Systems—Riparian-appropriative conflicts and adjustments."

(1) Riparian land. "Riparian rights arise out of the ownership of land through or by which a stream of water flows."[91] The riparian right is part and parcel of the land.[92] "Riparian rights depend upon ownership of land which is contiguous to the water."[93]

"All surveys of land which abut upon a running stream are riparian as to all

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(*Continued*)
recognized that "Motl v. Boyd is stare decisis on many matters which were in issue. On those matters we are bound. We do not presume to overrule the case. It has been often cited and properly so, on the issues within the case." *State* v. *Valmont Plantations*, 346 S.W. (2d) 853, 879 (Tex. Civ. App. 1961).

[89] *Motl* v. *Boyd*, 116 Tex. 82, 107-108, 286 S.W. 458 (1926).

[90] Tex. Laws 1913, ch. 171, §97, V.T.C.A., Water Code §5.001(b) (1972), formerly T.R.C.S.A. art. 7619.

[91] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905).

[92] *Parker* v. *El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 642-643, 297 S.W. 737 (1927).

[93] *Woody* v. *Durham*, 267 S.W. (2d) 219, 221 (Tex. Civ. App., 1954, error refused). See also *Richter* v. *Granite Mfg. Co.*, 107 Tex. 58, 62, 174 S.W. 284 (1915); *Magnolia Petroleum Co.* v. *Dodd*, 125 Tex. 125, 128-129, 81 S.W. (2d) 653 (1935); *Motl* v. *Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926); *McGhee Irr. Ditch Co.* v. *Hudson*, 85 Tex. 587, 591-592, 22 S.W. 398, 22 S.W. 967 (1893).

that portion of the survey which lies within the watershed of the stream, and its surface drainage is into the stream."[94] The riparian right cannot extend beyond the original survey as granted by the Government; and the boundary of riparian land is restricted to land the title to which was acquired by one transaction.[95]

Some related matters are discussed below, notably under "(2) Severance of riparian right from land" and "(8) Place of use of water."

(2) Severance of riparian right from land. Riparian rights arise out of ownership of riparian land, as noted above. However, the riparian right can be severed from the land in certain ways, such as reservation in a conveyance of the land;[96] grant;[97] dedication to the public;[98] and estoppel.[99] The Texas Supreme Court has said, "It is not an open question in Texas that an upper riparian proprietor may, by prescription, acquire the right to use the water of a running stream, in a special way and in excess of the right arising from ownership of his land, to the injury and detriment of lower riparian proprietors."[100]

At the trial in the *Valmont Plantations* case, Judge Blalock noted the absence of any clear pronouncement in Texas as to the effect upon the riparian right of irrigation, if any, of the existence of railroads, streets, highways, canals, flood control levees, and drainage canals situated between a navigable stream and a part of the land in an original grant abutting upon the river, or as to the effect of a sale, partition, subdivision, or other conveyance of an original tract riparian to the river, made in such manner as to separate other lands of such riparian tract from the river.[101] Accordingly, the judge held that as a matter of equity, such developed and irrigated lands within the original riparian grants and within the watershed as had lost access to the Rio Grande by partition, subdivision, voluntary alienation, intervention of rights-of-way, or creation of intervening bancos, retained their riparian status and riparian rights of

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[94] *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App. 1913).

[95] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905); *Sun Co.* v. *Gibson*, 295 Fed. 118, 119-120 (5th Cir. 1923).

With respect to tracts cut off and sold from a riparian tract, see the discussion in chapter 10 at note 211. See also the discussion at note 186, chapter 10.

The matter of use of water beyond the watershed is discussed below under "(8) Place of use of water."

[96] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 584-585, 86 S.W. 733 (1905).

[97] *Corpus Christi* v. *McLaughlin*, 147 S.W. (2d) 576, 578 (Tex. Civ. App. 1940, error dismissed).

[98] *Gibson* v. *Carroll*, 180 S.W. 630, 632-633 (Tex. Civ. App., 1915). See *State* v. *Arnim*, 173 S.W. (2d) 503, 508-509 (Tex. Civ. App. 1943, error refused want merit).

[99] *Motl* v. *Boyd*, 116 Tex. 82, 128-130, 286 S.W. 458 (1926).

[100] *Martin* v. *Burr*, 111 Tex. 57, 65, 228 S.W. 543 (1921).

See the more detailed discussion of this and other cases in chapter 14 at notes 801-810. See also the discussion at notes 668-674 thereof.

[101] Blalock, W. R., "Excerpts From the Opinion of the Trial Court," Proc. Water Law Conference, Univ. of Tex., pp. 16, 30-32 (1959).

irrigation notwithstanding such loss of access.[102] The appeal to the San Antonio Court of Civil Appeals did not deal with this portion of the judgment.[103]

(3) Riparian proprietors. The early cases contemplated the holding of riparian lands by individuals; the question of corporate ownership of riparian rights was not involved. But that a corporation might occupy such status if consonant with its corporate powers seems to have been taken for granted, and there is no apparent reason why this should not be so.[104]

In a civil appeals court case, the City of Brownwood was accorded broad riparian rights in a stream as the result of deed and contract rights granted by other riparian owners.[105] But there is nothing in the court's opinion to suggest that in an ordinary situation the city would have rights superior to or otherwise different from those of an individual landowner. In a Federal case at El Paso, there were no exceptional circumstances that would take the rights of a city as owner of riparian land out of the general rule that such rights do not differ from those of an individual proprietor; and the court expressed its opinion that the *Brownwood* case did not reflect any broad rule on the subject and observed that "the great weight of authority agrees that the pattern of riparian rights was never cut to fit the public water requirements of a large municipality."[106]

(4) Riparian waters. Riparian rights attach to normal flows of water in natural watercourses coming from natural sources;[107] and to natural lakes and ponds, regardless of origin.[108] In *Motl* v. *Boyd*, the Texas Supreme Court concluded that the portion of the streamflow to which riparian rights attached (discussed immediately below) included all waters in such segment, regardless of origin.[109]

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[102] *Texas* v. *Valmont Plantations*, No. B-20,791, 93rd Dist. Court, Hidalgo County, Texas (1959).

[103] Other aspects of this case are discussed at note 87 *supra.*

[104] Note the situation in *Great Am. Dev. Co.* v. *Smith*, 303 S.W. (2d) 861, 864 (Tex. Civ. App. 1957).

[105] *Grogan* v. *Brownwood*, 214 S.W. 532, 536-539 (Tex. Civ. App. 1919).

[106] *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 909-910 (W. D. Tex. 1955).

[107] *Rhodes* v. *Whitehead*, 27 Tex. 304, 309, 84 Am. Dec. 631 (1863); *Fleming* v. *Davis*, 37 Tex. 173, 194, 197, 201 (Semicolon Ct. 1872); *McGhee Irr. Ditch Co.* v. *Hudson*, 85 Tex. 587, 591-592, 22 S.W. 398, 22 S.W. 967 (1893); *Bigham Bros.* v. *Port Arthur Channel & Dock Co.*, 100 Tex. 192, 201, 97 S.W. 686 (1906).

[108] *Humphreys-Mexia Co.* v. *Arseneaux*, 116 Tex. 603, 611, 297 S.W. 225 (1927). See *Lakeside Irr. Co.* v. *Kirby*, 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused).

[109] *Motl* v. *Boyd*, 116 Tex. 82, 122, 286 S.W. 458 (1926). A Federal court thought that "it would be incorrect to hold that the riparian nature of water in a flowing stream and the right of a riparian owner to use it may depend upon the source of the water. We are aware of no authority in so holding." *American Cyanamid Co.* v. *Sparto*, 267 Fed. (2d) 425, 429 (5th Cir. 1959). Appellant in this Federal case had contended that substantially all the water in Trinity River as it flowed past appellees' land originated in the discharge from appellant's plant and was not riparian water.

In the landmark but controversial decision in *Motl* v. *Boyd*, the Texas Supreme Court, speaking through Chief Justice Cureton, expressed its "opinion that riparian waters are the waters of the ordinary flow and underflow of the stream; and that the waters of the stream, when they rise above the line of highest ordinary flow, are to be regarded as flood waters or waters to which riparian rights do not attach." This "line of highest ordinary flow" was stated to be the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal, and usual condition, uninfluenced by recent rainfall or surface runoff.[110] After being criticized for several decades by engineers and attorneys as impracticable of application, an attempt was made to apply this definition in the areawide litigation on the lower Rio Grande in the *Valmont Plantations* case. But Judge Blalock's written opinion at the conclusion of the trial stated that great difficulty was encountered because the phraseology appeared to be wholly foreign to the understanding of expert hydraulic engineers who testified at the trial. Judge Blalock, however, found the well-established formula of the hydrologists for determining "base flow" in the instant case to be closest to the Cureton definition, and accordingly he used the formula for determining base flow in calculating the number of second feet most nearly approaching the volume of water in the Rio Grande, entering Falcon Reservoir, at and below the highest line of ordinary flow, at the time of the trial.[111] But this question of the appropriate procedure for determining the "line of highest ordinary flow" was not dealt with by the appellate courts in the appeal of this case.[112]

(5) Use of water. "A dominant distinction between riparian rights and appropriative rights is the principle of equality among riparians in contrast to the principle of time priority among appropriators."[113] Under the riparian doctrine, no riparian owner can claim a superior right merely because he used the water first. Except for preferred domestic "natural uses," discussed below under "(6) Purpose of use of water," the use of the stream belongs equally to all proprietors;[114] and if the water is only enough for the riparian owners who are using it, it must be equitably divided among them.[115]

The riparian's use of the stream must be reasonable—a relative term, which depends upon the facts in a particular case.[116] Any use that works substantial

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[110] *Motl* v. *Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926).

[111] *Texas* v. *Valmont Plantations*, No. B-20,791, 93rd Dist. Ct., Hidalgo County, Texas (1959). Blalock, *supra* note 101, at 32-38.

[112] Other aspects of this case are discussed at note 87 *supra*.

[113] *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 910 (W. D. Tex. 1955).

[114] *Teel* v. *Rio Bravo Oil Co.*, 47 Tex. Civ. App. 153, 160, 104 S.W. 420 (1907).

[115] *Biggs* v. *Lee*, 147 S.W. 709, 710 (Tex. Civ. App. 1912, error dismissed); *Parker* v. *El Paso County W. I. Dist. No. 1*, 116 Tex. 631, 642-643, 297 S.W. 737 (1927).

[116] *Stacy* v. *Delery*, 57 Tex. Civ. App. 242, 247, 122 S.W. 300 (1909); *Baker* v. *Brown*, 55 Tex. 377, 379-380 (1881).

injury to the common right is unreasonable.[117]

If, then, each riparian proprietor is entitled to a just share of the water available for the use of all who own land riparian to a stream, some means is needed for determining just what is each one's fair share and hence apportioning the water among all the parties. In the absence of voluntary agreement among the interested parties, it remains for the courts to adjudicate relative rights and to provide for enforcing the decrees through the medium of judicial orders. That the courts have ample power to do this has been long recognized in the State.[118]

(6) Purpose of use of water. The Texas Supreme Court has held that human domestic use of water and the watering of domestic animals are "natural uses" of riparian water, and that irrigation is not. There was considerable uncertainty as to this until after the turn of the century, when the supreme court undertook to examine the conflicting statements made in previous judicial opinions and to settle the question. The natural uses of water have preference over so-called artificial uses, including irrigation, when the water supply is not adequate for all lawful demands.[119] But the preferred right relates to the *reasonable* domestic needs of riparians, including water for stock.[120]

As noted earlier, the Supreme Court of Texas held in the *Valmont Plantations* case, in affirming the judgment of the San Antonio Court of Civil Appeals, that lands in Spanish and Mexican grants riparian to the lower Rio Grande do not have an appurtenant right to irrigate with the river waters. But, there was no issue of *common law* riparian rights in this case; and nothing that the supreme court had previously said concerning the common law riparian right to irrigate was affected by this *Valmont* decision.[121]

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[117] *Motl* v. *Boyd,* 116 Tex. 82, 115, 286 S.W. 458 (1926).

[118] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 586, 86 S.W. 733 (1905); *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5*, 250 S.W. (2d) 941, 945 (Tex. Civ. App. 1952); *Hidalgo County W. I. Dist. No. 2* v. *Cameron County W. C. & I. Dist. No. 5*, 253 S.W. (2d) 294, 300-301 (Tex. Civ. App. 1952, error refused n.r.e.). For proportioning water on an acreage basis, see *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180 (Tex. Civ. App., 1913); *Hidalgo County* case, *supra*, 250 S.W. (2d) 941 at 944-945. For apportionment of water on a basis of time, by rotation, see *Ward County W. I. Dist. No. 3*, v. *Ward County Irr. Dist. No. 1*, 117 Tex. 10, 14-16, 295 S.W. 917 (1927); *Hidalgo County* case, *supra*, 253 S.W. (2d) 294 at 296-297.

[119] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585-590, 86 S.W. 733 (1905). For some previous cases involving this, see *Rhodes* v. *Whitehead*, 27 Tex. 304, 310, 84 Am. Dec. 631 (1863); *Tolle* v. *Correth*, 31 Tex. 362, 365, 98 Am. Dec. 540 (Military Ct. 1868); *Fleming* v. *Davis*, 37 Tex. 173, 196-200 (Semicolon Ct. 1872); *Baker* v. *Brown*, 55 Tex. 377, 379-380 (1881); *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 173-174, 11 S.W. 1078 (1889); *Barrett* v. *Metcalfe*, 12 Tex. Civ. App. 247, 253-254, 33 S.W. 758 (1896, error refused); *Toyaho Creek Irr. Co.* v. *Hutchins*, 21 Tex. Civ. App. 274, 282, 52 S.W. 101 (1899, error refused); *Hall* v. *Carter*, 33 Tex. Civ. App. 230, 233-234, 77 S.W. 19 (1903, error refused). See the application of the rule in *Grogan* v. *Brownwood*, 214 S.W. 532, 536-539 (Tex. Civ. App. 1919).

[120] *Martin* v. *Burr*, 111 Tex. 57, 62, 228 S.W. 543 (1921).

[121] See the discussion at note 87 *et seq. supra.*

"The statement in Texas usually includes domestic, livestock and reasonable irrigation as proper riparian uses, and those are the more familiar uses, but that is not literally an exclusive enumeration."[122] Other recognized uses of water on or in connection with riparian land include water power, including propulsion of mill machinery;[123] railroad operation;[124] and fishing.[125] It also includes attractive surroundings and recreation;[126] provided, at least, that preservation of the surroundings has some tangible value, not simply esthetic enjoyment such as "a mere artistic desire to see unappropriated and waste water flow by" one's land on its way to the sea.[127]

(7) Diversion and return of water. The riparian's rights attach to the stream where it crosses or passes his land and while it is flowing there. He has a simple usufruct in the water while it is there; and he must return to the stream, when it leaves his estate, the excess water above his rightful consumption.[128]

(8) Place of use of water. The riparian right is founded on the theory that land contiguous to a stream receives benefits and increased usufructuary value by reason of its location with respect to the stream, its direct access to the water, and the right to use the water on or in connection with the land.[129] Hence, basically, the place of use of water is on the riparian land.[130] The Texas Supreme Court has stated that although it is the general rule that a riparian owner has no right to divert his riparian water to nonriparian land, circumstances may exist under which it is lawful to do so. It would be allowable where water is abundant and no injury would result to lower riparian owners, for apparently it is only a prejudicial diversion of water that would fall within the general prohibition. The riparian owner also could contract for the use of his riparian water by another on nonriparian land so long as other riparians would not be injured.[131]

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[122] *El Paso County W. I. Dist. No. 1* v. *El Paso*, 133 Fed. Supp. 894, 909 (W. D. Tex. 1955).

[123] *Kuehler* v. *Texas Power Corp.*, 9 S.W. (2d) 435, 436-437 (Tex. Civ. App. 1928, error refused), 118 Tex. 224, 13 S.W. (2d) 667 (1929); *Rhodes* v. *Whitehead*, 27 Tex. 304, 309-310, 84 Am. Dec. 631 (1863).

[124] *Martin* v. *Burr*, 111 Tex. 57, 62, 65, 228 S.W. 543 (1921).

[125] *Diversion Lake Club* v. *Heath*, 126 Tex. 129, 138-139, 86 S.W. (2d) 441 (1935); *Taylor Fishing Club* v. *Hammett*, 88 S.W. (2d) 127, 131 (Tex. Civ. App. 1935, error dismissed).

[126] *Lakeside Irr. Co.* v. *Kirby*, 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused). See *Great Am. Dev. Co.* v. *Smith*, 303 S.W. (2d) 861, 864 (Tex. Civ. App. 1957).

[127] *Biggs* v. *Leffingwell*, 62 Tex. Civ. App. 665, 668, 132 S.W. 902 (1910).

The question of municipal water use is discussed at notes 105-106 *supra.*

[128] See *Haas* v. *Choussard*, 17 Tex. 588, 589-590 (1856); *Rhodes* v. *Whitehead*, 27 Tex. 304, 309-310, 84 Am. Dec. 631 (1863).

[129] *Magnolia Petroleum Co.* v. *Dodd*, 125 Tex. 125, 129, 81 S.W. (2d) 653 (1935).

[130] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 589, 86 S.W. 733 (1905).

See the discussion above under "(1) Riparian land." But see also the above discussion under "(2) Severance of riparian right from land" regarding some instances in which such severance may occur.

[131] *Texas Co.* v. *Burkett*, 117 Tex. 16, 25-28, 296 S.W. 273 (1927); *Humphreys-Mexia Co.*

(*Continued*)

Diversion of water to land lying in a watershed other than that in which the water originates involves further complications. It is the general rule that land that has riparian status with respect to a given stream does not extend beyond the watershed thereof, but the Texas Supreme Court, while approving the general limitation that the riparian cannot ordinarily divert riparian water to land lying outside the watershed, added that if the drainage area is small and the water supply abundant, so that other riparians are not deprived of an ample supply, "it might not be an unreasonable use to carry the water beyond the watershed."[132]

A statute (a) makes it unlawful to transfer any of the ordinary flow, underflow, or stormwaters of any stream, watercourse, or watershed in the State into another stream, watercourse, or watershed to the prejudice of any person or property situated within the original watershed; (b) provides that no transfer from one watershed to another shall be made without a permit from the Texas Water Rights Commission, which may be granted only after a full hearing as to the rights to be affected thereby; and (c) declares that any diversion in violation of these provisions is a misdemeanor.[133] The statutory inhibition is placed upon all persons, without limitation to appropriators of water, and hence apparently applies to riparian owners as well.

(9) Storage of water. In a few cases in the high courts of Texas, the right of a riparian owner to utilize storage of water as a means of making the exercise of his right effective in a semiarid region, consistently with the rights of others on the stream, has been recognized.[134]

Interrelationships of the Dual Systems

In general.—Nonriparian uses of water were made before the passage in 1889 of the first water appropriation statute, which provided for their recordation and protection against forfeiture and encouraged their establishment in the courts. They were not termed appropriative uses by the legislature, but were integrated on a basis of priority of appropriation with rights acquired under the statutory procedure. In the meantime, several decisions with respect to riparian rights had been rendered by the Texas Supreme Court; and from the time of enactment of the first appropriation statute, the courts consistently recognized the existence of the conflicting dual systems of water rights. Some adjustments were made from time to time. An important one was the limitation of riparian

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(*Continued*)

v. *Arseneaux*, 116 Tex. 603, 610, 297 S.W. 225 (1927). See *Lakeside Irr. Co.* v. *Kirby*, 166 S.W. 715, 718 (Tex. Civ. App. 1914, error refused).

[132] *Watkins Land Co.* v. *Clements*, 98 Tex. 578, 585, 86 S.W. 733 (1905).

[133] V.T.C.A., Water Code § 5.085 (1972), formerly T.R.C.S.A. arts. 7589, 7590, and 7591.

[134] *Stacy* v. *Delery*, 57 Tex. Civ. App. 242, 248, 122 S.W. 300 (1909); *Chicago, R. I. & G. Ry.* v. *Tarrant County W. C. & I. Dist. No. 1*, 123 Tex. 432, 448, 73 S.W. (2d) 55 (1934).

This matter, including some limitations on such storage, and a contrasting view expressed by the trial court in the *Valmont Plantations* case, is discussed in chapter 10 at notes 672-677.

rights to waters of the normal flow and underflow of streams, floodwaters being available only for appropriation. A more recent important adjustment was made in the *Valmont Plantations* case in which the Texas Supreme Court held that lands in Spanish and Mexican grants on the lower Rio Grande do not have an appurtenant riparian right to irrigate from the river. Questions of riparian rights of lands in *common law* grants were not involved.[135]

Effect of some early water statutes on riparian rights.—The 1875 nonappropriation act, which was passed to encourage irrigation and navigation, purported to grant the free use of stream water to any company that complied with its provisions. This, said the Texas Supreme Court, could be held to apply only to streams on the public lands of the State, as the legislature had no power to impair vested rights of riparians without providing for compensation.[136]

In construing the early water appropriation statutes, likewise, the courts took note of their possible effect on riparian rights. The supreme court indicated that these statutes could not operate on preexisting rights of riparian owners, but only on such interests as were in the State by reason of its ownership of riparian lands.[137] They were valid only when they could be applied without detriment to vested property rights.[138] And they specifically undertook to protect the rights of riparian landowners.[139]

The supreme court objected to legislation authorizing the Board of Water Engineers (now the Texas Water Rights Commission) to make findings of fact and orders determining rights to the use of water, necessarily including riparian rights (see the later discussion, "Special Statutory Adjudication Procedures"),[140] but concluded in a later decision that the appropriation statutes of 1889 to 1917, inclusive, were valid and constitutional insofar as they authorized the appropriation of storm and floodwaters, and other waters without violation of riparian rights.[141]

Riparian and nonriparian waters.—The supreme court decision in *Motl* v. *Boyd* "partitioned flowing waters horizontally."[142] The partitioning was made

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[135] See the discussion at note 87 *et seq. supra.*

[136] *Mud Creek Irr., Agric. & Mfg. Co.* v. *Vivian*, 74 Tex. 170, 173-174, 11 S.W. 1078 (1889).

[137] *McGhee Irr. Ditch Co.* v. *Hudson*, 85 Tex. 587, 591-592, 22 S.W. 398, 22 S.W. 967 (1893).

[138] *Barrett* v. *Metcalfe*, 12 Tex. Civ. App. 247, 252-254, 33 S.W. 758 (1896, error refused); *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.*, 92 S.W. 1014, 1016 (Tex. Civ. App. 1906, error refused).

[139] Tex. Rev. Civ. Stat. Ann. arts. 7469, 7507, and 7620 (1954); *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180-1181 (Tex. Civ. App. 1913); *Grogan* v. *Brownwood*, 214 S.W. 532, 536 (Tex. Civ. App. 1919).

[140] *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).

[141] *Motl* v. *Boyd*, 116 Tex. 82, 124, 286 S.W. 458 (1926).

[142] Davenport, H., "Development of the Texas Laws of Waters," 21 Vernon's Tex. Civ. Stat. Ann. XIII, XXXVII (1954).

at "the line of highest ordinary flow," defined as "the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when the waters are in their ordinary, normal and usual condition, uninfluenced by recent rainfall or surface run-off."[143]

Under the declaration in *Motl* v. *Boyd*, waters of the "ordinary flow and underflow," up to the line of highest "normal and ordinary flow," are riparian waters of the stream, held in trust by the State for the riparian owners along its margins. These waters, to the extent necessary for riparian uses, are not "unappropriated waters" available for appropriation.[144] Waters of a stream that rise above the "highest line of ordinary normal flow" are to be regarded as floodwaters to which riparian rights do not attach, but which are subject to appropriation under the statute.[145]

In the *Valmont Plantations* case the trial court found it difficult to apply the *Motl* v. *Boyd* definition of line of highest ordinary flow. The trial court used the well-established formula of hydrologists for determining "base flow" in the instant case as being most similar to highest line of ordinary flow. This question was not dealt with on appeal.[146]

Diversion of riparian water to nonriparian land.—As discussed earlier under "The Riparian Doctrine—Some aspects of the riparian right—(8) Place of use of water," so long as stream water is abundant and injury will not result to lower riparian owners, a riparian owner can divert his riparian water to nonriparian land, and also can contract for its use on such land by another. In the cases so indicating, the court was discussing riparian waters and relative rights of riparian proprietors and their contractors. In *Texas Company* v. *Burkett*, the court mentioned plaintiff's offer to obtain a permit from the State and defendant's lack of interest therein, but stated that whether such a permit would have been necessary was not being decided.[147] The question of appropriating the riparian waters in litigation was not discussed in the opinions rendered in these cases.

Riparian-appropriative conflicts and adjustments.—Through the years, conflicts between riparian landowners and nonriparian claimants or appropriators with respect to rights to use common water supplies persisted. The Texas

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[143] *Motl* v. *Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926).

[144] 116 Tex. at 111, 118-119.

[145] 116 Tex. at 121-122, 124. The court indicated that its conclusions in this regard were in accord with preexisting Texas legislation and constitutional provisions, notably the 1895 appropriation act which provided, *inter alia*, that ordinary flows or underflows of watercourses might be diverted from their natural channels for authorized uses, but not to the prejudice of the rights of a riparian owner without his consent, except after condemnation thereof. Storm or rainwaters might be stored and diverted for certain uses. 116 Tex. at 118-123, citing, *inter alia*, Tex. Gen. Laws 1895, ch. 21. See also Hutchins, W. A., "The Texas Law of Water Rights" 111-123 (1961).

[146] See "The Riparian Doctrine—Some aspects of the riparian right—(4) Riparian waters," *supra*.

[147] *Texas Co.* v. *Burkett*, 117 Tex. 16, 27-28, 296 S.W. 273 (1927).

courts acknowledged the coexistence of the dual doctrines, that they are in conflict, and that conflicts that reach the state of litigation must be reconciled.[148] The courts took the position that the riparian doctrine is underlying and fundamental (formerly without regard to segments of stream-flow)[149] but, as decided in *Motl* v. *Boyd*, as to only the normal flow and underflow of the stream.[150] In the *Valmont Plantations* case the Texas Supreme Court held in 1962 that riparian lands in Spanish and Mexican grants along the lower Rio Grande do not have appurtenant rights to irrigate with the river waters, which effectively resolved the major conflict on that point. But nothing the supreme court had previously said about the *common law* riparian right to irrigate was affected by this decision.[151] In *Motl* v. *Boyd*, the court indicated, among other things, that riparian rights attached to lands granted by the State prior to the appropriation enactment in 1889. According to the legislature's own declaration in enacting the appropriation law of 1913—from which policy it has not receded—nothing contained in the act was to be construed as a recognition of any riparian right in the owner of any lands the title to which passed out of the State after July 1, 1895.[152]

An important limitation to reasonable and necessary use was imposed by a court of civil appeals in 1912.[153] The court took the position that to accord to riparian owners the right to have all the water flow past their land as against a statutory appropriator would be to destroy the statute in its entirety; that the riparian owners were entitled to quantities of water reasonably sufficient for irrigation, stockraising, and domestic purposes; but that waters in excess thereof were subject to a statutory appropriation.

A method of distributing waters of Pecos River to both riparian and nonriparian lands according to a schedule of rotation of the entire flow, rather than by simultaneous diversions of segments thereof, received judicial approval.[154]

A 1967 statute restricted the exercise of riparian rights, except for domestic and livestock purposes, to the extent of the maximum beneficial use without

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[148] Regarding the question of a riparian also claiming or applying for appropriative rights, see the discussion in chapter 7 at notes 102 and 103.

[149] *Biggs* v. *Miller*, 147 S.W. 632, 636-637 (Tex. Civ. App. 1912); *Matagorda Canal Co.* v. *Markham Irr. Co.*, 154 S.W. 1176, 1180-1181 (Tex. Civ. App. 1913).

[150] *Motl* v. *Boyd*, 116 Tex. 82, 111, 121-122, 286 S.W. 458 (1926). In the latter regard, see "Riparian and nonriparian waters," *supra*.

[151] See the discussion at note 87 *et seq. supra*. Nevertheless, see note 87 *supra* regarding certain "equitable" rights of riparians recognized in a 1969 Texas Court of Civil Appeals case.

[152] Tex. Laws 1913, ch. 171, §97, V.T.C.A., Water Code, §5.001(b) (1972), formerly T.R.C.S.A. art. 7619.

[153] *Biggs* v. *Lee*, 147 S.W. 709, 710-711 (Tex. Civ. App. 1912, error dismissed).

[154] *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1*, 237 S.W. 584, 588 (Tex. Civ. App. 1921), reformed and affirmed, 117 Tex. 10, 14-16, 295 S.W. 917 (1927).

waste made from 1963 to 1967, inclusive, or until the end of 1970 if works were under construction before the act's effective date.[155]

Definite Underground Streams

The Texas Supreme Court has not yet squarely declared what principle will govern rights to use water proved to be moving through the ground in a definite channel. The opinions of the court in ground water decisions so far indicate that the rules that should govern rights in definite streams are *not* the same as those which apply to percolating waters, discussed below. In the *East* case, on which the law of percolating water rights in this State is founded, the court adopted a rule applicable to rights to percolating waters, in litigation therein, and refused to apply any principle from the law of running streams.[156]

Underflow of Surface Streams

The Texas statute that governs the appropriation of water declares that waters of the ordinary flow "and underflow" of every flowing river or natural stream within the State are the property of the State, subject to appropriation as provided by law.[157]

What little has been said with respect to riparian rights in underflow in decisions of the Texas Supreme Court was to the effect that the underflow is riparian water to the same extent as water flowing in the channel on the surface.[158]

Percolating Ground Waters

Court decisions.—Ground waters of this class are not "underground streams with defined channels,"[159] or water flowing in a "well defined channel."[160] Rather, they are waters "percolating, oozing, or filtrating through the earth."[161] Ground waters are presumed to be percolating waters in the absence

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[155] If valid under existing law, claims for such rights [and certain other claimed rights similarly restricted (see note 192 *infra*)] were to be filed with the Texas Water Rights Commission by September 1, 1969, to prevent their being extinguished. Delays in filing until September 1, 1974, could be authorized for good cause shown. V.T.C.A., Water Code §5.303 (1972), formerly T.R.C.S.A. art. 7542a, §4. This apparently has not been construed by the Texas Supreme Court or courts of civil appeal, although in *Adams* v. *North Leon River Irr. Corp.*, 475 S.W. (2d) 873, 873-874 (Tex. Civ. App. 1972, error refused n.r.e.), one who had pumped water out of a river to irrigate his land had filed his claim with the Commission as a riparian owner. The adjudication of such claims and other claimed water rights under the 1967 Water Rights Adjudication Act, of which §5.303 is a part, is discussed later under "Special Statutory Adjudication Procedures."

[156] *Houston & T.C.R.R.* v. *East*, 98 Tex. 146, 81 S.W. 279 (1904).

[157] V.T.C.A., Water Code §5.021 (1972), formerly T.R.C.S.A. art. 7467.

[158] See *Motl* v. *Boyd*, 116 Tex. 82, 286 S.W. 458 (1926); *Texas Co.* v. *Burkett*, 117 Tex. 16, 296 S.W. 273 (1927).

[159] *Texas Co.* v. *Burkett*, 117 Tex. 16, 28-29, 296 S.W. 273 (1927).

[160] *Cantwell* v. *Zinser*, 208 S.W. (2d) 577, 578-579 (Tex. Civ. App. 1948).

[161] *Houston & T.C.R.R.* v. *East*, 98 Tex. 146, 149, 81 S.W. 279 (1904), quoting from *Frazier* v. *Brown*, 12 Ohio St. 294 (1861).

of evidence to the contrary.[162] The Texas statute governing appropriation of water, mentioned above, does not apply to such waters.

In *Corpus Christi* v. *Pleasanton*, the Texas Supreme Court reaffirmed the principle that it had established a half century earlier in the *East* case.[163] The supreme court stated that in the *East* case it adopted, unequivocally, the English or common law rule with respect to rights in percolating water, instead of any modification thereof or departure therefrom in favor of reasonable use or correlative rights on the part of owners of land overlying the same physically common supply of ground water.[164] By adopting the English rule in the *East* case, the court "established at least this much: that an owner of land had a legal right to take all the water he could capture under his land that was needed by him for his use, even though the use had no connection with the use of land as land and required the removal of the water from the premises where the well was located." And it may be assumed that the court adopted the English rule with only such limitations as existed in the common law. "About the only limitations applied by those jurisdictions retaining the 'English' rule are that the owner may not maliciously take water for the sole purpose of injuring his neighbor * * * or wantonly and willfully waste it."[165]

In the *Corpus Christi* case, the court held that under the common law rule, percolating waters are regarded as the property of the owner of the surface.[166] Thus a landowner could use all the percolating water he could capture from wells on his land for beneficial purposes either on or off the land. Likewise, the overlying owner could sell the water to others for beneficial purposes either on or off the land and outside the basin where produced, just as he could sell any other species of property. The court disclaimed the possibility of any common law limitation of the means of transporting the water to the place of use.

The main question presented to the court was whether the transportation of water from artesian wells down a natural streambed and through lakes with consequent natural losses in transit constitutes waste. Evidence in the case showed that losses in transit were very large. The court denied that owners of land situated over a common supply of percolating water have correlative rights therein. In construing statutes that forbid waste of artesian waters, discussed later, the court held that a wrong consists only of putting the water to an unlawful as distinguished from a lawful use. The percentage of loss in

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[162] *Texas Co.* v. *Burkett*, 117 Tex. 16, 296 S.W. 273 (1927).

[163] *Corpus Christi* v. *Pleasanton*, 154 Tex. 289, 293-294, 276 S.W. (2d) 798 (1955), reaffirming *Houston & T.C.R.R.* v. *East*, 98 Tex. 146, 81 S.W. 279 (1904).

[164] 154 Tex. at 292-293.

[165] 154 Tex. at 293-294. See the discussion in chapter 20 at notes 379 to 382 regarding the question of waste of water.

[166] See *Sun Oil Co.* v. *Whitaker*, 483 S.W. (2d) 808, 813 (Tex. Sup. Ct. 1972), regarding a mineral lessee's use of ground water for secondary recovery of oil. For another such case, see *Robinson* v. *Robbins Petroleum Corp.*, 501 S.W. (2d) 865 (Tex. Sup. Ct. 1973).

conveyance is not a criterion of waste.[167] The court stated that the legislature could validly declare that the transportation of percolating or artesian water in conduits which permitted escape of a large percentage of water is wasteful and unlawful, but emphasized that it had not seen fit to do so.

Underground water conservation districts.—In 1949, the Texas Legislature added to the water control and improvement district act a provision authorizing the creation of "underground water conservation districts."[168] Their purpose is the conservation, preservation, protection, recharging, and prevention of waste of waters in underground reservoirs or subdivisions thereof, and to control land subsidence caused by withdrawals of such waters.[169] Such underground reservoirs must have ascertainable boundaries and contain groundwater that can be produced from a well at a rate of at least 150,000 gallons a day.[170] "Underground water" means percolating ground water suitable for agricultural, gardening, domestic, or stock raising purposes, but does not include defined subterranean streams or the underflow of rivers.[171] No district can be created unless its area is coterminous with an underground reservoir or subdivision which has been designated by the Texas Water Rights Commission.[172] A district is organized after petition of landowners in the area to be included and its formation shall be considered by the Commission,[173] which shall grant the petition if the district is feasible and practicable, would benefit the land therein, and would be a public benefit or utility.[174] No "segregated irrigated area"[175] shall be included unless a majority of voting and qualified electors therein favor it.[176] A confirmation election by qualified electors apparently is required.[177]

Such a district may require and issue permits for drilling wells, subject to such terms and provisions as may be necessary to conserve the ground water, prevent waste, minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, or lessen interference between wells.[178]

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[167] *Corpus Christi* v. *Pleasanton*, 154 Tex. 289, 294-295, 276 S.W. (2d) 798 (1955).

[168] V.T.C.A., Water Code §§52.001-.401 (1972), as amended, formerly T.R.C.S.A. arts. 7880-3c to 7880-19.

[169] *Id.* §52.021 (Supp. 1974), formerly T.R.C.S.A. art. 7880-3c(B).

[170] *Id.* §52.001, formerly T.R.C.S.A. art. 7880-3c(A).

[171] *Id.*

[172] *Id.* §§52.023 (Supp. 1974), formerly T.R.C.S.A. art. 7880-3c(B).

[173] *Id.* §§52.022 and 51.013 (1972), formerly T.R.C.S.A. arts. 7880-3c(B) and 7880-10.

[174] *Id.* §52.025 (Supp. 1974), formerly T.R.C.S.A. art. 7880-19.

[175] This means an irrigated area separated from other irrigated areas by at least 5 miles of unirrigated land. *Id.* §52.001(8) (Supp. 1974), formerly T.R.C.S.A. art. 7880-3c(A).

[176] *Id.* §52.026 (1972), formerly T.R.C.S.A. art. 7880-3c(E).

[177] *Id.* §§52.022 and 51.033, *et seq.* formerly T.R.C.S.A. arts. 7880-3c(B) and 7880-23, *et seq.* And see §§51.036 and 51.037 (formerly art. 7880-115) regarding exclusion of parts of a district voting against its formation, and new elections, and §51.035 (formerly art. 7880-115) regarding exclusion of cities, towns, or municipal corporations voting against it.

[178] *Id.* §52.114, formerly T.R.C.S.A. art. 7880-3c(B).

The district also may provide for the spacing of wells and regulate their production for most such purposes and to control land subsidence.[179] And it may make and enforce rules for such purposes.[180] However, no landowner or his lessee having a well that will produce no more than 100,000 gallons of ground water a day shall require a permit, nor may a permit for, or his privilege to use such a well be denied, subject to the rules of the district, nor may its production be restricted by the district.[181]

The ownership and rights in underground water of the landowners, their lessees, and assigns are expressly recognized and protected, subject to rules promulgated by such districts. It is further provided that the laws and administrative rules regarding surface water do not apply to underground water.[182] The pertinent definition of "underground water" includes percolating ground water but does not include defined subterranean streams or the underflow of rivers.[183]

General Public Regulation of Artesian Water

An artesian well is "an artificial well in which, if properly cased, the waters will rise by natural pressure above the first impervious stratum below the surface of the ground."[184] An artesian well must be tightly cased, capped, and fitted with a device that will effectively control its flow. One not so equipped is a public nuisance.[185] Waste of artesian water is unlawful and punishable by fine or imprisonment or both.[186]

Special Statutory Adjudication Procedures

In 1917, the Texas Legislature enacted special procedures for adjudication of water rights[187] which the Texas Supreme Court held unconstitutional. In *Board of Water Engineers* v. *McKnight*, the supreme court concluded that as the legislature had attempted to confer on persons belonging to the executive branch of the State governmental powers that properly attached to another branch, without express permission of the constitution, the statutes were void.[188] Years later, in an oil and gas case, the court decided a parallel question of fundamental policy as to which the *McKnight* decision was held not to be controlling.[189] The policy change resulted from adoption of a constitutional

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[179] *Id.* § 52.117 (Supp. 1974), formerly T.R.C.S.A. art. 7880-3c(B).

[180] *Id.* § 52.101, formerly T.R.C.S.A. art. 7880-3c(B).

[181] *Id.* § 52.118 (1972), formerly T.R.C.S.A. art. 7880-3c(D).

[182] *Id.* § § 52.002 and 52.003, formerly T.R.C.S.A. art. 7880-3c(D).

[183] See the definition at note 171 *supra.*

[184] V.T.C.A., Water Code § 5.201 (1972), formerly T.R.C.S.A. art. 7600.

[185] *Id.* § 5.206, formerly T.R.C.S.A. art. 7601.

[186] *Id.* § § 5.093 and 5.095, formerly T.R.C.S.A. arts. 7606, 7607, 7610, and 7613. In this regard, see also the discussion at notes 165 and 167 *supra.*

[187] Tex. Laws 1917, ch. 88, § § 105-129.

[188] *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 229 S.W. 301 (1921). This is discussed in chapter 15 at note 31.

[189] *Corzelius* v. *Harrell*, 143 Tex. 509, 186 S.W. (2d) 961 (1945). This case is briefly

(*Continued*)

amendment[190] *after* the effective date of the statutes found objectionable in the *McKnight* case.

In 1967, the Texas Legislature declared:

> The conservation and best utilization of the water resources of this state are a public necessity, and it is in the interest of the people of the state to require recordation with the commission of claims of water rights which are presently unrecorded, to limit the exercise of these claims to actual use, and to provide for the adjudication and administration of water rights to the end that the surface-water resources of the state may be put to their greatest beneficial use.[191]

Pursuant to this declaration of policy the legislature provided for the recording of unrecorded claims of water rights[192] and the adjudication of water rights.[193]

The water rights in any stream or segment thereof may be adjudicated on the motion of the Texas Water Rights Commission, on petition to the Commission signed by 10 or more claimants of water rights from the source of supply, or on petition of the Texas Water Development Board.[194] After a petition is filed, the Commission determines whether an adjudication would be in the public interest. If it so determines, the Commission orders the adjudication and directs that an investigation of the area be made in order to obtain the relevant information necessary for a proper understanding of the claims of water rights involved.[195]

Following the giving of notice and the filing of claims by every person claiming water rights (except for domestic or livestock uses) from the stream or segment being adjudicated, the Commission holds a hearing and issues a preliminary determination.[196] Contests to the preliminary determination shall be heard by the Commission, after which it issues a final determination and

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discussed in a subsequent lower appellate court case involving water resources. *State* v. *Starley*, 413 S.W. (2d) 451, 460 (Tex. Civ. App. 1967).

[190] Tex. Const. art. XVI, §59(a), adopted August 21, 1917, which provides, in part, "The conservation and development of all of the natural resources of this State * * * are * * * hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."

[191] V.T.C.A., Water Code §5.302 (1972), formerly T.R.C.S.A. art. 7542a, §3.

[192] *Id.* §5.303, formerly T.R.C.S.A. art. 7542a, §4. This section, discussed at note 155 *supra*, applies to claims of riparian rights; claims to impound, divert, or use water under §5.141 for other than domestic or livestock purposes, for which no permit has been issued (see note 30 *supra*); claims of water rights under early irrigation legislation which were not filed pursuant to the statutes; and other claims of water rights except those under permits or certified filings. See the discussion and definition of certified filings at notes 41-44 *supra*.

[193] V.T.C.A., Water Code §5.304 *et seq.* (1972), formerly T.R.C.S.A. art. 7542a, §5(a) *et seq.*

[194] *Id.* §5.304, formerly T.R.C.S.A. art. 7542a, §5(a).

[195] *Id.* §5.305, formerly T.R.C.S.A. art. 7542a, §5(a).

[196] *Id.* §§5.306-.309, formerly T.R.C.S.A. art. 7542a, §§5(b)-(d).

files a copy of the determination and accompanying evidence in the appropriate court.[197]

Any affected person who appeared in the proceeding before the Commission may file exceptions.[198] In passing on exceptions, the court shall determine all issues of law and fact independently of the Commission's determination. But the court shall not hear exceptions not raised to the Commission on petition for rehearing nor shall the court consider any issue of fact raised by exception unless the Commission record reveals that it was genuinely an issue before the Commission.[199]

After the final hearing, the court enters a decree affirming or modifying the Commission's order. Appeals may be taken in the same manner as in other civil cases.[200]

The statute provides:

> The final decree in every water right adjudication is final and conclusive as to all existing and prior rights and claims to the water rights in the adjudicated stream or segment of a stream. The decree is binding on all claimants to water rights outside the adjudicated stream or segment of a stream.
>
> Except for domestic and livestock purposes or rights subsequently acquired by permit, a water right is not recognized in the adjudicated stream or segment of a stream unless the right is included in the final decree of the court.[201]

Upon the final determination, the Commission shall issue to each person who has been adjudicated a water right, a certificate of adjudication stating, among other things, the priority, extent, and purpose of the right, and, if the right is for irrigation, a description of the irrigated land.[202] A copy of the certificate shall be filed with the clerk of court of each county in which the appropriation is made.[203]

Administration of Water Rights and Distribution of Water

A special statutory adjudication procedure enacted in 1917 and held unconstitutional in 1921[204] was accompanied by several sections relating to

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[197] *Id.* §§5.313-.317, formerly T.R.C.S.A. art. 7542a, §§5(e)-(g).

[198] *Id.* §5.318, formerly T.R.C.S.A. art. 7542a, §5(h).

[199] *Id.* §5.320, formerly T.R.C.S.A. art. 7542a, §5(j).

A party in interest may demand a jury trial of any such issue of fact, but the court may in its discretion have a separate trial (with a separate jury) of any such issue. *Id.* Any exception heard by the court, without a jury, may be resolved on the record from the Commission, or the court may take additional evidence, or direct the Commission to hear additional evidence. *Id.* §5.321, formerly T.R.C.S.A. art. 7542a, §5(k). The statute is silent regarding what is to happen if no exceptions have been raised.

[200] *Id.* §§5.322(a) and (c), formerly T.R.C.S.A. art. 7542a, §5(k).

[201] *Id.* §§5.322(d) and (e), formerly T.R.C.S.A. art. 7542a, §5(k).

[202] *Id.* §5.323, formerly T.R.C.S.A. art. 7542a, §5(l).

[203] *Id.* §5.324, formerly T.R.C.S.A. art. 7542a, §5(m).

[204] *Board of Water Engineers* v. *McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).

supervision of diversions of water pursuant to the determination.[205] Nullification of the adjudication procedure necessarily rendered useless the procedures that were provided to enforce the adjudications. All sections pertaining to both procedures were omitted from the Revised Civil Statutes of 1925.[206]

In 1967, the Texas Legislature enacted a different statutory adjudication procedure which includes, as did the 1917 legislation, provisions for the administration of water rights. The Texas Water Rights Commission is directed to divide the State into water divisions, as necessary, for the administration of adjudicated water rights.[207] It may appoint one watermaster for each division and such assistants as needed to aid the watermaster. In a water division in which the office of watermaster is vacant, the Commission has the powers of a watermaster. The Commission shall supervise and generally direct the watermaster in the performance of his duties. Any person dissatisfied with any action of a watermaster may apply to the Commission for relief.[208]

The watermaster is to divide the waters of streams or other sources of supply in his division in accordance with adjudicated water rights; he shall regulate or cause to be regulated the controlling works of reservoirs and diversion works during water shortages as is necessary because of existing stream water rights or to prevent waste of water or its diversion, storage, or use in excess of the quantities to which water rights holders are entitled; and he may regulate the distribution from any system of works that serves users whose rights have been separately determined.[209] If the owner of waterworks refuses or neglects to comply with directions of the Commission regarding the installation of headgates, measuring devices, and flumes, the Commission, after reasonable notice, may order the watermaster to make adjustments of the control works to prevent the owner from diverting, taking, storing, or distributing any water until he has fully complied with the order of the Commission.[210]

If water rights of record in the office of the Commission have not been adjudicated, the claimants of the rights and the Commission may enter into a written agreement for their administration.[211] Permits, other than temporary permits, issued by the Commission to appropriate water from an adjudicated stream are subject to administration in the same manner as adjudicated water rights.[212]

Not later than March 1 of every year, every person who takes water during the preceding calendar year from a stream or reservoir shall submit a written report to the Commission containing all information required by the

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[205] Tex. Laws 1917, ch. 88, §§130-134.
[206] Tex. Rev. Civ. Stat. 1925, Final Title, §2.
[207] V.T.C.A., Water Code §5.325, formerly T.R.C.S.A. art. 7542a, §8(a).
[208] *Id.* §5.326, formerly T.R.C.S.A. art. 7542a, §8(b).
[209] *Id.* §5.327, formerly T.R.C.S.A. art. 7542a, §8(c).
[210] *Id.* §5.333, formerly T.R.C.S.A. art. 7542a, §8(e).
[211] *Id.* §5.335, formerly T.R.C.S.A. art. 7542a, §8(g).
[212] *Id.* §5.336, formerly T.R.C.S.A. art. 7542a, §6.

Commission to aid in administering the water law and in inventorying the State's water resources. Except for public utilities and public subdivisions which supply water for municipal uses, no report is required for solely domestic or livestock uses.[213]

In any suit to which the State of Texas is a party, the purpose of which is to determine the rights of parties in not more than four counties to divert and use waters of a surface stream, the court is authorized to appoint a watermaster to distribute, under orders of the court, waters taken into judicial custody. However, the court may not appoint a watermaster to act both upstream and downstream from any reservoir constructed on such a stream.[214]

Utah

Governmental Status

The Territory of Utah was established September 9, 1850.[1] In addition to what is now Utah, all the area within the present State of Nevada except that south of the 37th parallel was originally included in the Territory. The Nevada portion was taken out of Utah Territory with the creation of the separate Territory of Nevada March 2, 1861.[2] Utah was admitted to the Union as a State January 4, 1896.[3]

Early Irrigation in Utah

The Mormon pioneers in the Great Basin were the first Anglo-Saxons to practice irrigation on an extensive scale in the United States. The first pioneer company, led by Brigham Young, entered Great Salt Lake Valley in July 1847, and established there the nucleus of a great colonization enterprise, which was carried out under a strong church leadership. The valley was a desert into which flowed a number of mountain streams and which produced little without the application of water. Of necessity, agriculture under irrigation was the first industry, and no time was lost in making small ditches from City Creek to moisten the ground for plowing and to irrigate the seed potatoes and corn that had been brought across the plains. With the arrival of new settlers, colonies were established by the Latter Day Saints Church in the valleys to the north and south, and thence on for great distances.[4] The Mormon colonization

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[213] *Id.* § 5.031, formerly T.R.C.S.A. art. 7612.

[214] *Id.* § § 5.401-.409, formerly T.R.C.S.A. art. 7589b.

The trial court has exclusive jurisdiction to administer, allocate, and distribute the water in its custody to the parties pending appeal.

[1] 9 Stat. 453 (1850).

[2] 12 Stat. 209 (1861).

[3] 29 Stat. 876 (1896).

[4] Adams, F., "Agriculture under Irrigation in the Basin of the Virgin River," in "Report of Irrigation Investigations in Utah," U.S. Dept. Agric., O.E.S., Bull. 124, p. 207, 210 (1903).

policy involved establishment of many small communities, generally separated from each other by miles of desert or mountain range and therefore largely self-contained. Usually, the settlements were located close to streams where they left the mouths of canyons, from which the first short ditches diverted water for domestic use, stockwatering, and irrigation of crops. The major activities in these settlements were carried on cooperatively. From the first, management and utilization of the irrigation water supply was one of the major activities. Out of earlier forms of organization, the typical Utah mutual irrigation company evolved the dominant form of irrigation organization in the State, the larger ones being incorporated.[5]

State Administrative Agency

The Utah State Engineer is the chief water rights administrative officer of the State. He has "general administrative supervision of the waters of the state, and of the measurement, appropriation, apportionment and distribution thereof."[6] The statutory procedure for the determination of water rights is initiated with an action by the State Engineer filed in the appropriate district court. The State Engineer's report and proposed determination form the basis on which the court makes a final determination.[7]

Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—(1) Custom, under Latter Day Saints Church direction. The appropriation doctrine in Utah, and its application to the exclusion of any recognition of rights to the use of water on the part of riparian landowners solely by reason of land location, grew from necessity. The land on which the pioneers settled was public land, shortly to be ceded by Mexico to the United States by the treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848.[8] A desert, it contained much more

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[5] With respect to colonization and cooperative irrigation in Utah, see Brough, C. H., "Irrigation in Utah" (1898); Thomas, G., "The Development of Institutions under Irrigation with Special Reference to Early Utah Conditions" (1920); Hutchins, W. A., "Mutual Irrigation Companies in Utah," Utah Agric. Expt. Sta. Bull. 199 (1927); *Id.* "Mutual Irrigation Companies in California and Utah," F.C.A., Coop. Div. Bull. 8 (1936).

[6] Utah Code Ann. §73-2-1 (1968).

The statutes provide that the Division of Water Rights, within the Department of Natural Resources, shall be the water rights authority of the State and "is vested with such powers and required to perform such duties as are set forth in law." The State Engineer, as Director of this Division, "shall report to the executive director of natural resources at such times and on such administrative matters concerning his office as the executive director may require." However, "Nothing contained in this act shall modify, repeal or impair the powers or duties of the state engineer relating to the administration, appropriation, adjudication and distribution of the waters of the state of Utah as are conferred upon him [by law]." *Id.* §§73-2-1.1 to 73-2-1.3.

[7] *Id.* §§73-4-1 and 73-4-11 to 73-4-15.

[8] 9 Stat. 928 (1848).

cultivable land than could be watered from the incoming mountain streams; and the Mormon land system contemplated settlement and occupation of the Territory in such way as to make most extended use of available water supplies on land that could be reached by the water—not their confinement to lands contiguous to surface stream channels. The Latter-Day Saints Church took possession of the region and supervised and sanctioned early allotments of parcels of land to settlers in the several communities. These early possessory titles were recognized by the State of Deseret and the Territory of Utah pending the issuance of formal land titles by the United States.[9] And with respect to the indispensable matter of water supply, the principle was first established that those who first made beneficial use of water should be entitled to continued use in preference to those who came later. Having originated in custom under guidance of the Church, this fundamental principle was eventually sanctioned by the legislature and the courts.[10]

(2) Legislation. The earliest water legislation did not grant individuals the right to appropriate water in the sense in which that right is accorded now. It comprised grants of water privileges to individuals and communities, and it authorized public officials to make grants.[11]

As discussed later, under "Procedure for appropriating water: Prestatutory," an act passed at the first session of the Territorial Legislative Assembly provided, "The County Court has the control of all timber, water privileges, or any water course or creek, to grant mill sites, and exercise such powers as in their judgment shall best preserve the timber, and subserve the interest of the settlements, in the distribution of water for irrigation, or other purposes. All grants, or rights, held under Legislative authority, shall not be interfered with."[12]

Even the statute of 1880, providing for settlement of disputes over water rights and issuance and recording of certificates, was a recognition of accrued rights to water acquired by appropriation, but without containing a specific authorization to appropriate water.[13]

The first statutory procedures for future appropriation of water was provided in 1897.[14] In 1935 the Utah Supreme Court observed that insofar as its research had disclosed, this law of 1897 constituted the first law of the State or Territory of Utah prescribing a procedure to be followed by anyone desiring to appropriate unappropriated public water, except as recognized by diversion and beneficial use.[15]

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[9] Hutchins, "Mutual Irrigation Companies in Utah," *supra* note 5, at 9-16.

[10] Kinney, C. S., "A Treatise on the Law of Irrigation and Water Rights," vol. 4, § § 2055 and 2059 (2d ed. 1912).

[11] Laws and Ordinances of the State of Deseret (Utah), Compilation 1851 (1919).

[12] Terr. Utah Laws 1852, § 39, p. 38. See the detailed account of Territorial water legislation by Thomas, *supra* note 5, chs. 4 and 5.

[13] Utah Laws 1880, ch. 20.

[14] Utah Laws 1897, ch. 52.

[15] *Wrathall* v. *Johnson*, 86 Utah 50, 81, 40 Pac. (2d) 755 (1935).

(3) Court decisions. In the earliest decisions of the Utah Supreme Court pertaining to water the principle of prior appropriation was recognized.[16] "This is a free country," said this court in 1880, "and the appropriation of the water is open to all."[17] Many years later the supreme court declared, "In Utah the doctrine of prior appropriation for beneficial use is, and always has been, the basis of acquisition of water rights."[18]

(4) Constitutional declaration. The constitution of the State of Utah provides, "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."[19]

Procedure for appropriating water: Prestatutory.—In the early Territorial days, rights to use water from public streams were acquired either by actual diversion and application of water to beneficial use, or by legislative grant.[20] And for 50 years after the beginning of irrigation in Utah, appropriations of water were made by diverting the water from stream channels and applying it to beneficial use—in which cases the intention of the appropriator and usefulness of the purpose were tests in determining validity of the right[21]—without any specific statutory procedure for acquiring appropriative rights.[22]

(1) Prior grants by county courts. The legislative authorization to the county courts to make grants of water privileges, enacted in 1852, was noted earlier under "Recognition of doctrine of prior appropriation." The very potent authority exercised in this field by the county courts in the early growth of the Territory was based on one sentence—an authorization vesting the county court (probate judge and three selectmen) with control over all water privileges, such power to be so exercised as to best subserve the interests of the communities in the distribution of water. As administered by the county courts, an appropriator was required to bring petition before the court for a

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[16] *Crane* v. *Winsor*, 2 Utah 248, 253 (1878).

[17] *Munroe* v. *Ivie*, 2 Utah 535, 537-538 (1880). The court observed preliminarily that "Water is something that the appellants could not control in any other way than by appropriation. * * * If they failed to appropriate it, any stranger could appropriate it * * *."

[18] *Gunnison Irr. Co.* v. *Gunnison Highland Canal Co.*, 52 Utah 347, 354, 174 Pac. 852 (1918). Few cases reached the Utah Supreme Court prior to enactment of the 1897 statute; and to those that did, the court, without equivocation, applied the prior appropriation doctrine and definitely repudiated the common law doctrine of riparian water-use rights. *Wrathall* v. *Johnson*, 86 Utah 50, 82-83, 40 Pac. (2d) 755 (1935).

[19] Utah Const. art. XVII, § 1.

[20] *Wrathall* v. *Johnson*, 86 Utah 50, 80, 40 Pac. (2d) 755 (1935).

[21] *Hague* v. *Nephi Irr. Co.*, 16 Utah 421, 429-430, 52 Pac. 765 (1898).

[22] More details with respect to the successive methods of appropriating water, as developed by trial and error in this arid region by the pioneers are found in "Report of Irrigation Institutions in Utah," U.S. Dept. Agric. Bull. 120 (1903); Thomas, *supra* note 5. While the generalized statements in these two publications conflict on some points of actual use and the usefulness of earlier appropriative methods, both contain much valuable material.

water privilege, which the court claimed the right either to grant or to reject, and he could proceed to make his appropriation only after his petition had been granted and only pursuant to the terms imposed in the grant. In other words, in any county which asserted jurisdiction in this respect, one could appropriate water only with the prior permission of the county court.[23] The county courts water legislation was in effect from its enactment in 1852 until 1880, when it was replaced by the provisions for county water commissioners discussed immediately below.[24]

(2) Unsupervised diversion and application of water to beneficial use. The statute of 1880,[25] which replaced the county courts procedure originally established in 1852, made the county selectmen *ex officio* water commissioners of the county, with authority to measure streamflow; to determine all claims of right to the use of water; to issue certificates of water right to parties found to possess vested water rights, and to record the certificates; and to distribute the waters accordingly. "Primary" and "secondary" water rights were provided for. See "Classification of primary and secondary water rights," below. This 1880 law therefore recognized accrued rights to water acquired by appropriation, and it provided for their determination and for their orderly recordation. But it contained no procedure for making new appropriations. By contrast with the 1852 procedure for issuance of grants by county courts, an intending appropriator no longer was required to petition the county court for permission to make his appropriation. He diverted and applied water to beneficial use and thereby appropriated it, as before, but without the terms and conditions which the county court had previously been authorized to impose and which apparently it did include in many grants. Nor was there any longer administrative restraint upon overappropriation of water or upon unnecessarily wasteful use. During this period, "rights to the use of unappropriated waters were not acquired without a taking and diverting and using them. The mere making of a survey and the posting of a notice neither conferred nor initiated any such rights [reservoir sites and appropriative rights for irrigation and power purposes]."[26]

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[23] A detailed account of the making by county courts of grants of water, with many examples, is contained in Thomas, *supra* note 5, at 57-91. Aspects thereof are summarized in Hutchins, W. A., assisted by Jensen, D. W., "The Utah Law of Water Rights" 11-12 (1965).

[24] Terr. Utah Laws 1852, p. 38, § 39. Section 39 of the 1852 law was repealed by Utah Laws 1866, ch. 145, § 14 and was reenacted in substantially the original language as § 7 thereof. Section 7 of the 1866 law became § 182 of Utah Compiled Laws 1876, the Compiled Laws being approved and adopted by Utah Laws 1878, ch. 10. Laws 1880, ch. 20, § 17, provided, "All Acts or parts of Acts in conflict with this Act, are hereby repealed."

[25] Utah Laws 1880, ch. 20.

[26] *Coray* v. *Holbrook*, 40 Utah 325, 338, 121 Pac. 572 (1912). Prior to 1894, certain parties made explorations and a survey of Provo Canyon. In 1892 they posted at a certain point along the river a notice of their intention to obtain and divert water of the

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The 1880 law remained in effect until the act of 1897, discussed below, which established procedure for appropriating water and repealed all conflicting legislation.[27]

Procedure for appropriating water: Original statutory method.—The first specific statutory procedure for the future appropriation of water in Utah was provided in 1897.[28] This provided for posting of notices, filing them with the county recorder, and commencing and prosecuting the work to completion with reasonable diligence. If the appropriator met all statutory requirements in initiating and consummating his appropriation, the priority related back to the date of posting notice.

This 1897 procedure was not exclusive—even without posting and filing notice, a valid right could continue to be acquired in the same manner as before, by simply diverting and applying the water to beneficial use. According to the Utah Supreme Court, the notice and record required by the statute were merely *prima facie* evidence of the facts recited therein; and any person who actually used the water for a useful or beneficial purpose, whether or not he posted notice, acquired the right to take it as against all subsequent claimants.[29] However, while the act of 1897 was in effect, failure to post and record notice deprived the appropriator of the benefit of the doctrine of relation.[30]

During the final period of operation of the act of 1897, one writer wrote, "Very few parties have taken advantage of this law, and it is therefore practically useless."[31] Heavy pressures were then developing for public

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river at that point for power and irrigation purposes. The notice was never recorded; nor was any work done or commenced aside from making the survey and posting the notice. By so doing, "They never acquired nor initiated any such rights."

The validity of this act of 1880 was questioned by leading attorneys as granting judicial power to an administrative body not named in the Organic Act. Thomas, *supra* note 5, at 57; Teele, R. P., "General Discussion of Irrigation in Utah," in "Report of Irrigation Investigations in Utah," U.S. Dept. Agric. O.E.S. Bull. 124, p. 23 (1903). However, the Territorial supreme court apparently was never called upon to pass on the question.

[27] Utah Laws 1897, ch. 52.

[28] Utah Laws 1897, ch. 52, §§8-11.

[29] *Patterson* v. *Ryan*, 37 Utah 410, 414-415, 108 Pac. 1118 (1910). "Until 1903 when an exclusive method for appropriating water was prescribed by statute, water could be appropriated by merely diverting the water from its natural channel and putting it to a beneficial use." *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 481, 137 Pac. (2d) 634 (1943). In *Bishop* v. *Duck Creek Irr. Co.*, 121 Utah 290, 293, 241 Pac. (2d) 162 (1952), the court said that in the absence of filings in the office of the State Engineer, whatever right a certain party had to the water in litigation must necessarily rest upon appropriation by beneficial use before 1903.

[30] *Robinson* v. *Schoenfeld*, 62 Utah 233, 238-239, 218 Pac. 1041 (1923). "A failure to comply with the provisions of this act deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, but by complying with the provisions of this act, the right to the use of the water shall relate back to the date of posting the notice." Utah Laws 1897, ch. 52, §11.

[31] Teele, *supra* note 26, at 25.

supervision over adequate definitions of existing water rights and acquisition of new rights. In 1903, this resulted in enactment of the first Utah administrative law, discussed below, which was exclusive in the field of appropriation of water and replaced all preexisting procedures.

Diligence rights.—Appropriative rights claimed to have been acquired by putting the water to beneficial use prior to 1903, when the mandatory procedure administered by the State Engineer was initiated, are commonly called "diligence rights." Generally such rights must be established by proof of beneficial use prior to the 1903 enactment.[32] "[A]nyone who had initiated a right to appropriate water before the act of 1903 took effect was by the act permitted to perfect such right under the law as it existed before the act of 1903 went into effect."[33] Legislation has provided a procedure for filing claims regarding such rights with the State Engineer and has provided that such claims shall be *prima facie* evidence of the claimed rights.[34]

Procedure for appropriating water: Current method.—(1) The statute. The current method of appropriating water was adopted by the legislature in its first complete water appropriation statute, enacted in 1903, which repealed the water rights laws previously in effect.[35] This 1903 statute was revised and reenacted in 1905[36] and again in 1919.[37] The 1919 law, as amended, is the basis of the current statute.

(2) Validity. The Utah Supreme Court, upholding the constitutionality of the current water rights law, declared that the State has the right to control the diversion and distribution of the public waters within its boundaries.[38] The legislature, said the court, had undoubted authority to vest control of the diversion and distribution of such public waters in the State Engineer, subject to judicial review and to the constitutional provision recognizing and confirming existing rights to the use of waters for useful and beneficial purposes. The statutes clearly impose upon the State the duty to control appropriation of the public waters in a manner that will be for the best interests of the public.[39] As a matter of basic principle, the State in its governmental capacity may regulate, within reasonable bounds, the use of water even by those whose rights have been adjudicated.[40]

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[32] *Yardley* v. *Swapp*, 12 Utah (2d) 146, 149, 364 Pac. (2d) 4 (1961).

[33] *Jensen* v. *Birch Creek Ranch Co.*, 76 Utah 356, 362, 289 Pac. 1097 (1930).

[34] Utah Code Ann. §73-5-13 (1968).

[35] Utah Laws 1903, ch. 100.

[36] Utah Laws 1905, ch. 108.

[37] Utah Laws 1919, ch. 67.

[38] *Spanish Fork Westfield Irr. Co.* v. *District Ct.*, 99 Utah 527, 535, 104 Pac. (2d) 353 (1940).

[39] *Tanner* v. *Bacon*, 103 Utah 494, 506, 136 Pac. (2d) 957 (1943).

[40] *Eden Irr. Co.* v. *District Ct.*, 61 Utah 103, 113-114, 211 Pac. 957 (1922). See also *Caldwell* v. *Erickson*, 61 Utah 265, 274-275, 213 Pac. 182 (1923).

The Utah Supreme Court also sustained the validity of the statutes investing the State

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(3) Exclusiveness of procedure. The current statutory procedure is the exclusive method of appropriating water of watercourses in Utah. For a time there was some question as to this;[41] but in 1935 the legislature so amended the appropriation statute as to provide explicitly that no appropriation of water could be made and no right to the use thereof initiated otherwise than in the manner provided in the statute.[42] In 1949, the Utah Supreme Court stated that the 1935 amendment, "enacted immediately after the Wrathall decision and undoubtedly with this holding in mind, leaves no doubt that thereafter no right to the use of the unappropriated public waters of this state can be acquired without complying with the statutory requirements."[43]

(4) Waters. The Utah appropriation statute declares, "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof."[44] "Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title."[45]

(5) Appropriators. The procedure that must be followed in acquiring a water right applies to any person who is a citizen of the United States, or who has filed his declaration of intention to become such; any association of such citizens or declarants; any corporation; the State of Utah by the directors of the divisions of Travel Development, Industrial Promotion, Fish and Game, and

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Engineer with quasi-judicial powers similar to those vested in the water administrative officers of Wyoming, Nebraska, Colorado, and Oregon. *Spanish Fork Westfield Irr. Co.* v. *District Ct.*, 99 Utah 527, 536, 104 Pac. (2d) 353 (1940).

[41] The Utah Supreme Court held in 1925 that the statutory method was the only method by which rights to appropriate water were to be acquired after enactment of the act of 1903. *Deseret Live Stock Co.* v. *Hooppiania*, 66 Utah 25, 34-37, 239 Pac. 479 (1925). And in the following year the court said, "In order to acquire a legal right to the use of the water, the plaintiff would be required to show that the same was public water, subject to appropriation, and that she had appropriated the same *as provided by our statute*." [Emphasis supplied.] *Torsak* v. *Rukavina*, 67 Utah 166, 170, 246 Pac. 367 (1926). However, 10 years later in its prevailing opinion in the *Wrathall* case, the court purported to overrule the *Hooppiania* case in this respect, although the statement appears to have been *dictum*. *Wrathall* v. *Johnson*, 86 Utah 50, 120, 40 Pac. (2d) 755 (1935).

[42] Utah Laws 1935, ch. 105, Code Ann. §73-3-1 (1968).

[43] *Hanson* v. *Salt Lake City*, 115 Utah 404, 415, 205 Pac. (2d) 255 (1949), referring to *Wrathall* v. *Johnson*, 86 Utah 50, 40 Pac. (2d) 755 (1935). See *Bullock* v. *Tracy*, 4 Utah (2d) 370, 373-374, 294 Pac. (2d) 707 (1956); *Fairfield Irr. Co.* v. *Carson*, 122 Utah 225, 231-232, 247 Pac. (2d) 1004 (1952); *Smith* v. *Sanders*, 112 Utah 517, 520, 189 Pac. (2d) 701 (1948). See also *Mosby Irr. Co.* v. *Criddle*, 11 Utah (2d) 41, 46, 354 Pac. (2d) 848 (1960).

[44] Utah Code Ann. §73-1-1 (1968).

[45] *Id.* §73-3-1.

Waters once appropriated but allowed to drain into a natural watercourse beyond control of the original appropriator are public waters subject to appropriation and to reasonable regulation and control by the State in the interest of saving water. *McNaughton* v. *Eaton*, 121 Utah 394, 404-405, 242 Pac. (2d) 570 (1952).

State Lands; the Chairman of the State Road Commission for the use and benefit of the public; the United States of America; and the Director of the Division of Water Resources.[46]

(6) Procedural steps. Before commencing construction, enlargement, extension, or structural alteration of any distributing works, or performing similar work toward acquiring an appropriation right or enlarging an existing one, a written application must be made to the State Engineer. Notice of the application is published; and protests that are filed must be considered by the State Engineer before he approves or rejects the application. Reasons for approval or rejection are noted later under "Restrictions and preferences in appropriation of water." If approved, the applicant is authorized to proceed with construction of the necessary works and to take all steps required to perfect his proposed appropriation. The times within which construction of works shall be completed and the water applied to beneficial use are fixed by the State Engineer, subject to extensions under prescribed circumstances. Proof of completion of works and application of water to beneficial use must be made; and if the appropriation is perfected in accordance with all requirements, the State Engineer issues a certificate of appropriation which is *prima facie* evidence of the holder's rights of use, subject to prior rights.[47] The Utah Supreme Court has indicated that in appropriating water in Utah, the statutory steps must be substantially complied with.[48]

Filing the application is an essential preliminary step. It confers upon the applicant no vested right to use the water,[49] but merely gives him a right to complete his proposed appropriation in compliance with all requirements of the act.[50] It is a valuable inchoate right,[51] which may be defended in court.[52] But it has been held that between the times of filing the application and of consummating the appropriation, others may acquire rights to use the water, subject to eventual adjudication of relative priorities; that the first applicant's cause of action against these intervenors does not accrue until his appropriation has been perfected; but that in the interim he is entitled to have an action entertained against the intervenors for declaratory judgment establishing relative priorities of water filings.[53]

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[46] Utah Code Ann. § § 73-3-2 and 73-10-19(3) (Supp. 1975).

[47] Utah Code Ann. § § 73-3-2 to 73-3-17 (1968), as amended.

[48] *Torsak* v. *Rukavina*, 67 Utah 166, 170, 246 Pac. 367 (1926); *Little Cottonwood Water Co.* v. *Kimball*, 76 Utah 243, 289 Pac. 116 (1930). For a case dealing with a minor irregularity, see the discussion at note 61 *infra*.

[49] *Lehi Irr. Co.* v. *Jones*, 115 Utah 136, 145, 202 Pac. (2d) 892 (1949).

[50] *Duchesne County* v. *Humpherys*, 106 Utah 332, 335, 148 Pac. (2d) 338 (1944); *Little Cottonwood Water Co.* v. *Kimball*, 76 Utah 243, 247-248, 289 Pac. 116 (1930).

[51] *McGarry* v. *Thompson*, 114 Utah 442, 448, 201 Pac. (2d) 288 (1948).

[52] *Tanner* v. *Provo Res. Co.*, 78 Utah 158, 169-170, 2 Pac. (2d) 107 (1931).

[53] *Whitmore* v. *Murray City*, 107 Utah 445, 451-453, 154 Pac. (2d) 748 (1944). See also *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 267, 67 Pac. 672 (1902).

The appropriative right to the use of water completed under the current legislation is expressed quantitatively, in acre-feet of storage or in second-feet of flow.[54] The statutes of 1880 and 1897 provided that a right to the use of water might be measured by fractional parts of the whole supply, or by fractional parts with a limitation as to periods of time of use; and the 1880 law also authorized measurements by cubic inches of flow with prescribed limitations.[55] Prorata divisions of streamflow measured either by fractional parts or by percentages of the flow were commonly made in Utah in the early days.[56] The old determinations and stipulated decrees based on proportion of available flow caused considerable trouble in water administration, but most of them apparently were superseded by modern determinations under the special statutory procedure or in private litigation.[57]

Statutory provisions for prorating streamflows at low water stages, regardless of relative priorities, which were in effect for a time (see "Restrictions and preferences in appropriation of water" and "Early classification of primary and secondary water rights," below), were finally eliminated in the 1919 reenactment.[58]

The principle of gradual development of a water use project according to the circumstances of the particular case—that is, that the appropriator is not necessarily required to complete his appropriation in the first year or even longer—was approved in early cases by the Utah Supreme Court.[59] Under the current statute, the permissible times for completing construction and application of water to beneficial use are fixed by the State Engineer, subject to extensions (not to exceed 50 years from the date of the approval of the application) under prescribed conditions on proper showing of diligence or reasonable cause for delay.[60] In passing on an action of the State Engineer in granting an extension of time to file proof of appropriation, and action of the court on appeal therefrom, the Utah Supreme Court stated that the real criterion appears to be the good faith of the attempt to appropriate which must be pursued with all the expedition and constant effort to accomplish the undertaking that is usual with "men engaged in like enterprises, and who desire a speedy accomplishment of their designs."[61]

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[54] Utah Code Ann. § § 73-3-17 and 73-4-12 (1968).

[55] Utah Laws 1880, ch. 20, § 8, Laws 1897, ch. 52, § 24.

[56] Thomas, *supra* note 5, at 143-144.

[57] But see *Ordville Irr. Co.* v. *Glendale Irr. Co.*, 17 Utah (2d) 282, 409 Pac. (2d) 616, 620 (1965), upholding prorata sharing provisions in a 1900 decree, as not changed by later 1925 and 1931 decrees.

In these regards, and for examples of early decrees and controlling agreements, see the discussion in chapter 7 at notes 378-382 and in chapter 8 at notes 267-268.

[58] Utah Laws 1919, ch. 67, § 10.

[59] *Elliot* v. *Whitmore*, 23 Utah 342, 352-353, 65 Pac. 70 (1901); *Salt Lake City* v. *Gardner*, 39 Utah 30, 40, 114 Pac. 147 (1911).

[60] Utah Code Ann. § 73-3-12 (1968).

[61] *Carbon Canal Co.* v. *Sanpete Water Users Assn.*, 10 Utah (2d) 376, 380, 353 Pac. (2d)

The supreme court held in 1954 that Salt Lake City may acquire, develop, and manage such surplus water above its present requirements as is incident to needs reasonably anticipated in the future; that it may construct and operate facilities necessary therefor; and that it may sell and distribute the surplus outside its corporate limits pending the time the water is needed by the city, without regulation by the Public Service Commission.[62]

With respect to an application by an *individual* to appropriate water for a beneficial purpose contemplated in the future, in an early case the Utah Supreme Court confessed that the question was open to debate and not free from doubt, but "with some hesitancy" it reached the conclusion that the application might be properly made in good faith and not for mere speculation or monopoly.[63] Under present practice and procedure, the State Engineer has authority to consider such aspects—along with all others—of a proposed application (see "Restrictions and preferences in appropriation of water," below) and to fix such time limits upon gradual development of a project as are reasonable under the circumstances.

(7) Purpose of use. The statute declares, "The appropriation must be for some useful and beneficial purpose;"[64] and the Utah Supreme Court has subscribed to the rule that not only must the use of water be beneficial to the lands of the appropriator, it must also be reasonable in relation to the reasonable requirements of subsequent appropriators.[65] This theme of essential beneficial use has been reiterated over and over again in the many water rights decisions of the Utah Supreme Court. The following purposes of use of appropriated water have all appeared in the supreme court opinions: domestic, stockwatering, irrigation, municipal, power, manufacturing, mining, fish

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916 (1960). See also *Carbon Canal Co.* v. *Sanpete Water Users Assn.*, 19 Utah (2d) 6, 425 Pac. (2d) 405 (1967).

In a quiet title action, where the appropriators had spent about 15 years of diligent effort in perfecting their rights with no apparent neglect, refusal to cooperate, or *mala fides*, and 30 years thereafter beneficially using the water, the supreme court refused to invalidate the priority as of date of application on the asserted ground of minor informalities in making final proof. *Huber* v. *Deep Creek Irr. Co.*, 6 Utah (2d) 15, 17-18, 305 Pac. (2d) 478 (1956). "Perfecting water rights in Utah at best is not easy," said the supreme court.

[62] *County Water System* v. *Salt Lake City*, 3 Utah (2d) 46, 53-54, 278 Pac. (2d) 285 (1954).

[63] *Sowards* v. *Meagher*, 37 Utah 212, 221-222, 108 Pac. 1112 (1910). Compare *Goodwin* v. *Tracy*, 6 Utah (2d) 1, 3-4, 304 Pac. (2d) 964 (1956).

[64] Utah Code Ann. §73-3-1 (1968).

[65] *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah (2d) 77, 82, 348 Pac. (2d) 679 (1960). The court added that it has the power to order improved methods of diverting, conveying, and measuring water so as to assure the greatest possible use of this natural resource, but without thereby limiting or modifying established water rights. See also *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff*, 49 Utah 569, 579, 164 Pac. 856 (1917).

culture.[66] Uncultivated land is included in the list where the purpose of watering it is to provide grazing and hay.[67] But appropriation of water for irrigation of unenclosed and unoccupied public domain of the United States for the sole purpose of propagating wild waterfowl was not approved.[68]

(8) Quantity and time limitations. "It is elementary that an appropriation of water is limited by time as well as by amount; in other words, that an appropriator's right is limited by the quantity of water which he has beneficially used and the seasonal period during which he has used the same."[69] If an appropriator's right relates to a part of the year only, he cannot prevent others from acquiring equally valid rights in the same water supply at other seasons.[70]

(9) Priority. As between appropriators, the one first in time is first in right, with priority as among them according to the dates of their respective appropriations–subject, however, to certain statutory exceptions.[71] An application to appropriate water, in proper form, takes priority as of the date of its original receipt in the State Engineer's office, subject to compliance with further requirements of the law and regulations thereunder. The priority of a lapsed application that is reinstated is changed to the date of reinstatement.[72] When an application to appropriate water lapses, by neither the fraud nor the

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[66] In an early case the supreme court listed the following: "domestic purposes, irrigating lands, propelling machinery, and the like; that is, the water may be applied to any useful purpose." *Hague* v. *Nephi Irr. Co.*, 16 Utah 421, 429, 52 Pac. 765 (1898). Use of navigable water for recovery of salts and other minerals is recognized by the statute and by the supreme court. Utah Code Ann. § 73-3-8 (Supp. 1975); *Deseret Livestock Co.* v. *State*, 110 Utah 239, 171 Pac. (2d) 401 (1946).

[67] *Jensen* v. *Birch Creek Ranch Co.*, 76 Utah 356, 361-362, 289 Pac. 1097 (1930). "The use of water for the irrigation of pasture land, as counsel agree, constitutes a beneficial use of water." *In re Escalante Valley Drainage Area*, 11 Utah (2d) 77, 80, 355 Pac. (2d) 64 (1960).

[68] *Lake Shore Duck Club* v. *Lake View Duck Club*, 50 Utah 76, 80-81, 166 Pac. 309 (1917), also discussed at note 117 *infra*. "To our minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it." This general statement was made before provision for recreational facilities had become an important part of large water project development.

[69] *Hardy* v. *Beaver County Irr. Co.*, 65 Utah 28, 40, 234 Pac. 524 (1924). In 1960, the Utah Supreme Court repeated that one of the basic elements of a water right is the time, period, or season when the right to the use exists, which must be unequivocally determined and set out in a decree of adjudication; and it added, to supplement such element, that a water right is based upon annual use during the water use period of each year, or the entire year. *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah (2d) 77, 82-83, 348 Pac. (2d) 679 (1960).

[70] *Cleary* v. *Daniels*, 50 Utah 494, 500, 167 Pac. 820 (1917).

[71] Utah Code Ann. § § 73-3-1 and 73-3-21 (1968). See "Restrictions and preferences in appropriation of water," *infra*.

[72] *Id.* § § 73-3-5 and 73-3-18.

mistake of the State Engineer, he is without authority to reinstate the original priority date.[73]

Priority of appropriators as among themselves is provided by the water appropriation statute "so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right."[74] In one of its earliest water rights decisions, the Utah Supreme Court "spelled out" the principle of priority of the appropriative right by saying, "And the prior appropriator of water has the prior right to its use to the extent, in amount and time, of his first appropriation, and possibly to the extent to which he was at that time preparing to appropriate it."[75]

The priority thus represents the right to divert and to use beneficially the quantity of water required, not exceeding the quantity fixed in the certificate of appropriation or in a decree, in preference to all appropriations having later priorities.[76] Relative locations of diversion points on a stream have no bearing upon relative priorities of right. Where appropriations are made at different points of diversion on a stream and by means of different ditches, the diversion made by each ditch is of necessity an independent appropriation.[77]

(10) Relation back. The doctrine of relation—a legal device by means of which the priority of a completed appropriation is fixed as of the time of taking the first step in the process, provided reasonable diligence is used in consummating it—was recognized by the Utah courts before appropriative procedures had become formalized.[78] Failure to post and record a notice under the 1897 statute prior to 1903 deprived the claimant of the right to rely upon any work done or effort made in initiating or completing the appropriation antedating its completion.[79]

As noted immediately above in discussing priority, the current statute for appropriation of water embodies the principle of relation back to the date of filing the application in the office of the State Engineer, provided all statutory requirements are fulfilled. The Utah Supreme Court, according to one of its opinions, "has repeatedly indicated that an approved application only fixes a

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[73] *Mosby Irr. Co.* v. *Criddle*, 11 Utah (2d) 41, 46, 354 Pac. (2d) 848 (1960).

[74] Utah Code Ann. §73-3-21 (1968).

[75] *Lehi Irr. Co.* v. *Moyle* 4 Utah 327, 340, 9 Pac. 867 (1886).

George Thomas wrote that in the gradual settlement of the Lehi community, the irrigation canals were looked upon as community enterprises and for more than 25 years the question of priority did not arise; but that when eventually the water supply became insufficient for the area of land to be irrigated, some of the older settlers advanced priority claims to the use of the water. This resulted in the supreme court decision just cited. Thomas, G., "The Development of Institutions Under Irrigation With Special Reference to Early Utah Conditions" 170 (1920).

[76] *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 13-14, 72 Pac. (2d) 648 (1937).

[77] *Spring Creek Irr. Co.* v. *Zollinger*, 58 Utah 90, 98, 197 Pac. 737 (1921).

[78] *Elliott* v. *Whitmore*, 7 Utah 49, 24 Pac. 673 (1890); *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 264, 67 Pac. 672 (1902).

[79] *Robinson* v. *Schoenfeld*, 62 Utah 233, 238-239, 218 Pac. 1041 (1923).

priority date for the applicant in the event applicant can perfect his appropriation."[80]

The water rights statute provides procedure for entrance upon private property in order to acquire information needed in initiating an appropriation. In the event that this is accomplished, and application to appropriate the water is filed, the priority dates from the filing of petition with the district court for the right of entrance.[81]

(11) Storage of water. In making an application to appropriate water, storage by means of an onchannel reservoir is regarded as diversion, the point of diversion being the point at which the longitudinal axis of the dam crosses the center of the streambed.[82]

Authority to "commingle" water with other waters includes its discharge into a reservoir constructed across the bed of a natural stream. See "Some other aspects of the Utah appropriative right," below. "Any person having stored his appropriated water in a reservoir for a beneficial purpose shall be permitted to withdraw the same at such times and in such quantities as his necessities may require; provided, such withdrawal does not interfere with the rights of others."[83]

(12) Judicial review of administrative action. Any person aggrieved by a decision of the State Engineer may, within 60 days after notice of the decision, bring a civil action in the district court for a plenary review thereof under the procedure applicable to other equity cases. The hearing proceeds as a trial *de novo*. Appeal to the supreme court may be taken.[84]

Restrictions and preferences in appropriation of water.—(1) Acquisition of rights. Section 73-3-8 of the statute governing appropriation of water makes it the duty of the State Engineer to approve an application that meets the filing requirements if (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with more beneficial use of the water; (c) the proposed plan is physically and economically feasible (unless the applicant is the United States Bureau of Reclamation) and not detrimental to the public welfare; and (d) the applicant has the financial ability to complete the proposed works and has applied for the appropriation in good faith and not for speculation or monopoly. However, if the State Engineer has reason to believe that the proposed use will interfere with more beneficial use of the water for irrigation, domestic or culinary, stockwatering, power, mining, or manufacturing purposes, or public recreation or the natural stream environment will be unreasonably affected, or the public

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[80] *Lehi Irr. Co.* v. *Jones*, 115 Utah 136, 145, 202 Pac. (2d) 892 (1949). See *McGarry* v. *Thompson* 114 Utah 442, 448, 201 Pac. (2d) 288 (1948).

[81] Utah Code Ann. § 73-3-19 (1968).

[82] Utah Code Ann. § 73-3-2 (Supp. 1975).

[83] Utah Code Ann. § 73-3-20 (1968).

[84] *Id.* §§ 73-3-14 and 73-3-15. The nature of such judicial review, as construed by the Utah Supreme Court in several cases, has been discussed in chapter 7 at notes 497-499.

welfare will be adversely affected, he shall withhold approval or rejection of the application pending an investigation. If an application does not meet the requirements of section 73-3-8, it shall be rejected.[85]

One or more directions to the State Engineer contained in the statute have been considered by the Utah Supreme Court in a number of its decisions.[86] On the whole, the court has taken a liberal view of the legislative intent that the public waters of the State be made available for beneficial use; that in view of the State policy in that respect, "new appropriations should be favored and not hindered."[87] It was recognized that the statute required rejection of applications under specified conditions in the interest of the public welfare, even though all waters of the stream had not been appropriated;[88] but that when the question of unappropriated water is in doubt, the State Engineer should have power to approve the application and afford an orderly recourse to the courts.[89] He apparently needs to decide only that there is probable cause to believe that the applicant may be able to establish rights under his application without impairing the rights of others.[90] Nevertheless, it appears that the applicant has the burden to show that he has complied with all the provisions of section 73-3-8 entitling him to approval of his application. As stated in one decision, "The statute expressly provides that unless he proves the requisites therein set forth, the application shall be rejected."[91]

When, in the judgment of the Governor and the State Engineer, the welfare of the State demands it, the Governor of Utah by proclamation may suspend the right of the public to appropriate surplus waters of any stream or other source of water supply. This is for the purpose of preserving such unappropriated waters for use by irrigation districts and organized water users, "or for any use whatsoever." Waters withdrawn from appropriation may be restored

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[85] Utah Code Ann. § 73-3-8 (Supp. 1975). The latter provision regarding public recreation and natural stream environment was added by Utah Laws 1971, ch. 187, § 1.

[86] See, e.g., *Bullock* v. *Tracy*, 4 Utah (2d) 370, 373, 294 Pac. (2d) 707 (1956).

[87] *Little Cottonwood Water Co.* v. *Kimball*, 76 Utah 243, 248-249, 289 Pac. 116 (1930). See *Whitmore* v. *Welch*, 114 Utah 578, 586-587, 201 Pac. (2d) 954 (1949); *Brady* v. *McGonagle*, 57 Utah 424, 432-433, 195 Pac. 188 (1921).

[88] *Tanner* v. *Bacon*, 103 Utah 494, 504, 136 Pac. (2d) 957 (1943).

[89] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 202, 212. 135 Pac. (2d) 108 (1943). See *Lehi Irr. Co.* v. *Jones*, 115 Utah 136, 142-146, 202 Pac. (2d) 892 (1949).

[90] *United States* v. *District Ct.*, 121 Utah 1, 11-12, 238 Pac. (2d) 1132 (1951). See also *Eardley* v. *Terry*, 94 Utah 367, 376, 77 Pac. (2d) 362 (1938). In *United States* v. *District Court* the court also indicated that the State Engineer needs to reject an application "only when it is clear that the applicant can establish no valuable rights thereunder." 121 Utah at 11. The court also said, *inter alia*, "The object of the engineer's office is to maintain order and efficiency in the appropriation, distribution and conservation of water and to allow as much water to be beneficially used as possible." 121 Utah at 12. This was quoted approvingly in *Bullock* v. *Hanks*, 22 Utah (2d) 308, 452 Pac. (2d) 866, 868 (1969).

[91] *Shields* v. *Dry Creek Irr. Co.*, 12 Utah (2d) 98, 363 Pac.(2d) 82 (1961). Also see *Bullock* v. *Tracy*, 4 Utah (2d) 370, 294 Pac. (2d) 707 (1956).

by the proclamation of the Governor upon recommendation of the State Engineer. Applications to appropriate such water may not be filed during the period of withdrawal.[92]

In *Tanner* v. *Bacon*, the statutory directions to the State Engineer were relied upon by a district court, on appeal, in ordering reinstatement of an application to appropriate water but with restrictions favoring an earlier pending application.[93] The purpose of this earlier application was to store floodwaters for domestic, irrigation, and other purposes, which both the district court and the Utah Supreme Court believed to be more beneficial than the earlier applicant's power project. In the statutory declaration, noted immediately below, that in times of scarcity domestic use shall have first preference and irrigation the next highest, the legislature itself considered these two uses as the most beneficial to which water could be applied. The supreme court held that the trial court's decision, being not arbitrary or capricious but based upon experience and well-recognized principles, must be sustained. Another statutory provision relied on in *Tanner* v. *Bacon* was the requirement noted above that an application must be rejected if in the opinion of the State Engineer the proposed project would prove detrimental to the public welfare. On the theory that anything which is not for the best interest of the public would be detrimental to the public welfare, the State Engineer was authorized to reject or limit the earlier application.

(2) Preferences in use of appropriated water. In a section of the water appropriation statute that accords priority of right as among appropriators there is a proviso that "* * * in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use."[94]

In its original 1880 version, this preference in use of water applied as between holders of primary rights, with a proviso that "Such preference shall not be exercised to the injury of any vested right, without just compensation for such injury."[95] All primary rights were vested rights, their perfect and complete use being superior to all vested secondary rights. See "Early classification of primary and secondary water rights," below. The right of preference in time of scarcity of water was included in the 1903 water administration law, but without the requirement of compensation for injury.[96] And all distinctions between primary and secondary rights were eliminated by the 1919 revision of

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[92] Utah Code Ann. § § 73-6-1 and 73-6-2 (1968).

[93] *Tanner* v. *Bacon*, 103 Utah 494, 506-510, 136 Pac. (2d) 957 (1943).

[94] Utah Code Ann. § 73-3-21 (1968).

[95] Utah Laws 1880, ch. 20, § 14.

[96] Utah Laws 1903, ch. 100, § 54. It does not appear in the 1897 water statutes. So far as has been ascertained, the omission of the former compensation requirement

the 1903 law. See "Early classification of primary and secondary water rights," below.

In *Tanner* v. *Bacon*, the supreme court observed that the Utah statute did not include this rule of preferences for the express guidance of the State Engineer in rejecting or approving applications, as the California statute had done, but that it did indicate clearly that the legislature considered these two purposes as the most beneficial uses to which water may be applied.[97]

Early classification of primary and secondary water rights.—The water statute of 1880 "recognized and acknowledged" the vesting and accrual of primary and secondary rights for any useful purpose such as domestic, irrigation, propelling machinery, mining, "and other like purposes."[98] Conditions of accrual were: (1) *Primary right*, when any person (a) diverted and used unappropriated water of any stream, watercourse, lake, spring, or other natural source of supply; or (b) had "the open, peaceable, uninterrupted and continuous use of water for a period of seven years." (2) *Secondary right*, "subject to the perfect and complete use of all primary rights," (a) when all water of any such natural source had been appropriated and used by prior appropriators for parts of a year only, and subsequent appropriations had been made of all or part of the water during any other part of the year; (b) when the average seven years flow of water had been appropriated, and other persons thereafter appropriated an increase over such average flow. With respect to this 1880 statute, Elwood Mead said in part that "Whenever there is not water enough for all primary rights, the flow of the stream is divided among them pro rata. When there is more than enough for the primary rights, but not enough for the secondary rights, the excess over the primary rights is divided among the secondary rights pro rata."[99]

The 1897 law provided that all appropriators of water from streams, springs, and lakes up to "their average flow at low water mark" should be "deemed equal in rights to, the said waters, according to their vested rights;" secondary rights, as described in the 1880 legislation, were to be recognized, subject to "prior rights."[100]

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has not been expressly considered by the Utah Supreme Court. See chapter 7 at note 1003.

In one case the court discussed §73-3-21 and its relative priorities during times of scarcity in relation to domestic water-use purposes versus the winter flooding of fields. *Fairfield Irr. Co.* v. *White*, 18 Utah (2d) 93, 416 Pac. (2d) 641, 644-645 (1966); later decision, 28 Uath (2d) 414, 503 Pac. (2d) 853 (1972).

[97] *Tanner* v. *Bacon*, 103 Utah 494, 507-508, 136 Pac. (2d) 957 (1943), discussed at note 93 *supra*.

[98] Utah Laws 1880, ch. 20, §§6 and 7.

[99] Mead, E., "Irrigation Institutions" 228 (1910), discussed in more detail in chapter 7, note 1006. Related provisions regarding measurement of water rights by fractional parts of available stream flows are discussed at notes 55-57 *supra*.

[100] Utah Laws 1897, ch. 52, §§5 and 6.

The foregoing laws were repealed by the water administration statute of 1903.[101] This statute declared the principles of priority among appropriators and preferences among them in time of scarcity of water that are still contained in the current law, but it also included a proviso that when the natural streamflow should have receded in volume to the low water stage, the rights of all users at such stage should be deemed equal in priority and the water at and below such stage should be apportioned pro rata among them. This provision for low water distribution was eliminated in the 1919 revision,[102] leaving the section in substantially its present form.[103]

As a general rule—except for any decreed water rights under the earlier classifications which have not been reversed, modified, vacated or otherwise legally set aside[104]—priority in time of appropriating water, subject to statutory exceptions mentioned above under "Restrictions and preferences in appropriation of water," currently prevails in both the legislative and the judicial jurisprudence of this State.

Statutory recognition of primary and secondary water rights is reflected in several opinions rendered by the Utah Supreme Court with respect to early water rights.[105] Insofar as has been ascertained, the supreme court has not had occasion to pass upon the statutory elimination of equality of rights at low water stages.

Some other aspects of the Utah appropriative right.—(1) Nature of the right. "In appropriating water it is necessary not only to designate the water to be appropriated, but also to have the intent to apply the water to a beneficial use, to have a diversion from the natural channel by means of a ditch, canal or other structure, and to make application of it within a reasonable time to some useful purpose." But water may not be appropriated in excess of the reasonable quantity that may be used for the beneficial purpose designated in the application to appropriate the water.[106]

The appropriative water right is a usufruct.[107] It is a right to divert from the

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[101] Utah Laws 1903, ch. 100, § 72.

[102] Utah Laws 1919, ch. 67, § 10.

[103] Utah Code Ann. § 73-3-21 (1968), discussed at note 94 *supra.*

[104] See Utah Code Ann. § 73-4-11 (1968), described at note 212 *infra.*

[105] See *Manning* v. *Fife*, 17 Utah 232, 236-237, 54 Pac. 111 (1898); *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 266, 67 Pac. 672 (1902), 25 Utah 456, 71 Pac. 1069 (1903); *Bishop* v. *Duck Creek Irr. Co.*, 121 Utah 290, 295-296, 241 Pac. (2d) 162 (1952).

[106] *Crawford* v. *Lehi Irr. Co.*, 10 Utah (2d) 165, 168-169, 350 Pac. (2d) 147 (1960). In *Silver King Consol. Min. Co.* v. *Sutton* 85 Utah 297, 331, 39 Pac. (2d) 682 (1934), the court said that the allowable quantity of water is first measured by the original application and, if that is more than can be beneficially used, then by the factual measure of beneficial use.

A good summary by the Utah Supreme Court of important elements of a completed appropriative right is given in *Rocky Ford Canal Co.* v. *Cox*, 92 Utah 148, 157-158, 59 Pac. (2d) 935 (1936).

[107] *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 266, 67 Pac. 672 (1902).

source of supply the quantity of water reasonably necessary for the purpose of the appropriation, not an ownership in the *corpus* of the water while flowing in the stream.[108] The right is real property;[109] and it carries the right to have so much of the waters of the stream as he has appropriated flow down to his point of diversion,[110] which right extends to all the sources that feed the stream back to the farthest limits of the watershed.[111] "True, courts have said the appropriator has an interest in the stream from his point of diversion to its source, but this interest, other than as a part of the public, is merely the right to have water, in quantity and quality to satisfy his appropriation, come to his point of diversion. Coincident with this right, on his part, to insist as against the public that his quantity come to him, is the right of the public to insist that no more than his quantity come to him."[112] This right, said the supreme court, is that of only a preferential use, commonly called a priority. Property rights in water consist not only in the amount of the appropriation but also in the priority. It often happens that the chief value in an appropriation consists in its priority; therefore, to deprive a person of his priority is to deprive him of a valuable property right.[113]

(2) Relation of the appropriative right to land. "The right to make use of one's land and the right to use water are two severable things."[114] And, one may appropriate water for use on a specific tract of land without having title to the land.[115] In general, the right to the use of water is independent of the right to land.[116] However, in refusing to sustain an attempted appropriation of water to irrigate unenclosed and unoccupied public land for the sole purpose of producing food for wild waterfowl, the Utah Supreme Court held that there must be some type of possessory right in the appropriator good as against all but the Government.[117]

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[108] *Garner* v. *Anderson*, 67 Utah 553, 565, 248 Pac. 496 (1926).

[109] *In re Bear River Drainage Area*, 2 Utah (2d) 208, 211, 271 Pac. (2d) 846 (1954). A suit to quiet title to water rights is in the nature of an action to quiet title to real estate.

[110] *Conant* v. *Deep Creek & Curlew Valley Irr. Co.*, 23 Utah 627, 629-631, 66 Pac. 188 (1901).

[111] *Richlands Irr. Co.* v. *Westview Irr. Co.*, 96 Utah 403, 418, 80 Pac. (2d) 458 (1938).

[112] *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 13, 72 Pac. (2d) 648 (1937).

[113] *Whitmore* v. *Murray City*, 107 Utah 445, 453, 154 Pac. (2d) 748 (1944).

[114] *Stubbs* v. *Ercanbrack*, 13 Utah (2d) 45, 368 Pac. (2d) 461 (1962).

[115] *Jensen* v. *Birch Creek Ranch Co.*, 76 Utah 356, 362, 289 Pac. 1097 (1930). The Federal Government early recognized the necessity of permitting persons in the arid region to acquire an interest in water sources on the public domain distinct from interest in the lands themselves. *Sullivan* v. *Northern Spy Min. Co.*, 11 Utah 438, 442, 40 Pac. 709 (1895); *Sowards* v. *Meagher*, 37 Utah 212, 217-218, 108 Pac. 1112 (1910).

[116] *Whitmore* v. *Salt Lake City*, 89 Utah 387, 397-400, 57 Pac. (2d) 726 (1936). In this case the supreme court negated a contention that a filing on public water may not be made where the proposed point of diversion is on privately owned land.

[117] *Lake Shore Duck Club* v. *Lake View Duck Club*, 50 Utah 76, 80-82, 166 Pac. 309 (1917), also discussed at note 68 *supra*.

(*Continued*)

A right to use stream water acquired by appropriation is a hereditament appurtenant to the land for the benefit of which the appropriation was made.[118] Essential to attachment of the right as an appurtenance are the facts that the use of the water is beneficial to the land and that it is necessary to the use and enjoyment of such land.[119]

The water rights statute provides that an appurtenant water right passes to the grantee of the land to which it is appurtenant; but that the water right or any part thereof may be reserved by the grantor in express terms in the conveyance, or it may be separately conveyed.[120] It has long been the law in this jurisdiction, said the Utah Supreme Court, that water rights, even though appurtenant to certain land, may be separately conveyed from such land.[121] A deed to land, in statutory form, without reservation of water, conveys whatever water rights the grantor has appurtenant to the land.[122]

"Water rights * * * shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land * * *."[123] The effect of this statute, as construed by the Utah Supreme Court, was to establish a rebuttable presumption that a water right represented by corporate shares did not pass to the grantee as an appurtenance to the land on which used, but that the grantee could overcome such presumption by clear and convincing evidence that the water right was appurtenant and that the grantor intended to transfer it with the land, even though not expressly mentioned in the deed.[124]

(3) Diversion and use of water. (a) Necessity of actual diversion. Actual diversion of the water to which an appropriative right attaches is necessary to acquisition and exercise of such right.[125] "So far as the claims of respondents, based on percolation and natural overflow from the river channel, are concerned, they are but assertions of riparian rights which are not recognized in this state."[126] In view of what immediately follows, it must be emphasized

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(*Continued*)

With respect to the question of a trespasser becoming an appropriator, see the discussion in chapter 7 at notes 217-218.

[118] *Conant* v. *Deep Creek & Curlew Valley Irr. Co.*, 23 Utah 627, 629, 66 Pac. 188 (1901).

[119] *Thompson* v. *McKinney*, 91 Utah 89, 93-98, 63 Pac. (2d) 1056 (1937).

[120] Utah Code Ann. §73-1-11 (1968).

[121] *Salt Lake City* v. *McFarland*, 1 Utah (2d) 257, 260-261, 265 Pac. (2d) 626 (1954).

[122] *Thompson* v. *McKinney*, 91 Utah 89, 92-93, 63 Pac. (2d) 1056 (1937); *Anderson* v. *Hamson*, 50 Utah 151, 153, 167 Pac. 254 (1917).

[123] Utah Code Ann. §73-1-10 (1968).

[124] *Hatch* v. *Adams*, 7 Utah (2d) 73, 75, 318 Pac. (2d) 633 (1957); *Brimm* v. *Cache Valley Banking Co.*, 2 Utah (2d) 93, 99-100, 269 Pac. (2d) 859 (1954). See the discussion in chapter 8 at notes 133-137.

[125] *Crawford* v. *Lehi Irr. Co.*, 10 Utah (2d) 165, 168, 350 Pac. (2d) 147 (1960); *Bountiful City* v. *DeLuca*, 77 Utah 107, 118-119, 292 Pac. 194 (1930).

[126] *Hardy* v. *Beaver County Irr. Co.*, 65 Utah 28, 40, 234 Pac. 524 (1924). The uncontrolled use of water in this case could not establish a prior right, and it was too wasteful to be tolerated.

that this statement of the necessity of diversion from the stream channel pertains to *appropriative* water rights.

The question as to what right, if any, is acquired by merely permitting animals *to drink directly from a stream* has caused difficulty. In 1930, the Utah Supreme Court held that such acts gave no right to or possession of use of the water.[127] But 7 years later, in the *Adams* case, the court recognized the general right of anyone to water his stock in a stream without making a diversion of water therefrom, and distinguished this right from the special right of prior appropriation so long recognized and provided for by law.[128] The *Adams* case resulted from efforts of defendant downstream appropriators to make upstream improvements designed to increase the flow at their point of diversion, the effect of which would be to exclude plaintiff sheepmen from access to the stream for the purpose of watering their stock therein as they had been doing for many years. Plaintiffs had not made application to the State Engineer to appropriate the desired increase in water on the theory that it was new water, nor to change the place of diversion if considered such.

The supreme court held in the *Adams* case that while flowing naturally in a stream channel, water is commonly property to which all have equal rights, subject at all times not only to the same rights in others but also to the special rights to divert and use water of the stream recognized by the law of appropriation. Thus, subject to vested rights of appropriation by others, anyone may drink or dip water from the stream or water his animals therein. But to acquire the special right by appropriation, which is a limitation on these rights of public use, there must be a diversion from the natural channel, or an interference with the natural free flow for storage, effected by the work, labor, or art of man. In the instant case, defendants' preferential rights pertained to the quantity of water previously appropriated by them at their existing place of diversion. Defendants had the burden of proving their right to make upstream improvements that would exclude the public from use of accustomed watering places, but had not done so. Thus, under the circumstances of this case, the right to water one's livestock in a stream without making a diversion therefrom was given judicial recognition; it was explicitly distinguished from a water right acquired by prior appropriation; and it was protected against impairment by parties who attempted to add the water involved to their appropriated quantity without complying with the statutory procedure for appropriating water or for changing the place of diversion.[129]

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[127] *Bountiful City* v. *DeLuca*, 77 Utah 107, 118-119, 292 Pac. 194 (1930).

[128] *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 11-16, 72 Pac. (2d) 648 (1937).

[129] In a decision rendered in 1959, the Utah Supreme Court observed that as plaintiff's sole use and diversion of water in waterholes was for watering his cattle there, "his right to the water is dependent upon the question of whether this constitutes a valid appropriation. To support his contention that it does, he relies upon Adams v. Portage Irrigation Reservoir & Power Co., 95 Utah 1, * * *." The trial court's finding against plaintiff's contentions, "on conflicting evidence as to the nature of the water involved

(*Continued*)

(b) Efficiency of distribution works. In view of expert testimony in an adjudication suit to the effect that with reasonably efficient distribution works certain lands could be irrigated successfully, the Utah Supreme Court held it to be the duty of the water users to prepare their lands properly and to provide reasonably efficient diversion and distribution systems and methods of applying the water to the soil.[130]

(4) Appropriation of water for use of others. That water might be validly appropriated for the use of persons other than the original appropriator has been a recognized facet of the Utah water right from the earliest times. The appropriation doctrine in this State originated chiefly in the practices followed by informal communities, organized municipalities, and irrigation organizations of diverting and distributing water for the domestic and agricultural uses of the individuals within their service areas. Community effort was an essential factor in the early colonization of Utah. And so the *de facto* appropriation of water by a community for individual use therein was an old story long before the fine points of the appropriation doctrine were established in court.

In a decision rendered in 1898, the Utah Supreme Court remarked that undoubtedly unappropriated waters might be appropriated by means of control works "to be used or sold for any useful purpose."[131] A half-century later, the court repeated that the appropriator may lease or sell the right to use water under his control.[132]

(*Continued*)

and the manner of its use," was sustained by the supreme court. *Cassity* v. *Castagno*, 10 Utah (2d) 16, 18-19, 347 Pac. (2d) 834 (1959).

[130] *Hardy* v. *Beaver County Irr. Co.*, 65 Utah 28, 41-44, 234 Pac. 524 (1924).

[131] *Manning* v. *Fife*, 17 Utah 232, 237, 54 Pac. 111 (1898). See *Sowards* v. *Meagher*, 37 Utah 212, 218, 108 Pac. 1112 (1910).

[132] *Lasson* v. *Seely*, 120 Utah 679, 688, 238 Pac. (2d) 418 (1951); *McNaughton* v. *Eaton*, 121 Utah 394, 403-404, 242 Pac. (2d) 570 (1952).

In *Genola* v. *Santaquin*, 96 Utah 88, 101-102, 80 Pac. (2d) 930 (1938), the supreme court explained that water rights are pooled in a mutual company for convenience of operation and more efficient distribution, and perhaps for more convenient transfer; that a stock certificate in such a company is really a certificate showing an undivided part ownership in a certain water supply, with the right to call for such undivided part according to the prevailing method of distribution. See *St. George City* v. *Kirkland* 17 Utah (2d) 292, 409 Pac. (2d) 970, 972 (1966). In *Syrett* v. *Tropic & East Fork Irr. Co.*, 97 Utah 56, 59-61, 89 Pac. (2d) 474 (1939), discussed in note 152 *infra*, the court said that for the purposes of the statute governing changes in point of diversion of appropriated water, a mutual irrigation company stands as a single appropriator of all the water to which its stockholders are entitled. The statute was held not applicable to what was simply a question of internal management of the company, in which no other appropriators on the river were affected. In *Smithfield West Bench Irr. Co.* v. *Union Cent. Life Ins. Co.*, 105 Utah 468, 471-473, 142 Pac. (2d) 866 (1943), the court held that undistributed waters while in the canal of a mutual company belonged to the company, but that when once served to the stockholders, all rights in the water passed to them from the company. Compare *East Bench Irr. Co.* v. *Deseret Irr. Co.*, 2 Utah (2d) 170, 271 Pac. (2d) 449 (1954). In *Park* v. *Alta Ditch & Canal Co.*, 23 Utah (2d)

(5) Relative rights of senior and junior appropriators. The senior appropriator of water is "entitled to receive his whole supply before any subsequent appropriator shall have any right," subject in times of scarcity to certain preferred water uses.[133] At the court's discretion, reasonable regulations may be imposed in a decree of adjudication upon the use of water by the parties;[134] but, said the Utah Supreme Court, the trial court should carefully avoid making a regulation which has the potentiality of depriving the prior appropriators of a substantial portion of the quantity of water which it found they are entitled to use.[135]

The senior appropriator is entitled to protection not only in the quantity of water and the times of receiving it to which he is entitled, but also against such deterioration in quality as would *materially* impair his use of the water for the purpose for which he appropriated it.[136] He may also be protected against such fluctuations of the flow by upstream junior appropriators as unduly affect his own diversion and use.[137]

But the senior appropriator does not have an unlimited right to the use of water; he is subject to a reasonable limitation of his right for the benefit of junior appropriators.[138] Any excess water in the stream above the quantity to which the prior appropriator is entitled—as measured both by the terms of his water right and by his actual needs, whichever is the lesser—is public water to which he has no right but which is subject to appropriation or to the general rights of the public.[139] If the senior actually diverts more water than he is entitled to, the surplus must be returned to the stream for the use of subsequent appropriators,[140] for he cannot waste, give away, or otherwise

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86, 458 Pac. (2d) 625, 627-628 (1969), the court denied a shareholder's assertion that a certain agreement by a mutual water company, to exchange certain waters for other waters to be distributed by it, was invalid and deprived him of his rightful share.

[133] Utah Code Ann. §73-3-21 (1968), discussed at notes 94-97 *supra* regarding preferred uses in times of scarcity.

[134] *McKean* v. *Lasson*, 5 Utah (2d) 168, 173, 298 Pac. (2d) 827 (1956).

[135] *McNaughton* v. *Eaton*, 4 Utah (2d) 223, 225-226, 291 Pac. (2d) 886 (1955).

[136] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 202, 213-214, 135 Pac. (2d) 108 (1943).

The owner of an appropriation has a vested right to the quality as well as the quantity of water which he has beneficially used.

Salt Lake City v. *Boundary Springs Water Users Assn.*, 2 Utah (2d) 141, 144, 270 Pac. (2d) 453 (1954). This was recognized in the earliest of the Utah Supreme Court's water rights decisions. *Crane* v. *Winsor*, 2 Utah 248, 253 (1878).

[137] *Logan, Hyde Park & Smithfield Canal Co.* v. *Logan*, 72 Utah 221, 226, 269 Pac. 776 (1928).

[138] *In re Water Rights of Escalante Valley Drainage Area*, 10 Utah (2d) 77, 82, 348 Pac. (2d) 679 (1960).

[139] *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 13-14, 72 Pac. (2d) 648 (1937).

[140] *Gunnison Irr. Co.* v. *Gunnison Highland Canal Co.*, 52 Utah 347, 357, 174 Pac. 852 (1918).

dispose of surplus water to the injury of the latter.[141] Nor may the senior so increase his demand and use of the water appropriated by him as to impair a subsequent intervening right initiated before his original demand increased.[142]

An appropriator, either senior or junior, is entitled to have the stream conditions maintained substantially as they existed at the time he made his appropriation.[143]

No complaint may be rightfully made by a senior appropriator if a subsequent upstream appropriator diverts water from the stream and returns it into the prior appropriator's canal, provided the quantity is not diminished nor the quality impaired, and that the prior appropriator can make full use of the water at the point where it is returned and without injury to the exercise of his right.[144] Nor may the senior legally object to upstream use of water by juniors at such times as the flow, if allowed to remain in the stream channel, would not reach the downstream lands in quantity sufficient to benefit them.[145]

Between the time at which an appropriation of water is initiated and the time it is completed with due diligence, intervening appropriators may acquire rights to use such water, subject to the prior right of the first appropriator when he is ready to begin use of the water and thus perfect his right,[146] and to avoidance of injury to his water facilities or to the progress of his construction.[147]

(6) Rotation in use of water. In several decisions rendered over the years, the Utah Supreme Court approved the use of rotation systems as among appropriators of water from the same stream where it appeared to serve the best interests of the community.[148] Although, on one occasion, expressing some doubts about the power of the courts to impose rotation on a nonconsenting appropriator,[149] the supreme court in later decisions approved of this practice by the trial courts.[150]

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[141] *Manning* v. *Fife*, 17 Utah 232, 238, 54 Pac. 111 (1898).
See the discussion in chapter 1 at notes 69-72 which, *inter alia*, discusses a *dictum* in *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 13-14, 72 Pac. (2d) 648 (1937), believed to be an erroneous and inadvertant generalization.

[142] *Jensen* v. *Birch Creek Ranch Co.*, 76 Utah 356, 362, 289 Pac. 1097 (1930).

[143] *East Bench Irr. Co.* v. *Deseret Irr. Co.*, 2 Utah (2d) 170, 178, 271 Pac. (2d) 449 (1954).

[144] *United States* v. *Caldwell*, 64 Utah 490, 497-498, 231 Pac. 434 (1924).

[145] *Dameron Valley Res. & Canal Co.* v. *Bleak*, 61 Utah 230, 234-235, 211 Pac. 974 (1922); *Fenstermaker* v. *Jorgensen*, 53 Utah 325, 333, 178 Pac. 760 (1919).

[146] *Whitmore* v. *Murray City*, 107 Utah 445, 451-452, 154 Pac. (2d) 748 (1944).

[147] *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 267, 67 Pac. 672 (1902).

[148] *Becker* v. *Marble Creek Irr. Co.*, 15 Utah 225, 229, 49 Pac. 892 (1897).

[149] *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff*, 49 Utah 569, 589, 164 Pac. 856 (1917), discussed in chapter 9 at note 139.

[150] *Crawford* v. *Lehi Irr. Co.*, 10 Utah (2d) 165, 169, 350 Pac. (2d) 147 (1960), discussed in chapter 9 at note 140; *Dameron Valley Res. & Canal Co.* v. *Bleak*, 61 Utah 230, 237, 211 Pac. 974 (1922). "When necessary, periods of rotation may be imposed." *Rocky Ford Canal Co.* v. *Cox*, 92 Utah 148, 158, 59 Pac. (2d) 935 (1936).

(7) Commingling. The water rights statute provides that with approval of the State Engineer, appropriated water may be turned into a natural stream channel or body of water, or into an onchannel reservoir, commingled with its waters, and rediverted minus seepage and evaporation losses. Other conditions are that the water already there shall not be deteriorated in quality nor diminished in quantity by the water turned into it, the rights of others are not interfered with, and the incoming water shall bear its equitable share of reservoir costs.[151]

(8) Change in exercise of water right. The statute provides an exclusive procedure for making changes in place of diversion, place of use, and purpose of use of appropriated water, subject to the basic requirement that no such change may be made if it impairs any vested right without just compensation. Approval of the State Engineer is required. Such changes may be either permanent or temporary, the latter being limited to fixed periods not exceeding 1 year.[152] The procedure in acting upon an application differs somewhat for permanent and temporary changes. "Applications for either permanent or temporary changes shall not be rejected for the sole reason that such change would impair vested right of others, but if otherwise proper, they may be approved as to part of the water involved or upon condition that such conflicting rights be acquired." The State Engineer's determination is final, subject to judicial review.[153] The right to make these changes under the invariable condition of noninjury to others has long been recognized by the Utah Supreme Court.[154]

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[151] Utah Code Ann. §73-3-20 (1968).

[152] The statutory provisions governing these changes in water diversion and use apply to water diverted from stream channels or other public sources of supply. They are not applicable to deliveries of water by a mutual irrigation company to its own stockholders, in instances in which the users desire to change their individual diversions from one point to another on the company's canal. *Syrett* v. *Tropic & East Fork Irr. Co.*, 97 Utah 56, 57-61, 89 Pac. (2d) 474 (1939), also discussed in note 132 *supra.*

[153] Utah Code Ann. §73-3-3 (1968).

[154] Point of diversion, *Spring Creek Irr. Co.* v. *Zollinger*, 58 Utah 90, 95, 197 Pac. 737 (1921); *Hague* v. *Nephi Irr. Co.*, 16 Utah 421, 434, 52 Pac. 765 (1898); purpose of use, *Manning* v. *Fife*, 17 Utah 232, 238, 54 Pac. 111 (1898); change of place of use denied because of injury, *Tanner* v. *Provo Res. Co.*, 76 Utah 335, 346, 289 Pac. 151 (1930).

The Utah Supreme Court has indicated that the original appropriator of stream water acquires, in addition to the right to use water, a right to continue the means of diverting the water which he has installed, as against an attempted change by another claimant to his prejudice. But if another appropriator can save water and put it to beneficial use by causing a change in the existing diversion of the prior user, he may do so *at his own expense* provided he thereby preserves all the rights of this prior appropriator. *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff*, 56 Utah 196, 204-205, 189 Pac. 587 (1919). In declaring this principle in *Salt Lake City* v. *Gardner*, 39 Utah 30, 45-47, 114 Pac. 147 (1911), the supreme court warned that in no case should a court sanction a subsequent appropriation "unless all prior rights can by some feasible means be protected and maintained." "Moreover, the right of a subsequent ap-

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The basic principles that govern administrative action and judicial review thereof with respect to applications to make changes in exercise of water rights apparently are generally the same as those that guide the course of action upon applications to appropriate water. In adjudicating approval of an application to change winter direct flow rights to storage rights, however, the Utah Supreme Court made an important distinction that should be noted (in contrast to the procedures and principles discussed earlier under "Restrictions and preferences in appropriation of water"). The trial court, in sustaining the State Engineer's approval of the application, found that "there is reason to believe" that applicant's use of the winter waters made no contribution to the river underflow. This, said the supreme court, was not an adjudication of nonexistence of return flow, but it did justify approval of the application which would allow the applicant to build the dam and thereafter demonstrate, if possible, noninjury to lower water users. But in proving its claim to obtain a certificate of change, "reason to believe" noninjury to lower users would not be enough. It must justify a favorable decision by substantial evidence, with the burden of proving noninjury by a preponderance of all the evidence.[155]

(9) Loss of water right. (a) Statutory forfeiture. It is provided by statute that on abandonment or cessation of use of water for a period of 5 years, the right shall cease and the water revert to the public subject to further appropriation, unless before expiration of the period the water right owner applies to the State Engineer for an extension of time for not exceeding 5 years, and unless the State Engineer grants it after a hearing. Applications may be granted for periods not exceeding 5 years each, upon a showing of reasonable cause for such nonuse of water. These provisions are applicable "whether such unused or abandoned water is permitted to run to waste or is used by others without right."[156] The Utah Supreme Court has said intent is not the governing factor in forfeiting one's appropriative right for nonuse.[157]

The State held that statutory forfeiture requires a *continuous* 5-year period

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propriator to divert water from a stream at a point above a prior appropriator's point of diversion and to use and to return the same into a ditch or canal of the prior appropriator, if undiminished in quantity and unaffected in quality, has become the settled law of this jurisdiction." *United States* v. *Caldwell*, 64 Utah 490, 497-498, 231 Pac. 434 (1924). *Salt Lake City* v. *Salt Lake City Water & Elec. Power Co.*, 24 Utah 249, 67 Pac. 672 (1902), 25 Utah 456, 71 Pac. 1069 (1903). See the discussions in chapter 13 at notes 124-126 and chapter 9 at notes 75-77 and 270-272.

[155] *Piute Res. & Irr. Co.* v. *West Panguitch Irr. & Res. Co.*, 12 Utah (2d) 168, 172-173, 364 Pac. (2d) 113 (1961). The decision granting approval of the application was reversed on a hearing when new and substantial evidence was introduced. 13 Utah (2d) 6, 367 Pac. (2d) 855 (1962).

[156] Utah Code Ann. § 73-1-4 (1968). Various aspects of this statute are discussed in *Baugh* v. *Criddle*, 19 Utah (2d) 361, 431 Pac. (2d) 790 (1967); and *Glenwood Irr. Co.* v. *Myers*, 24 Utah (2d) 78, 465 Pac. (2d) 1013 (1970).

[157] *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 114, 363 Pac. (2d) 777 (1961).

during which failure to make use of water takes place.[158] In construing forfeiture statutes of other States similar to this, the court said, it has been uniformly held that forfeiture will not operate where the failure to make use of the right results from physical causes beyond control of the appropriator, such as floods and droughts, where he is ready and willing to divert the water when it is naturally available.[159]

(b) Abandonment. "It is a well-settled principle of law that in order to constitute an abandonment there must be an intent to abandon, coupled with some external act of relinquishment by which the intent is carried out."[160] Evidence of mere temporary nonuse, without other evidence tending to show that it was at any time the intention of the appropriator to abandon use of the water for irrigation, failed to support an assertion of abandonment in this early case. Intent is an essential element of abandonment. "Once water rights are established, the burden is upon the person claiming abandonment to demonstrate that the water user has in fact intentionally abandoned the water," which burden in this case was not met.[161]

(c) Statutory forfeiture and abandonment distinguished. In a decision rendered in 1937, *Hammond* v. *Johnson*, the Utah Supreme Court stated with clarity the fundamental distinctions between these methods of losing appropriative rights.[162] Among these are the basic concepts that abandonment is not based upon a time element, whereas forfeiture depends on nonuse for a definite period of years; in abandonment, the controlling element is a matter of intent, whereas forfeiture may occur despite a specific intent not to surrender the right.

Only a few years later, the Utah court surprisingly stated in the *Tanner* case that abandonment of a water right requires concurrence of intent to abandon and actual failure in its use for the statutory period, citing an Oregon case.[163] However, it is clear from subsequent decisions that the deviation in the *Tanner* case did not disturb the theretofore sound Utah judicial concept. In rejecting defenses that there had been both statutory forfeiture and abandonment, the supreme court said in 1943, "Abandonment is a separate and distinct concept from that of forfeiture," and quoted the pertinent observations to that effect in the *Hammond* case.[164]

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[158] *Rocky Ford Irr. Co.* v. *Kents Lake Res. Co.*, 104 Utah 216, 218, 140 Pac. (2d) 638 (1943).

[159] 104 Utah at 207-208.

[160] *Promontory Ranch Co.* v. *Argile*, 28 Utah 398, 407-408, 79 Pac. 47 (1904). See also *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 115, 363 Pac. (2d) 777 (1961); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 468, 137 Pac. (2d) 634 (1943).

[161] *Dalton* v. *Wadley*, 11 Utah (2d) 84, 88, 355 Pac. (2d) 69 (1960).

[162] *Hammond* v. *Johnson*, 94 Utah 20, 31, 66 Pac. (2d) 894 (1937).

[163] *Tanner* v. *Provo Res. Co.*, 99 Utah 139, 152, 98 Pac. (2d) 695 (1940); citing *Broughton* v. *Stricklin*, 146 Oreg. 259, 277, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934). This is discussed in chapter 14 at notes 349-352.

[164] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 467-468, (*Continued*)

(d) Adverse possession and use. Title to a water right by adverse use could become fixed only after continuous, uninterrupted, hostile, notorious, adverse enjoyment for the statutory period of 7 years; and to have been adverse, it must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the prior right. The presumption is against acquisition of such a right; therefore, the burden of proof of all facts necessary to establish his claim is on the party who asserts adverse use.[165]

In a 1943 case, the Utah Supreme Court, among other things, (1) stated that it is well settled that at least prior to 1903, when the exclusive statutory method of appropriating water was adopted, title to a water right could be acquired by adverse use; and (2) concluded that between 1903 and 1939 title could be acquired by adverse possession.[166]

In the late 1930's the relationships of abandonment and forfeiture to adverse use in connection with acquisition of title to water rights were in a state of considerable uncertainty.[167] In 1939 the Utah Legislature took action by so amending the water appropriation statute as to prevent the acquisition of a right to use water already appropriated by another, solely by adverse use.[168] To this end, the general statement of the exclusive manner of acquiring water rights ends with this declaration: "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."[169] The statutory forfeiture section now includes the following

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137 Pac. (2d) 634 (1943).See also *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4, 361 Pac. (2d) 407 (1961); *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 114-115, 363 Pac. (2d) 777 (1961), discussed in chapter 14 at note 354.

[165] *In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 106, 363 Pac. (2d) 199 (1961); *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 456-457, 462, 482, 137 Pac. (2d) 634 (1943). Various aspects of prescription in relation to water rights are discussed in *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 361 Pac. (2d) 407 (1961). In the *Wellsville* case, *supra* 104 Utah at 463-466, the supreme court reviewed the authorities and drew conclusions as to what constitutes a legally effective interruption of adverse possession sufficient to prevent acquisition of title by adverse use. It is almost universally held, the court stated further, that adverse use will not "run upstream." 104 Utah at 482.

[166] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 462, 137 Pac. (2d) 634 (1943).

[167] See *Clark* v. *North Cottonwood Irr. & Water Co.*, 79 Utah 425, 437, 11 Pac. (2d) 300 (1932); *Hammond* v. *Johnson*, 94 Utah 20, 28-33, 66 Pac. (2d) 894 (1937), 94 Utah 35, 39-40, 75 Pac. (2d) 164 (1938); *Adams* v. *Portage Irr., Res. & Power Co.*, 95 Utah 1, 11-16, 72 Pac. (2d) 648 (1937), 95 Utah 20, 21, 81 Pac. (2d) 368 (1938).

Regarding clarification of this matter in the 1943 *Wellsville* case, which is discussed immediately above, see the discussion in chapter 14 at notes 787-790. And see the discussion in chapter 14 at note 364 of *In re Area of Bear River in Rich County*, 12 Utah (2d) 1, 4-5, 361 Pac. (2d) 407 (1961).

[168] Utah Laws 1939, ch. 111.

[169] Utah Code Ann. §73-3-1 (1968).

sentence: "The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right."[170] In the opinions in a number of subsequent cases, the Utah Supreme Court has noted that since this enactment, it is no longer possible to acquire a right to use water in Utah by adverse possession and use.[171]

(e) Estoppel. The exercise of water rights by appropriators may be estopped by their inequitable conduct, by acts and declarations, which lead others to make use of their water rights on the assumption that such use would be legal.[172]

(10) Rights-of-way. The statute providing for appropriation of water declares that the use of water for beneficial purposes, as provided in the legislation, is a public use.[173] It also provides that any person may have a right-of-way across public, private, and corporate lands for necessary reservoirs, dams, diversion and distribution works for domestic, culinary, industrial, and irrigation purposes, or for any necessary public use, or for drainage, upon payment of just compensation therefor.[174] And any person may have the right to use, or to enlarge and use, a ditch already constructed, upon payment of proper compensation.[175] Proceedings under the section granting the right to use or enlarge an existing canal are controlled by the principle involved in eminent domain.[176]

Repudiation of the Riparian Water-Use Doctrine

Although many years elapsed after the first settlement and use of water in Utah before the Territorial supreme court was called upon to recognize and apply the doctrine of appropriation (see the earlier discussion, "Appropriation of Water of Watercourses—Recognition of doctrine of prior appropriation), it was even longer before that court first had occasion to express its repudiation of the doctrine of riparian rights. In an 1891 case, the court said, "Riparian

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[170] *Id.* §73-1-4.

[171] See the cases cited in chapter 14 n. 786.

[172] *Wellsville East Field Irr. Co.* v. *Lindsay Land & Livestock Co.*, 104 Utah 448, 472-473, 137 Pac. (2d) 634 (1943). But in this case the court held that the facts necessary to constitute estoppel did not exist. In other cases the court considered the subject of estoppel in relation to water rights and held either (1) that certain parties were estopped to assert their claims [see, e.g., *Lehi Irr. Co.* v. *Moyle*, 4 Utah 327, 342-343, 9 Pac. 867 (1886); *Tanner* v. *Provo Res. Co.*, 76 Utah 335, 344-346, 289 Pac. 151 (1930); *Tanner* v. *Provo Res. Co.*, 99 Utah 139, 155-157, 98 Pac. (2d) 695 (1940)], or (2) that certain circumstances negated imputations of estoppel. See *Elliot* v. *Whitmore*, 23 Utah 342, 354, 65 Pac. 70 (1901). Compare *United States* v. *District Ct.*, 121 Utah 18, 21-24, 242 Pac. (2d) 774 (1952).

[173] Utah Code Ann. §73-1-5 (1968).

[174] *Id.* §73-1-6.

[175] *Id.* §73-1-7. Regarding the validity of this legislation, see the discussion in chapter 7 at notes 273-279.

[176] *Nielson* v. *Sandberg*, 105 Utah 93, 96-102, 141 Pac. (2d) 696 (1943); *Peterson* v. *Sevier Valley Canal Co.*, 107 Utah 45, 50-51, 151 Pac. (2d) 477 (1944).

rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this Territory, it would still be a desert * * *."[177] That the common law doctrine of riparian water-use rights does not obtain in Utah[178] is a fundamental principle of water jurisprudence which has been stated in many decisions of the Utah Supreme Court.[179]

Ground Waters

Ground waters subject to appropriation.—The Legislature of the State of Utah has declared "all waters in this state, whether above or under the ground," to be public property, "subject to all existing rights to the use thereof."[180] In *Riordan* v. *Westwood*, the Utah Supreme Court summarized this legislative declaration by saying, "[I]t is clear that the legislature intended, as far as it was legally possible, to declare all waters of the state whether under or above the surface of the ground and whether flowing or not, to be public property subject to the existing rights of the use thereof."[181]

With one exception, the appropriation doctrine under current appropriation procedures is applicable to all ground water flowing in defined channels,[182] existing in artesian basins,[183] or merely seeping and percolating through the soil.[184] The *Riordan* decision[185] delineated the one exception. The court stated that those ground waters diffused and percolating through the soil *near the surface*, sustaining beneficial plant life on the property owner's land without

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[177] *Stowell* v. *Johnson*, 7 Utah 215, 225-226, 26 Pac. 290 (1891). A half-century later the Utah Supreme Court said, "The doctrine of riparian rights was entirely unsuited to the conditions found in the arid portions of the country. It tended to retard the development of vast regions in the western states." *Spanish Fork Westfield Irr. Co.* v. *District Ct.*, 99 Utah 527, 534, 104 Pac. (2d) 353 (1940).

[178] *Bountiful City* v. *DeLuca*, 77 Utah 107, 118, 292 Pac. 194 (1930).

[179] The doctrine of riparian rights may, however, encompass more than just the right to use water. See chapter 6 at notes 154-156. In *Poynter* v. *Chipman*, 8 Utah 442, 32 Pac. 690 (1893), the Utah Supreme Court discussed and recognized riparian rights to accretions and relictions along a lake. In *Utah State Road Comm'n* v. *Hardy Salt Co.*, 26 Utah (2d) 143, 486 Pac. (2d) 391 (1971), the court again considered and discussed such riparian rights but held that "in view of the unique and special conditions affecting Great Salt Lake * * * the recession of the waters from the land in question has not been natural, gradual and imperceptible * * * and that the doctrine of reliction should not be applied" to it. 486 Pac. (2d) at 393.

[180] Utah Code Ann. § 73-1-1 (1968).

[181] *Riordan* v. *Westwood*, 115 Utah 215, 224, 203 Pac. (2d) 922 (1949).

[182] *Little Cottonwood Water Co.* v. *Sandy City* 123 Utah 242, 258 Pac. (2d) 440 (1953).

[183] *Hanson* v. *Salt Lake City*, 115 Utah 404, 205 Pac. (2d) 255 (1949).

[184] *Riordan* v. *Westwood*, 115 Utah 215, 203 Pac. (2d) 922 (1949). Also see *Bullock* v. *Tracy*, 4 Utah (2d) 370, 294 Pac. (2d) 707 (1956).

[185] *Riordan* v. *Westwood* 115 Utah 215, 203 Pac. (2d) 922 (1949).

artificial diversion and having no course traceable onto the lands of others, are considered part of the soil and not public property subject to appropriation.

Current procedure for appropriating ground water.—The current procedure for acquiring a right to use unappropriated water in Utah, discussed earlier,[186] is substantially the same regardless of the supply involved.[187] The Utah Code expressly provides that all rights to appropriate must be initiated by filing an application in the Office of the State Engineer.[188] This procedure has been exclusive since 1935.[189]

Protection of means of diversion.—A prior appropriator of ground water in Utah is not only entitled to the quantity and quality of water appropriated, but also protection for his means of diversion. In 1959, the Utah court held that a prior appropriator of ground water through the beneficial use of natural springs and artesian wells was entitled to restrain subsequent appropriators from lowering the static head pressure of the underground basin unless they replaced the quantity and quality of the water and bore the cost of replacement.[190] In this 1959 case, section 73-3-23 of the Utah statutes, granting the right of replacement to a junior appropriator where his use diminishes the quantity or quality of a prior ground water appropriator's right,[191] was interpreted as the legislative expression of this same concept which the court was bound to enforce. Replacement is made at the sole expense of the junior appropriator and the right of eminent domain is granted for this purpose. No replacement may be made without approval of an application by the State Engineer.[192]

A 1969 case involved Murray City, which had changed its diversion from old wells to a new well, as approved by the State Engineer under section 73-3-3 of

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[186] See "Appropriation of Water of Watercourses—Procedure for appropriating water: Current method."

[187] If, in the State Engineer's judgment, there is sufficient unappropriated water available and no likelihood of impairing existing rights, and all fees are advanced, he may issue a temporary permit to drill a well. But this does not dispense with publication of notice and the final approval or rejection of such application. Utah Code Ann. §73-3-5 (1968).

See the discussion in chapter 20 at notes 445-447, regarding the control of well drillers and replacement wells.

[188] Utah Code Ann. §73-3-1 (1968).

[189] See the discussion in chapter 20 at notes 404-414, regarding the exclusiveness of the statutory procedure since 1935, previous procedures for appropriating ground waters after and before the 1903 appropriation statute, provisions for recording certain earlier rights by filing claims in the Office of the State Engineer, and the limitation of rights to reasonable beneficial use.

[190] *Current Creek Co.* v. *Andrews*, 9 Utah (2d) 324, 344 Pac. (2d) 528 (1959).

[191] Utah Code Ann. §73-3-23 (1968).

[192] Section 73-3-23 and the *Current Creek* case were also cited in *Fairfield Irr. Co.* v. *White*, 18 Utah (2d) 93, 416 Pac. (2d) 641, 642 (1966); later decision, 28 Utah (2d) 414, 503 Pac. (2d) 853 (1972). Also see the discussion in note 96 *supra* regarding the *Fairfield* case's discussion of §73-3-21 and its relative priorities during times of scarcity.

the statutes. This section permits changes in the place of diversion or purpose of use, if no vested right is impaired, without compensation. The Utah Supreme Court said that "the trial court as authorized under Sec. 73-3-23, provided that Murray City 'must at [its] sole cost *permanently* replace to the plaintiffs water in amount and quality equal to the level of their prior use.' "[193] However, the supreme court required that this be modified. Among other things, the court stated:

> * * * there has come to be recognized what may be referred to as the "rule of reasonableness" in the allocation of rights in the use of underground water. This involves an analysis of the total situation: the quantity of water available, the average annual recharge in the basin, the existing rights and their priorities. All users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use.
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> * * * *
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> We perceive nothing in our statutory law inconsistent with this "rule of reasonableness" just discussed, nor which compels a conclusion that owners of rights to use underground water have any absolute right to pressure.[194]

Drainage of land versus interference with ground water rights.—A property owner who installs drains on his land to make property more usable, and not for the purpose of acquiring a water right, incurs no liability even though he may interfere with another's rights to the ground water unless he willfully or intentionally interferes with another's water or is negligent or reckless in the installation of his drains.[195] The Utah Supreme Court held that a property owner in draining his land to make it useable could not acquire a right to the use of ground waters therein which had been previously appropriated by an

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[193] *Wayman* v. *Murray City Corp.*, 23 Utah (2d) 97, 458 Pac. (2d) 861, 864 (1969). See also *Hanson* v. *Salt Lake City*, 115 Utah 404, 205 Pac. (2d) 255, 263 (1949), discussed in chapter 20 at note 432.

[194] 458 Pac. (2d) at 865-866, discussed in more detail in chapter 20 at note 436.

Later in its opinion the court said that §73-3-23 "deals with the replacement by a junior appropriator (not specifically this case) which states the 'replacement shall be at the sole cost and expense of the applicant', but adds 'subject to such rules and regulations as the state engineer shall prescribe.' " 458 Pac. (2d) at 866.

The court at the outset of its opinion had noted that "this is not a situation where a party (Murray City) has initiated a *new* withdrawal in a basin which adversely affects the flow of wells prior in time and right [court's footnote: "Thus in that respect different from the case of Current Creek Irr. Co. v. Andrews, 9 Utah 2d 324, 344 P.2d 528 (1959)" discussed at notes 190-192 *supra*]. What the City has done is to create a more efficient means of taking [water] from this basin * * *." 458 Pac. (2d) at 863.

[195] *N. M. Long & Co.* v. *Canon-Papanikolas Construction Co.*, 9 Utah (2d) 307, 343 Pac. (2d) 1100 (1959).

adjoining landowner. Only the water in excess of established rights could be appropriated.[196]

Forfeiture and abandonment.—Appropriative rights to ground water may be lost by forfeiture or abandonment in substantially the same manner as for surface watercourses, discussed earlier.[197]

Control of artesian wells.—The State Engineer is authorized by various methods to control artesian wells which are wasting public water.[198]

Early decisions relating to ground water.—The only classification of ground water of importance under current appropriation procedures in Utah is that noted above in the *Riordan* case.[199] However, for purposes of determining rights to ground water acquired prior to the complete adoption of the appropriation doctrine, these waters were classified as (1) defined underground streams, (2) underflow of surface streams, or (3) percolating waters. Waters flowing in definite underground streams in Utah have been held consistently to be subject to appropriation to the same extent as those flowing in surface streams.[200] In an early case, the Utah court similarly recognized the appropriability of stream underflow.[201]

In a number of early decisions, the Utah court announced that percolating waters belonged to the owner of the soil and were not subject to the appropriation doctrine.[202] But much of what was said in the early decisions concerning absolute ownership was *dicta*, because these cases involved disputes between landowners and appropriators and not rights between landowners.[203]

The correlative rights doctrine, with some modifications, existed as part of the ground water law in Utah from its adoption in 1921 in the case of *Horne* v. *Utah Oil Refining Company*[204] until the court's complete adoption of the appropriation doctrine in 1935.

In the *Horne* case, the court stated, "[E]ach proprietor of land within an artesian basin is entitled to water in proportion to his surface area, provided he make beneficial use of it." In a subsequent decision, the court modified the rule announced in the *Horne* case.[205] The court held that since every owner of surface area was entitled to the same proportionate quantity of water, his share could be put to beneficial use outside the district as long as there was no injury to the rights of others. Under the correlative rights doctrine, the landowner was

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[196] *Stubbs* v. *Ercanbrack*, 13 Utah (2d) 45, 368 Pac. (2d) 461 (1962).
[197] See the discussion at notes 156-164 *supra* and in chapter 20 at notes 437-440.
[198] Utah Code Ann. §73-2-21 (Supp. 1975).
[199] See the discussion at note 185 *supra*.
[200] *Chandler* v. *Utah Cooper Co.*, 43 Utah 479, 135 Pac. 106 (1913).
[201] *Howcroft* v. *Union & Jordan Irr. Co.*, 25 Utah 311, 316, 71 Pac. 487 (1903).
[202] See the discussion in chapter 20 at notes 419-421.
[203] *Riordan* v. *Westwood*, 115 Utah 215, 203 Pac. (2d) 922 (1949).
[204] *Horne* v. *Utah Oil Refining Co.*, 59 Utah 279, 202 Pac. 815 (1921).
[205] *Glover* v. *Utah Oil Refining Co.*, 62 Utah 174, 218 Pac. 955 (1923).

entitled to capture and use the percolating water while it was on his property, but he was not entitled to pursue it onto the lands of another.[206]

There were certain exceptions to the rules announced in the early court decisions with respect to percolating waters on the public domain and waste water from irrigation.[207]

Special Statutory Adjudication Procedures

The Utah water rights statutes provide for an integrated administrative-judicial determination of rights to the use of "any stream or water source."[208] Upon the petition of five or more or a majority of water users upon any stream or water source, the State Engineer makes an investigation of petitioners' claims. If he finds that the facts and conditions warrant it, the State Engineer files an action in court for the determination of water rights (which alternatively may be initiated by claimants)[209] and makes a physical survey of the waters pursuant thereto.[210] After the completion of notice and service upon the claimants, the parties must file their claims with the court.[211]

The State Engineer then tabulates the facts as set forth in the claims, making such investigations as he deems necessary. Upon completion of the tabulation, the State Engineer prepares "a report and a proposed determination of all rights to the use of water" claimed. The claimants may file complaints to the report and proposed determination in court. Except for any controlling prior decree (which may have been reversed, modified, vacated or otherwise legally set aside), the waters involved are to be distributed in accordance with the proposed determination of the State Engineer pending final court action.[212] If there is no challenge to the State Engineer's proposed determination "the court shall render a judgment in accordance with such proposed determination."[213]

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[206] *Utah Copper Co.* v. *Stephen Hayes Estate*, 83 Utah 545, 31 Pac. (2d) 624 (1934).

[207] See the discussion in chapter 20 at notes 426-431.

[208] Utah Code Ann. § 73-4-1 *et seq.* (1968).

With respect to the purpose of the statutory procedure, see chapter 15 at notes 4-6.

[209] *Id.* § 73-4-1. Such an action also may be initiated by direct petition to the court by 10 or more claimants, or by claimants involving a determination of rights to the major part of a water source. *Id.* § 73-4-3. Even if an action by fewer than 10 claimants or the users of a minor part of water rights pertaining to any water source is commenced, and if a general determination has not already been made, the court at its discretion may make a general determination under the statutory procedure. In any such action for determination of water rights, the State of Utah must be joined as a necessary party. *Id.* § 73-4-18.

[210] *Id.* § 73-4-3.

[211] *Id.*

Any person who fails to file his claim with the court within the prescribed time shall be forever barred and estopped from asserting the claimed right and shall be held to have forfeited the claimed right, unless the claimant complies with the statutory requirements for late filing. *Id.* § 73-4-9.

[212] *Id.* § 73-4-11.

[213] *Id.* § 73-4-12.

If the proposed determination is challenged[214] the court shall hold a hearing[215] and enter a judgment determining the water rights.[216] Appeal may be taken to the supreme court.[217]

Administration of Water Rights and Distribution of Water

The State Engineer establishes water districts and defines their boundaries.[218] He annually appoints water commissioners to distribute water from all or parts of any river system or water source, or a single commissioner for several distinct sources, when this is necessary in his judgment or that of the district court. The State Engineer must consult with the water users before making an appointment. If a majority agree, he acts in accordance therewith; if not, he makes a determination for them. The State Engineer may remove water commissioners for cause; or the water users may petition the district court for removal, whereupon the court after notice and hearing may order the removal and direct the State Engineer to appoint necessary successors.[219]

A major function of the State Engineer is to carry into effect judgments of courts respecting administration of water rights and distribution of water. This includes diversion of water within any district in accordance with the several appropriative rights and regulation of diversion and storage control works. He may enter upon private property for these purposes, with court permission after notice and hearing.[220] Every water user must install adequate diversion and storage controls and measuring devices approved by the State Engineer when required by him to do so.[221]

In the previous discussions of "Procedure for appropriating water: Current method" and "early classification of primary and secondary rights," under "Appropriation of Water of Watercourses," attention has been called to early enabling statutes and controlling agreements or decrees under which stream-flow was commonly divided among the water users according to multiple classes, fractional parts, or percentages of available flow, in addition to other decrees prescribing units of flow. By contrast, adjudications of claims under the current statutory procedure are made uniformly, stated in second-feet of

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[214] *Id.* § 73-4-13.

[215] *Id.* § § 73-4-13 and 73-4-14.

[216] *Id.* § 73-4-15.

[217] *Id.* § 73-4-16. If a claimant desires a redetermination of water rights he must post a security bond and pay all costs if judgment is against him. *Id.* § 73-4-19.

[218] *Id.* § 73-2-1.

For purposes of administration and distribution of water, the State Engineer may determine the watershed to which any particular stream or water source is tributary. The statute makes provision for notice to the water users, hearing, and notification to the public of the result of the determination. Any person aggrieved by this determination may appeal under the procedure provided in the statute. *Id.* § 73-5-14.

[219] *Id.* § 73-5-1.

[220] *Id.* § 73-5-3.

[221] *Id.* § 73-5-4. See also § 73-5-12.

flow or acre-feet of storage,[222] and measured by well-known conventional methods.

The statute commands the State Engineer, after formulating his proposed determination, to distribute the waters in accordance therewith—or according to a modification by court order—until a final decree is rendered by the court; "provided, if the right to the use of said waters has been theretofore decreed or adjudicated said waters shall be distributed in accordance with such decree until the same is reversed, modified, vacated or otherwise legally set aside."[223]

With certain exceptions, the State Engineer has supervision over construction, repair, and operation of dams in the interest of security, safety, and protection of property;[224] and he may require such additions to or alterations of ditches or diversion works as are needed to attain these goals.[225] He may require such changes in water control works as are necessary to prevent waste, loss, pollution, or contamination of any water whether above or in the ground.[226] He may require reports from water users.[227]

Upon the State Engineer's own motion, or upon the petition of at least one-third of the users of ground water in any area as defined by the State Engineer, he shall hold a hearing to determine whether or not the ground water supply within the area is adequate for existing claims. Following notice and hearing, if he determines that the water supply is inadequate for existing claims, he shall divide, or the water commissioner shall divide, the waters within the area among the several claimants according to their rights.[228]

Any person aggrieved by a decision of the State Engineer may bring a civil action in the district court for a plenary review of that decision.[229]

Washington

Governmental Status

The Territory of Washington was established March 2, 1853.[1] The congressional act admitting Oregon to the Union included a provision that

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[222] *Id.* § 73-4-5.

[223] *Id.* § 73-4-11.

[224] *Id.* § § 73-5-5 and 73-5-6.

[225] *Id.* § 73-5-7.

[226] *Id.* § 73-5-9.

[227] *Id.* § 73-5-8. See also § 73-5-12. Any person claiming the right to use surface or ground water whose rights are not evidenced by a certificate of appropriation, an application filed with the State Engineer, a court decree, or a notice of claim previously filed pursuant to law, shall file a notice of such claim with the State Engineer setting forth specified information and such other information and proof as the State Engineer may require. Such notice of claim, or claim, shall be *prima facie* evidence of such claimed right. *Id.* § 73-5-13.

[228] *Id.* § 73-5-1. The State Engineer is also authorized to control artesian wells which are wasting water.

[229] *Id.* § 73-3-14.

[1] 10 Stat. 172 (1853).

"Until Congress shall otherwise direct, the residue of the territory of Oregon shall be and is hereby incorporated into and made a part of the territory of Washington."[2] Washington was admitted to statehood by act of Congress, approved November 11, 1889.[3]

State Administrative Agency

The Director of the Department of Ecology, created in 1970, is the chief water rights administrative officer of the State. He and the Department have various functions regarding the appropriation of water, the adjudication of water rights, and the administration and distribution of water. Such functions were formerly exercised by the Department of Water Resources (which was abolished in 1970) and predecessor agencies.[4] Various aspects of these functions are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—(1) Territorial legislation. The Territorial legislature accorded recognition to the appropriation doctrine in several enactments. For example, a law passed in 1873 relating to Yakima County, and one in 1886 applying to Yakima and Kittitas Counties (Kittitas was formerly a part of Yakima County), authorized appropriations for irrigation, recognized mining, manufacturing, and other beneficial purposes as well, and provided that all controversies respecting water rights for such purposes in the specified counties should be determined by respective dates of appropriation.[5] In 1879 a general act authorized appropriation of stream water for mining or manufacturing purposes.[6] An 1881 act authorized cities, incorporated towns and villages to provide water supplies for purposes of fire protection and use of their inhabitants.[7] And an 1883 act related to the acquisition of rights by incorporated water companies for the purpose of furnishing water to municipalities or their residents.[8]

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[2] 11 Stat. 383, § 5 (1859).

[3] 26 Stat. 1552 (1889).

[4] Wash. Laws 1970, ch. 62, created the Department of Ecology and the Office of the Director and transferred to them functions in these regards formerly exercised by the Department of Water Resources or its Director. Notably see RCWA § § 43.21A.040, 43.21A.050, and 43.21A.060(2) (Supp. 1974) and 43.21.130 (1962).

Although a number of the statutes discussed in the ensuing material still refer to the Department of Water Resources and/or its Director or a predecessor agency, these functions are now exercised by the Department of Ecology and/or its Director by virtue of this 1970 legislation.

For a listing of the predecessor agencies see, in chapter 7, "Methods of Appropriating Water of Watercourses—Water Rights Administration—Administrative Agencies—Changes in the several States—Washington."

[5] Wash. Laws 1873, p. 520, Laws 1885-86, p. 508.

[6] Wash. Laws 1879, p. 124, § 1.

[7] Wash. Laws 1881, p. 24.

[8] Wash. Laws 1883, p. 45, § 1, subd. 8.

(2) State constitution. The constitution of Washington declares that use of the waters of the State for irrigation, mining, and manufacturing purposes shall be deemed a public use.[9]

(3) State legislation. The first Legislature of the State of Washington not only recognized the doctrine of prior appropriation, but authorized appropriations of stream water for purposes of irrigation and provided for registration of irrigation ditches thereafter constructed or enlarged.[10] A year later, a law was passed declaring that water might be appropriated for irrigation, mining, manufacturing, or municipal purposes, and providing procedure for making appropriations for irrigation.[11] In 1917 the legislature enacted what was commonly referred to as the water code, which is the basis of the present water rights statutes.[12]

(4) Court decisions. The earliest decisions of the State supreme court with respect to water rights recognized the existence of the doctrine of appropriation on the public domain by virtue of the act of Congress of July 26, 1866.[13] "We therefore hold that the right to prior appropriation as recognized by said act of congress existed as a part of the laws and customs of the locality."[14] Acknowledgment of the principle was reiterated from time to time over the years.[15] In 1901, the supreme court observed that an elementary principle of the law of appropriation of water for irrigation is that the first appropriator is entitled to the quantity of water he appropriates, to the exclusion of subsequent claimants by either appropriation or riparian ownership.[16]

Originally, there was derived the broad rule that "the doctrine of appropriation applies only to public lands, and when such lands cease to be public and become private property, it is no longer applicable."[17] But in 1959 the court indicated it had rejected the earlier expressed view that the doctrine of appropriation applies only to public lands.[18]

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[9] Wash. Const. art. 21, § 1.

[10] Wash. Laws 1889-90, ch. 21, "Water Rights," subdivision "Irrigation and Irrigating Ditches."

[11] Wash. Laws 1891, ch. 142.

[12] Wash. Laws 1917, ch. 117.

[13] 14 Stat. 253, § 9 (1866). *Thorpe* v. *Tenem Ditch Co.*, 1 Wash. 566, 569, 20 Pac. 588 (1889); *Ellis* v. *Pomeroy Improvement Co.*, 1 Wash. 572, 577-578, 21 Pac. 27 (1889); *Geddis* v. *Parrish*, 1 Wash. 587, 590, 21 Pac. 314 (1889).

[14] *Isaacs* v. *Barber*, 10 Wash. 124, 128, 38 Pac. 871 (1894).

[15] See *Benton* v. *Johncox*, 17 Wash. 277, 279, 49 Pac. 495 (1897); *Nesalhous* v. *Walker*, 45 Wash. 621, 623-624, 88 Pac. 1032 (1907); *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 612, 117 Pac. 466 (1911). "The doctrines of appropriation and riparian rights have been recognized in this state from an early date." *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

[16] *Longmire* v. *Smith*, 26 Wash. 439, 447, 67 Pac. 246 (1901).

[17] *Benton* v. *Johncox*, 17 Wash. 277, 289, 49 Pac. 495 (1897).

[18] *Drake* v. *Smith*, 54 Wash. (2d) 57, 61, 337 Pac. (2d) 1059 (1959). This is discussed in more detail at notes 167-170 *infra.*

Procedure for appropriating water: Prestatutory.—For many years following the establishment of Washington Territory in 1853 there were no laws governing appropriation of water or recognizing existence of the appropriation doctrine in the jurisdiction. The first legislative recognition applicable to the Territory was an act of Congress of 1866 wherein it was declared, with respect to the public lands of the United States, that whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes had vested and accrued and were recognized and acknowledged by the *local customs, laws, and decisions of courts,* their possessors would be protected in their enjoyment thereof.[19] This act recognized and protected customs and usages which had grown up on the public domain with the Government's silent acquiescence; it reached back into the past as well as forward into the future.[20]

Throughout the Territorial period in this jurisdiction there was no statutory procedure for acquiring appropriative rights although the right to make appropriations was recognized, as noted in the preceding subtopic. But the Territorial legislature neither provided nor suggested any method by which a valid right could be acquired. That came very promptly with statehood. Prior thereto water was appropriated solely pursuant to local customs.

In early decisions the Washington Supreme Court referred to the matter of appropriating water pursuant to community customs,[21] identified the right so acquired with the declarations in the act of 1866,[22] and held that lack of Territorial procedural legislation did not impair the validity of the right.[23] In its first reported water rights decision the court discussed the early establishment of local customs. It indicated that agreement of all neighbors in a community that water could be and was appropriated by the first settlers in a certain way is such a custom as the act of 1866 designates as a vested right.

> Local customs of appropriating water may be establsihed by miners' meetings, or by common agreement of all the people in the locality, which latter was its manner of adoption in this case, and the defendant cannot claim that the doctrine of relation shall be given effect against this local custom, to which they agreed in common with all the people then in that locality.[24]

In a case decided in 1924, the Washington Supreme Court referred to the development of irrigation (slowly but definitely in sparsely settled areas), and

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[19] 14 Stat. 253, §9 (1866).

[20] *Broder* v. *Water Co.*, 101 U.S. 274, 275-276 (1879); *Isaacs* v. *Barber*, 10 Wash. 124, 129-132, 38 Pac. 871 (1894).

[21] *Ellis* v. *Pomeroy Improvement Co.*, 1 Wash. 572, 577-578, 21 Pac. 27 (1889).

[22] *Isaacs* v. *Barber*, 10 Wash. 124, 128, 38 Pac. 871 (1894).

[23] The positive acts of the water user and his reasonably inferable intentions would provide an acceptable basis for ascertaining his right and its extent. *Longmire* v. *Smith*, 26 Wash. 439, 448, 67 Pac. 246 (1901).

[24] *Thorpe* v. *Tenem Ditch Co.*, 1 Wash. 566, 570, 20 Pac. 588 (1889). But custom cannot authorize waste of water, as discussed in note 95 *infra.*

to notices of appropriation or intended appropriation. Such an appropriation was made in 1877 on public land of the United States. The court agreed that these notices, being unauthorized by law at that time, probably did not actually create rights, but stated that they were strong evidence of claims of right and of the intention of the parties, made public in the only way possible at that time and under the circumstances.[25]

Procedure for appropriating water: Act of 1890.—A long act of the first State legislature—which related to appropriations for irrigation purposes only—provided, among other things, for appropriation of water, apportionment among the several ditches according to priority of appropriation, and adjudication of priorities.[26] In section 42, every person thereafter constructing or enlarging a ditch diverting at least 1 cubic foot per second of water from any natural stream or lake for irrigation purposes was required to file in the office of the county clerk, within 90 days after completion of work, a map and verified statement showing prescribed information relating thereto. Priority related back to date of commencement of work if the filing was made within the time limit, otherwise only to the date of filing; but due diligence was not dispensed with. Section 43 provided that while the statute applied only to irrigation ditches, all rights were forfeited under the act unless due diligence was used in construction or enlargement.

Procedure for appropriating water: Act of 1891.—The water appropriation statute enacted in 1891 provided that the right to the use of water of streams, lakes, and certain other named surface sources for irrigation, mining, manufacturing, domestic, or municipal purposes might be acquired by appropriation, and that as between appropriations the first in time is first in right; but the procedure for appropriating water contained in the act applied only to appropriations made for irrigation. All conflicting acts or parts of acts were repealed.[27]

This 1891 procedure, which was in effect for 26 years, followed the pattern established in California in 1872 which was adopted in several other western jurisdictions as well. An intending appropriator was required to post a notice of his claim at the proposed point of storage or diversion and to file a copy within 10 days in the office of the county auditor. Work must have been commenced within prescribed times and be diligently and continuously prosecuted to completion unless interrupted by the elements. If the rules were strictly complied with, the right related back to the time of posting notice; but failure to comply deprived the appropriator of the right to use the water as against a subsequent appropriator who complied faithfully. Persons who had previously appropriated water but without completing their appropriations were required to proceed within 30 days as provided in the act or forfeit their rights.

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[25] *In re Alpowa Creek*, 129 Wash. 9, 15-16, 224 Pac. 29 (1924).
[26] Wash. Laws 1889-90, ch. 21.
[27] Wash. Laws 1891, ch. 142.

In answer to contentions that the right to use such waters of the State might be acquired only by compliance with the act of 1891, the Washington Supreme Court expressed its belief that such law did not provide an exclusive method of appropriation. "The statute does not express the intention to create an exclusive method, but it seems that the statute extended rather than restricted the privilege of securing rights to water by appropriation."[28] The court held further that "the posting of the notice does not give the right, but is a means of proving and preserving the right."[29]

Posting and filing of a notice of appropriation in 1905 and 1906, in connection with a use of water which was merely a continuation of a use innitiated many years previously, could not be held to limit the rights theretofore initiated nor to change appurtenant water rights in any essential particular.[30]

Procedure for appropriating water: Current method.—The 1917 legislature repealed the 1891 statute as well as all other conflicting laws and gave Washington an administrative system for control of public waters including an exclusive method of appropriating them for any beneficial use.[31] This 1917 act, as amended, is the basis of the current law.

(1) Exclusiveness of procedure. It is the expressed intent of the legislature that this law shall provide an exclusive method of appropriating water in Washington. Any right to the use of the water "shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise * * *."[32] The procedure starts with an application to the Director of the Department of Ecology for a permit to make the appropriation, and the water must not be used or diverted until a permit has been received. "The construction of any ditch, canal, or works, or performing any work in connection with the construction or appropriation, or the use of any waters, shall not be an appropriation of the water nor an act for the purpose of appropriating water unless a permit to make the appropriation has first been granted * * *."[33]

(2) Waters. Subject to existing rights, "all waters within the state belong to the public" and rights thereto may be acquired only by appropriation under the statute.[34] That this declaration relates to surface waters is indicated in the

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[28] *In re Crab Creek & Moses Lake*, 134 Wash. 7, 11-12, 235 Pac. 37 (1925). The court reached the same conclusion in *Kendall* v. *Joyce*, 48 Wash. 489, 491-492, 93 Pac. 1091 (1908), holding that (notwithstanding the existence of the statute) a valid appropriation could be made by an actual diversion and use of the water without posting the statutory notice.

[29] 134 Wash. at 14.

[30] *In re Deer Creek & Its Tributaries*, 171 Wash. 205, 208-209, 17 Pac. (2d) 856 (1933).

[31] Wash. Laws 1917, ch. 117.

[32] RCWA §90.03.010 (1962).

[33] *Id.* §90.03.250.

[34] *Id.* §90.03.010.

ground water law enacted in 1945 which specifies what ground waters are public and subject to appropriation, and extends the application of the surface water statutes to the appropriation and beneficial use of such ground waters as discussed later under "Ground Waters—Legislation."

(3) Who may appropriate water. (a) Current method. Those to whom the privilege of appropriating water is extended by the current statute are any person, firm, association, corporation, municipal corporation, irrigation district, or water users' association.[35] Special provision is made for appropriation of water by the United States, including temporary withdrawals for the purpose of making investigations.[36]

(b) The question of landownership as a qualification. The current statutory statement of organizations and entities that may appropriate water, noted above, obviously and necessarily disregards landownership as a qualification of an appropriator. The first general statute of 1890 contained several authorizations that "any person" might appropriate water for irrigation; a person holding a possessory right to land near a stream or lake, but not abutting thereon, might do so; and a person or organization might do so for the purpose of furnishing irrigation water to persons on his or its ditch whether or not they owned land contiguous thereto.[37] The statute of 1891 contained no restrictions as to landownership. It authorized appropriation of water for irrigation, mining, manufacturing, domestic, and municipal purposes, and provided procedure to be followed by any person, persons, or association desiring to appropriate water for irrigation purposes.[38]

The Washington Supreme Court rendered conflicting decisions on the question of landownership as a qualification of an appropriator of water. Apparently, it came to favor the principle that the appropriator need not own the land in order to initiate the appropriation, but that if the proposed appropriation is to be perfected, he must necessarily make some arrangements to operate the land on which he expects to complete the appropriation by application of the water to beneficial use.[39]

(4) Procedural steps. One who seeks to appropriate water must make an application to the Director of the Department of Ecology for a permit to make the appropriation. On receipt of the application, the Director orders publication of notice and investigates the application. Factors to be considered in acting on applications are discussed below under "Restrictions and preferences in appropriation of water." Pending issuance of a permit, no water

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[35] *Id.* § 90.03.250.

[36] *Id.* § § 90.40.030 and 90.40.040. In the latter regard, see the discussion at the end of note 75 *infra.*

[37] Wash. Laws 1889-90, ch. 21, § § 1, 7, 8, 55.

[38] Wash. Laws 1891, ch. 142, § § 1, 2-5.

[39] This is discussed in chapter 7 at notes 208-210. See also the discussion at notes 87-90 *infra.*

may be diverted or used and no construction performed with respect to the proposed appropriation. However, a temporary permit valid only during pendency of the application may be granted upon proper showing. Furthermore, if information for making the required findings is not available, the Director may issue a preliminary permit for a specified term, not to exceed 3 years, in order that the applicant may make the necessary surveys and studies.

Upon satisfactory showing that an appropriation has been perfected in accordance with the permit and the statute, the Director shall issue to the applicant a certificate stating the pertinent facts. Provision is made for recording certificates in the offices of the Director and the appropriate county.[40]

Any person adversely affected by an order, decision, or determination of the Director or an assistant or watermaster may appeal therefrom to the superior court. A stay bond may be filed if desired. Appeal may be taken from the court's judgment.[41]

(5) Diligence and gradual development. Construction work must be commenced, prosecuted with diligence, and completed within the times fixed by the Director, subject to extension for good cause shown. In fixing times for commencement and completion of work and application of water to beneficial use, the Director shall consider the cost and magnitude of the project and the engineering and physical features to be encountered.[42]

In one of its earliest decisions in water controversies, the Washington Supreme Court added to its definition of an appropriation the qualification that the intent or physical demonstration thereof "must be followed up with reasonable diligence, and consummated without unnecessary delay."[43] The factor of diligence has been repeatedly emphasized in succeeding cases.[44] Diligence as affecting reasonableness of time in taking successive steps in making an appropriation is necessary to successful invocation of the doctrine of relation.[45] (See "(7) Doctrine of relation," below.)

The general rule that an appropriator is not required to complete his

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[40] RCWA § § 90.03.250 to 90.03.340 (1962).

[41] *Id.* § 90.03.080. A recent case discussing considerations in such appeals is *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 169 *et seq.* (1973).

[42] RCWA § 90.03.320 (1962).

[43] *Ellis* v. *Pomeroy Improvement Co.*, 1 Wash. 572, 578, 21 Pac. 27 (1889).

[44] "It has usually been held that any matters not incidental to the enterprise itself, but rather personal to the appropriator, such as pecuniary inability, sickness and the like, are not circumstances excusing great delay in the construction of the works necessary to actual diversion and use of the water." *Grant Realty Co.* v. *Ham, Yearsley & Ryrie*, 96 Wash. 616, 624, 165 Pac. 495 (1917). For some time factors, see *In re Doan Creek*, 125 Wash. 14, 25, 215 Pac. 343 (1923); *In re Alpowa Creek*, 129 Wash. 9, 13-15, 224 Pac. 29 (1924); *State* v. *Anderson*, 134 Wash. 331, 339, 235 Pac. 809 (1925).

[45] *Pleasant Valley Irr. & Power Co.* v. *Okanogan Power & Irr. Co.*, 98 Wash. 401, 409, 167 Pac. 1122 (1917).

appropriation by putting all the water to beneficial use in the first year, or even in a longer period, provided he uses reasonable diligence in extending his irrigated area or other application of water under all the circumstances, has been acknowledged by the Washington Supreme Court.[46] But the court has indicated that the rule may not be applied in cases in which the projected uses are too remote and speculative,[47] or in which the growth is extremely slow.[48]

(6) Priority. "[As] between appropriations, the first in time shall be the first in right."[49] A defective application to appropriate water does not lose its priority if corrected as required by the Director within a reasonable time set by him.[50]

(7) Doctrine of relation. Under the current statutory procedure, "The right acquired by appropriation shall relate back to the date of filing of the original application * * *."[51] This applies to appropriations for any beneficial use of water.

The doctrine of relation back has had the attention of the Washington Supreme Court in a number of cases. It is a legal device for preserving the priority of an appropriation made diligently and in strict conformity with prevailing statutes or customs, whichever may have been controlling under the circumstances, as against appropriators who failed to conform and whose appropriations were completed after claimants who adhered to the law had initiated theirs.[52] This subtopic is closely related to that of "(5) Diligence and gradual development," discussed earlier.

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[46] *In re Crab Creek & Moses Lake*, 134 Wash. 7, 14-15, 235 Pac. 37 (1925). "As to what may be considered reasonable diligence in putting appropriated waters to a beneficial use must depend to a large extent upon circumstances. * * * The law does not require an immediate use. The doctrine of common sense applies." *In re Alpowa Creek*, 129 Wash. 9, 14-15, 224 Pac. 29 (1924).

[47] *Thorp* v. *McBride*, 75 Wash. 466, 469-470, 135 Pac. 228 (1913).

[48] *In re Doan Creek*, 125 Wash. 14, 25, 215 Pac. 343 (1923).

[49] RCWA §90.03.010 (1962). This is subject to the statutory authorization of condemnation of an inferior use of water for a superior use, discussed below under "Restrictions and preferences in appropriation of water—(2) Preferential uses of water."

[50] *Id.* §90.03.270.

[51] *Id.* §90.03.340.

[52] *Hunter Land Co.* v. *Laugenour*, 140 Wash. 558, 565, 250 Pac. 41 (1926).

Under the arid region doctrine of appropriation, which was in effect in Washington prior to statehood, "the completed diversion, if diligently accomplished, related back to the initial work so as to cut out intervening claimants." The supreme court went on to say that statutes such as the Washington act of 1891 (discussed above under the subtopic "Procedure for appropriating water: Act of 1891") are in the main but declaratory of the arid region doctrine, with the added requirement of an initial statutory notice to the date of which the appropriator's rights relate on condition that (1) he commence work within a given time, (2) prosecute it diligently and continuously to completion, and (3) apply the water to a beneficial use. *Grant Realty Co.* v. *Ham, Yearsley & Ryrie*, 96 Wash. 616, 623, 165 Pac. 495 (1917). Hence, while the statute of

(8) Period of use of water. In a suit between private parties to interpret a decree of adjudication with respect to duration of the irrigation season, the supreme court held that the court may determine the time or period of use of water, as well as the priority and amount of use.[53]

(9) Storage of water. Applications for reservoir permits are subject to the provisions governing applications for permits to appropriate water from the Director of the Department of Ecology. The applicant who proposes to apply to a beneficial use water stored in a reservoir also files an application for a secondary permit which refers to the reservoir as the source of water supply and shows documentary evidence of an agreement with the reservoir owners for the impounding of enough water for his purposes. On perfection of beneficial use under the secondary permit, the Director takes proof of the water users. The final certificate of appropriation refers to both the ditch and works described in the secondary permit and the reservoir described in the primary permit.[54]

Construction of works for storage of 10 acre-feet or more of water is subject to supervision and approval of the Director with respect to their safety. Reservoir owners or operators must provide for water measuring devices when required by the Director.[55]

1891 was in effect, one who complied with it in making an appropriation for irrigation enjoyed the benefit of the doctrine of relation. *State ex rel. Ham, Yearsley & Ryrie* v. *Superior Ct.*, 70 Wash. 442, 462, 126 Pac. 945 (1912). See *State* v. *Icicle Irr. Dist.*, 159 Wash. 524, 525-528, 294 Pac. 245 (1930); *Pleasant Valley Irr. & Power Co.* v. *Okanogan Power & Irr. Co.*, 98 Wash. 401, 409, 167 Pac. 1122 (1917). But where reasonable diligence in prosecuting the work was lacking, there could be no relation back from completion of the diversion and application to beneficial use to the inception of the right. *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 612-614, 117 Pac. 466 (1911). The 1891 statute did not provide an *exclusive* method of appropriating water; hence failure to post notice and otherwise follow the statute strictly did not affect the validity of the appropriative right, when completed, with priority fixed as of the date of completion. *Kendall* v. *Joyce*, 48 Wash. 489, 491, 93 Pac. 1091 (1908). Since the statutory procedure requiring posting of notice related only to irrigation, the priority of a power water right perfected with reasonable diligence related back to the first substantial act of acquiring the right, whether that act was the actual commencement of construction work or other necessary work incident thereto. *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 641, 131 Pac. 220 (1913).

[53] *Wilson* v. *Angelo*, 176 Wash. 157, 160-161, 28 Pac. (2d) 276 (1934).

[54] RCWA §90.03.370 (1962).

[55] *Id.* §§90.03.350 and 90.03.360. See also §90.28.170 with respect to dams across streams.

Other legislation dating from 1960, *inter alia*, imposes a 25-foot limitation on the height of dams on certain tributary waters within the Columbia River fish sanctuary. Initiative 25, approved 1960; Wash. Laws 1961, ch. 4, RCWA §75.20.110 (1962). (Section 75.20.010, enacted in 1949, contains a rather similar provision.) The State supreme court decided that this legislation's 25-foot limitation on the height of dams

(*Continued*)

Restrictions and preferences in appropriation of water.—(1) Statutory restrictions. The water rights statute provides that if on receipt of an application to appropriate water and investigations thereon, the Director of the Department of Ecology finds that there is no unappropriated water in the proposed source of supply, or that the proposed use conflicts with existing rights, or that it threatens to prove detrimental to the public interest, having due regard to the highest feasible development of use of public waters, it is his duty to reject the application and refuse to issue the permit asked for.[56] If an applicant should purchase or condemn such conflicting rights, the Director may grant the permit. An application may be approved for a lesser quantity of water than applied for, if there is substantial reason therefor. In any event it may not be approved for more water than can be applied to beneficial use for the purposes contemplated in the application. (The purpose of use of appropriated water must be beneficial.[57]) It is the Director's duty to investigate all relevant and material facts in determining whether or not to issue a permit. The permit shall state the amount of water to which the applicant is entitled and the beneficial use or uses to which it may be applied.[58]

The Water Resources Act of 1971[59] includes a "general declaration of fundamentals" which shall guide the "utilization and management" of the waters of the State "to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state" and to provide direction to the Department of Ecology and other state agencies in carrying out water and related resources programs.[60] This includes the following list of various water uses declared to be beneficial:

> Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish

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(*Continued*)
was valid except to the extent it conflicts with the paramount Federal jurisdiction over navigable streams. *Tacoma* v. *Taxpayers of Tacoma*, 60 Wash. (2d) 66, 371 Pac. (2d) 938, 939, 942 (1962). Chapter 75.20 also contains other requirements for the protection of fish. See, e.g., RCWA § 75.20.100 (Supp. 1974).

[56] Washington legislation enacted in 1967, as amended in 1969, requires that anyone using or claiming the right to withdraw or divert and make beneficial use of public waters of the State other than under a permit or certificate from the Department of Ecology (or a predecessor agency) shall, after the required notice, file a claim with the Department by June 30, 1974, or it will be conclusively deemed to be relinquished. The filing of a claim does not constitute an adjudication of the claimed right. (See "Claim-filing Requirement," *infra.*) RCWA § § 90.14.010 to 90.14.121 (Supp. 1974).

[57] RCWA § § 90.03.250 and 90.03.290 (1962).

[58] *Id.* § 90.03.290.

[59] RCWA ch. 90.54 (Supp. 1974).

[60] The Act begins with a section entitled "Purpose" described generally in a recent case as follows: "The state water resource policy finds that the public health, preservation of natural resources and aesthetic values are deserving of promotion, in addition to the state's economic well-being. RCW 90.54.010." *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 172 (1973).

> and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.[61]

It also includes several other declarations, including declarations that (1) allocation of waters among potential uses and users shall be based generally on securing the "maximum net benefits" for the people of the State which shall constitute "total benefits less costs including opportunities lost;" (2) the quality of the natural environment shall be protected and, where possible, enhanced in certain general ways[62] including that "Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served"; (3) adequate and safe water supplies shall be preserved in potable condition to satisfy human domestic needs; (4) water conservation practices shall be encouraged; and (5) public water supply systems shall be encouraged and supply systems for multiple domestic use which do not serve the public generally shall be discouraged.[63]

The 1971 Act directed the Department of Ecology to develop and implement by appropriate rules, in accordance with the policies specified in the Act, a comprehensive state water resources program to provide "a process for making decisions on future water resource allocation and use. The Department may develop the program in segments so that immediate attention may be given to waters of a given physio-economic region of the state or to specific critical problems of water allocation and use." The Department was further directed to change its existing regulations and adopt new regulations as needed to insure its regulatory programs are in accord with the Act's policies and the Department's

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[61] RCWA §90.54.020(1) (Supp. 1974). See also §43.27A.020 (1970). Both sections were cited regarding domestic use being a beneficial use in *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 171 (1973).

The 1971 Act also provides that for its purposes: " 'Utilize' or 'utilization' shall not only mean use of water for such long-recognized consumptive or nonconsumptive beneficial purposes as domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, thermal power production, mining, recreational, maintenance of wildlife and fishlife purposes, but includes the retention of water in lakes and streams for the protection of environmental, scenic, aesthetic and related purposes, upon which economic values have not been placed historically and are difficult to quantify." RCWA §90.54.120 (Supp. 1974).

[62] This is discussed in part in *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 172 (1973).

[63] RCWA §§90.54.010 and 90.54.020 (Supp. 1974). Full recognition shall be given to natural interrelationships of surface and ground waters. *Id.* §90.54.020(8).

comprehensive program.[64] However, the 1971 Act provided that its provisions shall not affect any existing water rights—appropriative, riparian, or otherwise.[65]

The State Environmental Policy Act of 1971[66] requires, among other things, that all State agencies and other branches of government of the State include in their "major actions significantly affecting the quality of the environment," a detailed statement on various environmental impacts and alternatives to the proposed action, in consultation with other appropriate agencies and officials.[67] Other broad guidelines are included in the Act. But as amended in 1974, no such statement is required in making decisions pertaining to applications for appropriation of 50 cubic feet of water per second or less for agricultural irrigation projects promulgated by any person or private firm, corporation, or association, without resort to subsidy by either State or Federal Government.[68]

In a 1973 case the Washington Supreme Court, in reviewing a Departmental decision approving an application for water appropriation, indicated that as the agency's action had not been finalized prior to the passage of the Water Resources Act of 1971 and the State Environmental Policy Act of 1971, relevant provisions of both acts were applicable to pending issues in the case "and the department is obligated, under them, to consider the total environmental and ecological factors to the fullest in deciding major matters."[69] "There being no argument that the issuance of the water use permit in this case does not amount to a major action significantly affecting the quality of the environment * * * the department is required to act in accordance with the provisions of SEPA [the State Environmental Policy Act] in conducting its additional investigation under the remand decree" of the lower court.[70] The supreme court, among other things, said it recognized that

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[64] *Id.* §90.54.040. The Department also was directed to review and recommend any needed legislative changes.

[65] *Id.* §90.54.900.

[66] *Id.* ch. 43.21C.

[67] *Id.* §43.21C.030(2)(c) and (d).

[68] *Id.* §43.21C.035.

[69] The court indicated that the Department's contention that, in acting on water appropriation applications, the above-mentioned requirement that it should determine the question of detriment to the public welfare "does not [for specified reasons] require an examination of potential pollution resulting from the issuance of the appropriation permit and the appropriation * * * is no longer meritorious" in light of the enactment of these two 1971 statutes. *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 171-173 (1973).

Some other discussions of the Water Resources Act of 1971 in this case have been noted above.

[70] 508 Pac. (2d) at 172. In a subsequent case, *Eastlake Community Council* v. *Roanoke Assn., Inc.*, 82 Wash. (2d) 475, 513 Pac. (2d) 36, 45 (1973), involving a building permit, the court said, "The facts of [the instant] case do not present the retroactive

the Act "does not demand any particular substantive result in governmental decision making, for it indicates 'other considerations of state policy' * * * continue to be the responsibility of the agencies.[71] * * * In essence, what [the Act] requires, is that the 'presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.[72]' "

The Water Resources Act of 1971 provides that in conjunction with the programs to be formulated to provide a process for making decisions on future water resource allocation and use (discussed above) the Department may by rule, whenever deemed necessary by its Director (and after notice and hearing), reserve and set aside waters for beneficial utilization in the future, and when there is insufficient information to make sound decisions, it may withdraw various waters from additional appropriations until such information is available.[73]

Legislation enacted in 1969 provides that the Department of Ecology may establish minimum water flows or levels for streams, lakes or other public waters to protect fish, game, birds, or other wildlife resources, or recreational or aesthetic values, whenever this appears to be in the public interest. The statute provides that the Department shall establish such minimum flows or levels as are needed to protect the resource when requested to do so by the Department of Fisheries or the Game Commission, or by the Water Pollution Control Commission to preserve water quality. (The Water Pollution Control Commission was abolished in 1970 and its powers transferred to the Department of Ecology.[74]) In establishing such minimum flows, the Department also shall be guided by the State's policy to retain sufficient minimum flows or levels to provide adequate waters for stock on riparian grazing lands to drink from such streams or lakes if this does not result in an unconscionable waste. Regulations establishing minimum flows or levels shall be preceded by required public notices and hearings and shall be filed in a "Minimum Water Level and Flow Register." No right to divert or store public waters shall be granted by the Department which shall conflict with the regulations estab-

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application of SEPA because a major action triggering the act's application exists after SEPA's effective date." The court also said a renewal of the building permit was a "major action" because it involved a "discretionary nonduplicative stage of the building department's approval proceedings relative to an ongoing major project." 513 Pac. (2d) at 45.

[71] See RCWA §43.21C.020(2) (Supp. 1974), which states, "In order to carry out the policy set forth in this act, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to" accomplish the specified goals.

[72] 508 Pac. (2d) at 172.

[73] RCWA §90.54.050 (Supp. 1974). But this Act's provisions shall not affect existing water rights, as discussed at note 65 *supra*.

[74] Wash. Laws 1970, ch. 62, § §6 and 30(15), repealing RCWA §90.48.021.

lishing flows or levels, but such regulations establishing flows or levels shall not affect water and storage rights in existence prior to the enactment of this legislation in 1969.[75]

Earlier legislation dating from 1949 provides among other things, that subject to existing rights, the Director of the Department of Ecology shall give the Directors of the Departments of Fisheries and Game notice of each application for a permit to divert water from streams of the State, or other hydraulic permit, and give them 30 days to object. He "may refuse" to issue any such permit if in the opinion of the director of either department such permit "might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream." This legislation declares it to be State policy to maintain streamflows sufficient to support food and game fish populations.[76]

(2) Preferential uses of water. Washington legislation declares the beneficial use of water to be a public use. It extends to any person (meaning an individual, water users' association, corporation, irrigation district, or municipal corporation) the right to exercise the power of eminent domain for acquiring property and rights needed for the application or storage of water for beneficial use, which includes the right to condemn an inferior use of water for a superior use. The court is vested with the function of determining what use will be for the greatest public benefit and therefore to be deemed a superior use. A limitation is:

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[75] RCWA § 90.22.010 to 90.22.040 (Supp. 1974).

Chapter 90.24 (1962), as amended, was enacted in 1939 and pertains to petitions for an order of a superior court to regulate the outflow and level of a meandered lake for the benefit of abutting property and to periodically lower the level to restrict weed growth and other similar objectionable matters in the lake. But this does not apply to lakes storing water for irrigation or other beneficial purposes or to lakes navigable from the sea. In a recent case, the State supreme court said this statute "provides avenues to persons to set or regulate water levels in order to control floods," and held that a certain superior court order under this statute was inapplicable to issues in the instant case. *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 170-171 (1973). The original 1939 statute expressly provided that it was "in the interests of flood control." Wash. Laws 1939, ch. 107, § 2, p. 307. But subsequent to the 1950 court order involved in the *Stempel* case, the statute was amended in 1959 by substituting the above-described purposes and deleting its former express reference to flood control. Wash. Laws 1959, ch. 258, § 1, p. 1209.

Under RCWA § 90.40.030 (Supp. 1974), as amended in 1963, specified waters may be withheld from general appropriation for periods of time to enable the United States to make examination or surveys for their utilization.

[76] RCWA § 75.20.050 (1962). Other legislation dating from 1960 provides that within the Columbia River fish sanctuary no person, as defined, may divert so much water as to reduce streamflows below the annual average low flow, as defined, except subject to legal appropriation and on the concurrent orders of the directors of fisheries and game. Initiative 25, approved 1960, Wash. Laws 1961, ch. 4, RCWA § 75.20.110 (1962). (Section 75.20.010, enacted in 1949, contains a rather similar provision.) See also note 55 *supra* regarding another aspect of this legislation.

> That no property right in water or the use of water shall be acquired hereunder by condemnation for irrigation purposes, which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land then under irrigation to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity where such land is situated. In any case, the court shall determine what is the most economical method.[77]

In construing this legislation, the Washington Supreme Court held that although incidental benefits to be derived by the public from the establishment of a private enterprise could not be considered sufficient to make the intended use a public one, this nevertheless does not apply to the arid and semi-arid portions of the State in which water supplies are limited and generally cannot be duplicated—where "water is life itself." Hence under such circumstances the use of water for irrigation, or for "domestic purposes when the domestic purpose desired is the foundation of an agricultural enterprise," becomes a public use.[78]

Some other aspects of the Washington appropriative right.—(1) Nature of the right. The appropriative right is real property.[79] It is an incorporeal hereditament as distinguished from water alone, which is corporeal.[80]

The appropriator has been said to become a conditional owner of the appropriated water, the condition being that he use reasonable diligence to put

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[77] RCWA §§ 90.03.040 and 90.03.480 (1962).

Other Washington legislation grants the power of eminent domain, within limitations, to specified municipalities, districts or State agencies for the acquisition of water or water rights for specified purposes, although without reference to this provision regarding the condemnation of an inferior use by a superior one. See, e.g., RCWA §§ 35.21.030, 35.92.190, 54.16.020, 56.08.010, 57.08.010, 75.08.040, and 87.03.140 to 87.03.150 (1962), and § 77.12.200 (Supp. 1974).

[78] *State ex rel. Andersen* v. *Superior Ct.*, 119 Wash. 406, 410-411, 205 Pac. 1051 (1922). The court said, "It is true that this proceeding cannot be upheld unless the purpose sought can be said to be a public purpose * * *." 205 Pac. at 1052. The court referred to Wash. Const. art. 21, § 1, which states, "The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use," and art. 1, § 16, which states, "Private property shall not be taken for private use, except for private ways of necessity," and whether a taking is for a public use is a judicial question "without regard to any legislative assertion that the use is public." The court indicated that for this purpose "public use" may include domestic or other uses besides those enumerated in art. 21, § 1, this being a judicial determination. 205 Pac. at 1052.

[79] *Thompson* v. *Short*, 6 Wash. (2d) 71, 87, 106 Pac. (2d) 720 (1940); *Tedford* v. *Wenatchee Reclamation Dist.*, 127 Wash. 495, 498, 221 Pac. 328 (1923).

[80] *Madison* v. *McNeal*, 171 Wash. 669, 675, 19 Pac. (2d) 97 (1933). In this case the supreme court stated that although some authorities make exceptions, it is a general principle of law that water, after diversion from a natural source and into artificial control works, takes the character of personal property, the ownership of which rests in the appropriator; but that the *water right* itself, whether the water is flowing naturally or in control works, is treated as an incorporeal hereditament.

it to a proper use.[81] An appropriative right is a right to use a definite quantity of water.[82] In one of its earliest water rights decisions, the Washington Supreme Court announced essentials of a valid appropriation of water which it has repeated from time to time. Appropriation, said the court, comprises the intent to take water, accompanied by some open, physical demonstration thereof, for some valuable use, followed up with reasonable diligence and consummated without unnecessary delay.[83]

(2) Relation of the appropriative right to land. (a) Public lands. Pursuant to early authorization by the United States Government, appropriations could be made of water flowing over the public domain. In early decisions the Washington Supreme Court indicated that the doctrine of appropriation applied only to public lands, but this restriction was later rejected by the court.[84]

(b) Location of irrigated land. It was early held that the right of appropriation is not controlled by juxtaposition of the stream and the premises irrigated.[85] Specifically, an essential facet of the doctrine has always been that water may be taken by appropriation for use on land nonriparian to the body of water from which it is taken.[86]

(c) Appurtenance of right to land. A right to use water applied to a beneficial purpose is appurtenant to the land or place of use,[87] but may be transferred and become appurtenant to some other land or place of use without loss of priority if made pursuant to a prescribed procedure.[88] Water appropriated for irrigation purposes becomes appurtenant "only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes."[89] Being an interest in real property appurtenant to the land, the water right passes to the grantee when title to the land is conveyed.[90]

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[81] *In re Alpowa Creek*, 129 Wash. 9, 17, 224 Pac. 29 (1924).

[82] *Wallace* v. *Weitman*, 52 Wash. (2d) 585, 588, 328 Pac. (2d) 157 (1958).

[83] *Ellis* v. *Pomeroy Improvement Co.*, 1 Wash. 572, 578, 21 Pac. 27 (1889). See *Sander* v. *Bull*, 76 Wash. 1, 4-5, 135 Pac. 489 (1913); *In re Alpowa Creek*, 129 Wash. 9, 13-14, 224 Pac. 29 (1924).

[84] This is discussed at notes 167-170 *infra.*

[85] *Offield* v. *Ish*, 21 Wash. 277, 281, 57 Pac. 809 (1899).

[86] *Hunter Land Co.* v. *Laugenour*, 140 Wash. 558, 570, 250 Pac. 41 (1926); *In re Alpowa Creek*, 129 Wash. 9, 17, 224 Pac. 29 (1924).

[87] The Washington Supreme Court has recognized the appurtenance of a water right to land. *Lawrence* v. *Southard*, 192 Wash. 287, 300, 73 Pac. (2d) 722 (1937); *Thompson* v. *Short*, 6 Wash. (2d) 71, 87-88, 106 Pac. (2d) 720 (1940); *Madison* v. *McNeal*, 171 Wash. 669, 675, 19 Pac. (2d) 97 (1933).

Regarding the question of landownership as a qualification of an appropriator, see the discussion at notes 37-39 *supra.*

[88] RCWA §90.03.380 (1962). See the discussion under "(7) Change in exercise of water right," *infra.*

[89] RCWA §90.03.290 (1962).

[90] *Drake* v. *Smith*, 54 Wash. (2d) 57, 61, 337 Pac. (2d) 1059 (1959); *Tedford* v. *Wenatchee Reclamation Dist.*, 127 Wash. 495, 498, 221 Pac. 328 (1923); *Geddis* v. *Parrish*, 1 Wash. 587, 591, 21 Pac. 314 (1889).

(3) Appropriation of water for use of others. That an appropriation of water may be made for the purpose of selling the water to others has been recognized from the earliest times.[91] It was reiterated in a decision to the effect that the appropriator of water need not be the owner of any lands, riparian or otherwise.[92]

(4) Relative rights of senior and junior appropriators. "It is an elementary principle of the law of appropriation of water for irrigation that the first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants by appropriation or riparian ownership."[93] This is subject to the statutory authorization of condemnation of an inferior use of water for a superior use, discussed earlier under "Restrictions and preferences in appropriation of water—(2) Preferential uses of water."

The measure of the appropriative right is the quantity of water actually diverted and put to a beneficial use.[94] The prior appropriator is entitled not only to take the quantity of water appropriated, but also to have such quantity of water flow to the prior appropriator's point of diversion without being so polluted by upstream parties as to render it unfit for the purpose for which the right was acquired.[95] However, with respect to a contention that water of a stream was being unduly polluted, but where the evidence failed to show that the upstream use was unreasonable, the Washington Supreme Court held that the downstream appropriator must accommodate its appliances for irrigation to the conditions which a reasonable use may require.[96]

(5) Rotation in use of water. Water users may rotate in the use of the water to which they are collectively entitled. Likewise, an individual who controls water rights of different priority may rotate in use when the rotation can be

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[91] *Thorpe* v. *Tenem Ditch Co.*, 1 Wash. 566, 570, 20 Pac. 588 (1889).

[92] *In re Alpowa Creek*, 129 Wash. 9, 17, 224 Pac. 29 (1924).

[93] *Longmire* v. *Smith*, 26 Wash. 439, 447, 67 Pac. 246 (1901); *Avery* v. *Johnson*, 59 Wash. 332, 335, 109 Pac. 1028 (1910).

Several parties may appropriate water simultaneously by means of a common ditch for lands even though held in severalty. These appropriators may hold ownership of the water right jointly or in common. Distribution of the water after diversion into their ditch is their own affair. *Miller* v. *Lake Irr. Co.*, 27 Wash. 447, 451-452, 67 Pac. 996 (1902).

[94] *Ortel* v. *Stone*, 119 Wash. 500, 503, 205 Pac. 1055 (1922). See the discussion at notes 42-45 and 51 *supra*, regarding diligence, gradual development, and the doctrine of relation.

[95] *Naches & Cowiche Ditch Co.* v. *Weikel*, 87 Wash. 224, 227-228, 151 Pac. 494 (1915). See *Drake* v. *Smith*, 54 Wash. (2d) 57, 60, 337 Pac. (2d) 1059 (1959). In a case decided while the statute of 1891 was in effect, the Washington Supreme Court declared that custom was not controlling in the case of a water contract allowing the company to adopt reasonable regulations, for in spite of custom a water user's rights and manner of use must be founded on necessity and on the quantity of water he can put to beneficial use; that custom cannot authorize waste of water. *Shafford* v. *White Bluffs Land & Irr. Co.*, 63 Wash. 10, 14-15, 114 Pac. 883 (1911).

[96] *Naches & Cowiche Ditch Co.* v. *Weikel*, 87 Wash. 224, 227-233, 151 Pac. 494 (1915).

made without detriment to other existing water rights. Approval of the watermaster or Director of the Department of Ecology is required.[97]

(6) Use of natural channel; commingling. The water rights statute authorizes conveyance of water along any natural stream or lake. Compensation must be made for injuries caused by raising the water already there above the ordinary high watermark. Due allowance shall be made for evaporation and seepage, the amount to be determined by the Director of the Department of Ecology on application of any interested person.[98]

(7) Change in exercise of water right. Change in point of diversion or purpose of use of an appropriated water supply, or transfer of use to other land or other place of use, is authorized by the statute if it can be done without injury to existing rights and pursuant to a prescribed statutory procedure. Application must first be made to the Director of the Department of Ecology and notice must be published as in case of applications for permits to appropriate water. If the Director finds that the desired change can be made without injuring others, he issues to the applicant a certificate which is filed and which has the same effect as provided in the original certificate or permit.[99] A seasonal or temporary change in point of diversion or place of use of water may be made, if it can be done without detriment to existing rights, with permission of the Director or the district watermaster.[100]

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[97] RCWA §90.03.390 (1962). This legislation was enacted in 1929. Wash. Laws 1929, ch. 122, §7.

Where all parties to a statutory adjudication of water rights had in 1924 agreed among themselves that their rights should be exercised by means of a rotation procedure, and no one had contested it, the Washington Supreme Court held the trial court should have affirmed the agreement (although, even though the court's adjudication decree might have little or no effect on the actual use of the water, the trial court erroneously dismissed the proceeding). *In re Crab Creek*, 194 Wash. 634, 644, 79 Pac. (2d) 323 (1938). In a 1926 decision rendered in the course of a statutory adjudication, this court declared that inclusion of a plan of rotation should first be considered and adjusted by the State administrator, which had not been "adopted entirely" by him here. "We think that neither the trial court nor ourselves should, in the first instance, decree such method of distribution, without much more conclusive and compelling evidence than is in this case." *In re Ahtanum Creek*, 139 Wash. 84, 95-96, 245 Pac. 758 (1926).

[98] RCWA §90.03.030 (1962). Construing the statute, the Washington Supreme Court stated that such limited use of natural channels is not inconsistent with ownership of the streambed by the owners of adjoining land. *Pleasant Valley Irr. & Power Co.* v. *Barker*, 98 Wash. 459, 462-463, 167 Pac. 1092 (1917). See also chapter 9 at note 278 regarding an earlier case.

Prior to the enactment of this statutory authorization, the court approved the practice of commingling (as established in other jurisdictions) when the circumstances were such that appropriators could take advantage of the natural beds and channels of streams without injury to the rights of others. *Miller* v. *Wheeler*, 54 Wash. 429, 436, 103 Pac. 641 (1909).

[99] RCWA §90.03.380 (1962).

[100] *Id.* §90.03.390.

The right to change the point of diversion without affecting the priority or quantity of water appropriated, so long as such change does not result in damage to others, has been consistently recognized by the Washington Supreme Court.[101]

(8) Loss of water right. (a) Abandonment and statutory forfeiture. The Washington Supreme Court has indicated that to constitute abandonment of an appropriative right, "The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region."[102] Intent, then, is an essential element of abandonment.[103] Abandonment is also a question of fact.[104] In one case, the court indicated that nonuse of the water for 10 or 11 years alone, with no evidence of intent to abandon the right, is not sufficient to justify a finding of abandonment.[105]

Washington legislation enacted in 1967 provides that any person entitled to divert or withdraw waters of the State through any appropriation authorized by legislation prior to the enactment of chapter 117, Laws 1917, or by custom or general adjudication, or any "person hereafter [after July 1, 1967] entitled to divert or withdraw waters of the state through an appropriation authorized under" the pertinent statutes who (1) "abandons the same" or (2) "voluntarily fails without sufficient cause,[106] to beneficially use all or any part" of such right "for any period of five successive years" after the effective date of the act (July 1, 1967) shall relinquish such right or portion thereof, which shall revert to the State and the affected waters become available for appropriation.[107] The

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[101] *In re Ahtanum Creek*, 139 Wash. 84, 100, 245 Pac. 758 (1926); *Offield* v. *Ish*, 21 Wash. 277, 281, 57 Pac. 809 (1899); *Mally* v. *Weidensteiner*, 88 Wash. 398, 403-404, 153 Pac. 342 (1915). The right to make a temporary change in point of diversion—authorized by permit pursuant to the statute—was denied by the supreme court because of the court's finding that the change could not be made without infringing certain vested and adjudicated rights. *Haberman* v. *Sander*, 166 Wash. 453, 456-463, 7 Pac. (2d) 563 (1932).

See the discussion in chapter 9 at note 22 regarding judicial rather than administrative control over changes within an irrigation district.

[102] *Miller* v. *Wheeler*, 54 Wash. 429, 435, 103 Pac. 641 (1909); *Sander* v. *Bull*, 76 Wash. 1, 6, 135 Pac. 489 (1913).

[103] *Schumacher* v. *Brand*, 72 Wash. 543, 546-547, 130 Pac. 1145 (1913). For other circumstances negating intention, see *Pleasant Valley Irr. & Power Co.* v. *Okanogan Power & Irr. Co.*, 98 Wash. 401, 411, 167 Pac. 1122 (1917).

[104] *Malnati* v. *Ramstead*, 50 Wash. (2d) 105, 109, 309 Pac. (2d) 754 (1957); *Wendler* v. *Woodward*, 93 Wash. 684, 688, 161 Pac. 1043 (1916); *Pays* v. *Roseburg*, 123 Wash. 82, 85, 211 Pac. 750 (1923); *Hunter Land Co.* v. *Laugenour*, 140 Wash. 558, 567, 250 Pac. 41 (1926).

[105] *Thorp* v. *McBride*, 75 Wash. 466, 468-469, 135 Pac. 228 (1913).

[106] Sufficient cause is defined as drought or other unavailability of water, service in the armed forces during military crisis, nonvoluntary service in the armed forces, operation of legal proceedings, or Federal laws imposing land or water use restrictions, acreage limitations, or production quotas. RCWA §90.14.140 (Supp. 1974).

[107] *Id.* §§90.14.160 and 90.14.180.

Director of the Department of Ecology may, after notice and hearing, make an order determining that a water right, or some portion thereof, has been relinquished for such nonuse.[108] But certain uses of water relating to power development, reserve supplies, determined future developments, municipal supplies, and waters not subject to appropriation, to enable certain Federal surveys for their use, are expressly exempted from these provisions.[109]

(b) Prescription or adverse use. Washington legislation effective July 1, 1967, provides that no rights to use "appropriated or unappropriated" waters of the State may be acquired by prescription or adverse use.[110] Prior to this legislation, the Washington Supreme Court recognized "that rights to the use of flowing waters may be acquired by prescription."[111] As a general proposition, such a right could be acquired only by adverse use of the character required for acquisition of title to land by adverse possession.[112] The extent of such a right was determined from the nature and character of the adverse use on which it was founded; and it resulted in vesting title in the claimant to the same extent as if the right had been conveyed by deed.[113] Since a prescriptive right is a corresponding loss or forfeiture of right by another, and since the law does not favor forfeitures, it was absolutely essential that all the elements necessary to establish adverse possession amounting to a prescriptive right should be present. And "The burden of proving the existence of a prescriptive right is placed upon the one who is benefited thereby."[114]

The essential elements of prescription as declared by the court were that the

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[108] *Id.* §90.14.130. This order is subject to appeal to an appropriate court, with the Director's findings of fact being prima facie evidence of such relinquishment. *Id.* §90.14.190.

[109] There shall be no relinquishment of a water right "(1) If such right is claimed for power development purposes under RCW 90.16 and annual license fees are paid in accordance with RCW 90.16, or (2) If such right is used for a standby or reserve water supply to be used in time of drought or other low flow period so long as withdrawal or diversion facilities are maintained in good operating condition for the use of such reserve or standby water supply, or (3) If such right is claimed for a determined future development to take place either within fifteen years of the effective date of this act, or the most recent beneficial use of the water right, whichever date is later, or (4) If such right is claimed for municipal water supply purposes under RCW 90.03, or (5) If such waters are not subject to appropriation under the applicable provisions of RCW 90.40.030 as now or hereafter amended [to enable certain Federal surveys for their use, discussed in note 75 *supra*]." *Id.* §90.14.140.

However, certain actions relating to water for public and industrial purposes are conclusive evidence of abandonment of rights to use water for power purposes. RCWA §90.16.060 (1962).

[110] RCWA §90.14.220 (Supp. 1974).

[111] *Dontanello* v. *Gust*, 86 Wash. 268, 270, 150 Pac. 420 (1915). See *Allen* v. *Roseberg*, 70 Wash. 422, 426, 126 Pac. 900 (1912).

[112] *Ochfen* v. *Kominsky*, 121 Wash. 60, 62, 207 Pac. 1050 (1922).

[113] *Dontanello* v. *Gust*, 86 Wash. 268, 270-271, 150 Pac. 420 (1915).

[114] *Downie* v. *Renton*, 167 Wash. 374, 377, 9 Pac. (2d) 372 (1932).

use of water must have been: open, visible, and notorious;[115] adverse and hostile to the true owner;[116] continuous, uninterrupted, and peaceable;[117] exclusive,[118] under claim of right or color of title;[119] and with the knowledge and acquiescence of the true owner.[120] Adverse use must have been continued throughout the period of the statute of limitations.[121] The period began to run only from the time the person suffering the damage first had a cause of action arising from the adverse use.[122]

Estoppel and laches have also been considered by the Washington Supreme Court in regard to the loss of water rights.[123]

The Riparian Doctrine

Recognition of the riparian doctrine.—(1) Legislative. The first Washington Legislature declared in 1891 that claimants or holders of possessory rights in land on the banks of any natural stream were entitled to the use of any water thereof not otherwise appropriated, for irrigation, to the full extent of the soil for agricultural purposes; and that such a person was entitled to a right-of-way through intervening lands or those above or below him on the stream if needed to get the water to his land.[124] The same statute provided for the right to condemn riparian rights in any natural stream or lake as such rights existed at

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[115] 167 Wash. at 377-384.

[116] *Malnati* v. *Ramstead*, 50 Wash. (2d) 105, 108, 309 Pac. (2d) 754 (1957). See also *Weidensteiner* v. *Mally*, 55 Wash. 79, 81, 104 Pac. 143 (1909); *Mally* v. *Weidensteiner*, 88 Wash. 398, 405, 153 Pac. 342 (1915); *In re Alpowa Creek*, 129 Wash. 9, 14, 224 Pac. 29 (1924); *Dontanello* v. *Gust*, 86 Wash. 268, 270-272, 150 Pac. 420 (1915). See *Allen* v. *Roseberg*, 70 Wash. 422, 426-427, 126 Pac. 900 (1912); *In re Ahtanum Creek*, 139 Wash. 84, 99-101, 245 Pac. 758 (1926).

[117] *Brand* v. *Lienkaemper*, 72 Wash. 547, 550, 130 Pac. 1147 (1913); *Malnati* v. *Ramstead*, 50 Wash. (2d) 105, 108, 309 Pac. (2d) 754 (1957); *Barnes* v. *Belsaas*, 73 Wash. 205, 208, 131 Pac. 817 (1913); *In re Ahtanum Creek*, 139 Wash. 84, 92-93; 245 Pac. 758 (1926); *Thomas* v. *Spencer*, 69 Wash. 433, 436, 125 Pac. 361 (1912).

[118] *Smith* v. *Nechanicky*, 123 Wash. 8, 12, 211 Pac. 880 (1923); *Malnati* v. *Ramstead*, 50 Wash. (2d) 105, 108, 309 Pac. (2d) 754 (1957).

[119] *In re Ahtanum Creek*, 139 Wash. 84, 92-93, 245 Pac. 758 (1926).

[120] *Madison* v. *McNeal*, 171 Wash. 669, 676-678, 19 Pac. (2d) 97 (1933); *Downie* v. *Renton*, 167 Wash. 374, 377-378, 9 Pac. (2d) 372 (1932). See also *Brand* v. *Lienkaemper*, 72 Wash. 547, 549, 130 Pac. 1147 (1913).

[121] *Barnes* v. *Belsaas*, 73 Wash. 205, 208, 131 Pac. 817 (1913); *Thomas* v. *Spencer*, 69 Wash. 433, 436, 125 Pac. 361 (1912).

[122] *St. Martin* v. *Skamania Boom Co.*, 79 Wash. 393, 399, 140 Pac. 355 (1914).

[123] Regarding estoppel, see *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 586, 38 Pac. 147 (1894), discussed in chapter 14 at notes 909 and 933; *Wilson* v. *Angelo*, 176 Wash. 157, 163, 28 Pac. (2d) 276 (1934), discussed in chapter 14 at note 959; *In re Ahtanum Creek*, 139 Wash. 84, 95, 245 Pac. 758 (1926), discussed in chapter 14 at note 908; *Hollett* v. *Davis*, 54 Wash. 326, 332-333, 103 Pac. 423 (1909), discussed in chapter 14 at note 960. Regarding estoppel and laches, see *Rigney* v. *Tacoma Light & Water Co.*, *supra*, 9 Wash. at 586-590; *Mason* v. *Yearwood*, 105 Wash. 335, 177 Pac. 777 (1919).

[124] Wash. Laws 1891, ch. 142, § § 2-4.

common law; but it cautioned that this right of condemnation was not intended to allow water used or needed by any person for irrigation to be taken from him.[125]

(2) Judicial. In its early decisions the Washington Supreme Court recognized the existence of the riparian doctrine in the jurisdiction. It seemed to the court that the law was uniformly settled that all proprietors on the banks of a river had equal rights to use of the water as it was wont to flow, without diminution or alteration, subject to prior rights of others.[126] As time went on, the court repeated this recognition and declared the principles pertaining to facets of the doctrine.[127] The vitally important modification of the doctrine in Washington, as against competing appropriative rights, and subsequent legislation affecting riparian rights, is discussed later under "Interrelationships of the Dual Systems."

Accrual and character of the riparian right.—(1) Accrual of the right. The riparian right was held by the Washington Supreme Court to accrue on the passage of title, from public to private ownership.[128] (But with respect to the question of riparian rights in school lands acquired under Federal legislation and held or granted by the State, the Washington Supreme Court held in a 1970 case that "the state may establish riparian rights in its trust lands, to the same extent that such rights could be established by a private owner."[129]

"Riparian rights date from the first step taken to secure title from the government."[130] Although the rights of the patentee relate back to the very inception of his title, by settlement or filing, yet they do not and cannot vest until patent issues.[131]

(2) Nature of the riparian right. The right of an owner of riparian land is to have the stream flow to and over his land as it is wont to do for the use of the riparian owner[132] (subject to limitations discussed below), which right, as

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[125] *Id.* § § 44-54 and 57.

[126] *Crook* v. *Hewitt*, 4 Wash. 749, 750, 31 Pac. 28 (1892).

[127] See *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 581-583, 38 Pac. 147 (1894); *Benton* v. *Johncox*, 17 Wash. 277, 279-280, 289-290, 49 Pac. 495 (1897); *Sander* v. *Bull*, 76 Wash. 1, 5-6, 135 Pac. 489 (1913); *Smith* v. *Nechanicky*, 123 Wash. 8, 12, 211 Pac. 880 (1923); *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

[128] *Nesalhous* v. *Walker*, 45 Wash. 621, 623-624, 88 Pac. 1032 (1907); *Atkinson* v. *Washington Irr. Co.*, 44 Wash. 75, 77-78, 86 Pac. 1123 (1906).

[129] *In re Stranger Creek & Tributaries in Stevens County*, 77 Wash. (2d) 649, 466 Pac. (2d) 508, 513 (1970).

This matter is discussed in more detail in chapter 10 at notes 82-84 and 279-280.

[130] *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

[131] *Benton* v. *Johncox*, 17 Wash. 277, 288, 49 Pac. 495 (1897); *Kendall* v. *Joyce*, 48 Wash. 489, 492-493, 93 Pac. 1091 (1908). The supreme court rejected the contention "that a mere squatter on public land who subsequently sells out or abandons his claim acquires, or can acquire, riparian rights in a stream flowing through the land." *Kendall* v. *Joyce, supra.*

[132] *Wallace* v. *Weitman*, 52 Wash. (2d) 585, 588, 328 Pac. (2d) 157 (1958).

noted above, attaches to the land by virtue of patent to the original owner.[133] It is held to be not a mere easement or appurtenance, but a part and parcel of the land itself,[134] and as such it passes by a grant of the land unless specially reserved.[135]

In discussing the common law riparian right in opinions in early cases, the Washington Supreme Court stated that the proprietor has no property in the water itself, but a simple usufruct while it passes along.[136] Several decades later, while the modified appropriation-riparian relationship was being established in Washington, the court held that although the owners of lands bordering a nonnavigable lake owned its banks and bed, they did not own the waters thereof.[137] What they owned were certain rights to use the water.

Some other aspects of the riparian right.—(1) Riparian lands. It is essential that land, to have riparian status with respect to a stream or other water source, shall be contiguous thereto. This is implicit in all the riparian decisions.[138]

An owner of riparian land who conveys to another a part of the land not contiguous to the stream thereby cuts off the riparian rights of such conveyed tract unless the conveyance declares the contrary, and land thus severed from the stream can never regain the riparian right even though thereafter reconveyed to the person who owns the part touching the stream.[139]

The requirement that to be riparian to a stream, land must lie within its watershed was apparently approved in one opinion of the Washington Supreme Court, but it was not the sole basis of the decision therein: "That respondent's homestead land in section twelve is not riparian to Grouse creek is rendered plain by the fact that it does not border thereon and that it lies beyond the low divide constituting the southerly water shed of Grouse creek, so that it drains away from the creek."[140]

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[133] *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950).

[134] *Methow Cattle Co.* v. *Williams*, 64 Wash. 457, 460, 117 Pac. 239 (1911); *Bernot* v. *Morrison*, 81 Wash. 538, 544, 143 Pac. 104 (1914).

[135] *Benton* v. *Johncox*, 17 Wash. 277, 281, 49 Pac. 495 (1897).

[136] *Crook* v. *Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892); *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 583, 38 Pac. 147 (1894). See the discussion in chapter 5 at notes 11-12 regarding confusing statements in two other cases. In one case, *Colburn* v. *Winchell*, 97 Wash. 27, 29, 165 Pac. 1078 (1917), the court said that "under the laws of this state, the waters of a nonnavigable stream are held to be a part and parcel of the soil over which it flows." Presumably the writer of the opinion was confusing "water" and "riparian right to the use of water." It may have been one of the "mere loose and general expressions in some of our opinions" referred to in *Brown* v. *Chase*, 125 Wash. 542, 553, 217 Pac. 23 (1923).

[137] *Proctor* v. *Sim*, 134 Wash. 606, 613-619, 236 Pac. 114 (1925).

[138] *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950).

[139] *Yearsley* v. *Cater*, 149 Wash. 285, 287-289, 270 Pac. 804 (1928). See also the discussion of this case in chapter 10, note 274.

[140] *Mally* v. *Weidensteiner*, 88 Wash. 398, 402, 153 Pac. 342 (1915). In an earlier case the

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The court has said, "A nonriparian owner has no right to divert water from a stream, even though the riparian owner is not himself using it * * *. Nonriparian owners have no right to divert water from a water course even though they are using it by grant or license from a riparian owner."[141]

(2) Relative rights of riparian owners. In its earliest riparian decisions, the Washington Supreme Court stressed the common law aspects of riparian ownership, to the effect that in the absence of limitation by grant, license, or prescription, each proprietor is entitled to have the stream flow over or along his land as it is wont by nature, affected only in quantity or quality by the consequences of reasonable use by other proprietors.[142]

The common law distinction between natural or ordinary and artificial or extraordinary uses of riparian water was adopted by the court. Under this principle, a riparian proprietor not only has a right to use the water to supply his natural wants and domestic purposes[143] but may, if necessary, consume all the water of the stream therefor. But irrigation and manufacturing are artificial or extraordinary uses as to which the privileges of riparians are equal; none can have exclusive use of the water therefor; all uses must be reasonable, considering the needs of the other riparian proprietors.[144]

The concept of a common right of reasonable use has been reiterated in one form or another in numerous decisions. In 1909 the court said, "Each riparian owner is entitled to a reasonable use of the waters as an incident to his ownership, and as all owners upon the same stream have the same right of reasonable use, the use of each must be consistent with the rights of others, and the right of each is qualified by the rights of others."[145] Hence no one has the right to use the entire supply for irrigation or other artificial purposes, as against other riparian proprietors who wish to make reasonable use of the water.[146] And no riparian owner has rights superior to the others by reason of prior settlement of riparian land.[147]

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question was raised by appellants; but the point of decision did not rest on that question. *Miller* v. *Baker*, 68 Wash. 19, 20-22, 122 Pac. 604 (1912).

[141] *Alexander* v. *Muenscher*, 7 Wash. (2d) 557, 110 Pac. (2d) 625, 627 (1941). This case is discussed in more detail in chapter 10 at note 709, as well as a broad statement in an earlier case. The court has taken a somewhat different approach to the question of riparian rights as against appropriative rights, as discussed under "Interrelationships of the Dual Systems," *infra.*

[142] *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 582-583, 38 Pac. 147 (1894); *Shotwell* v. *Dodge*, 8 Wash. 337, 339, 36 Pac. 254 (1894); *Crook* v. *Hewitt*, 4 Wash. 749, 750, 31 Pac. 28 (1892).

[143] This is discussed further at notes 156-157 *infra.*

[144] *Hunter Land Co.* v. *Laugenour*, 140 Wash. 558, 572-575, 250 Pac. 41 (1926).

[145] *McEvoy* v. *Taylor*, 56 Wash. 357, 358, 105 Pac. 851 (1909). See *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 608, 117 Pac. 466 (1911).

[146] *Smith* v. *Nechanicky*, 123 Wash. 8, 12, 211 Pac. 880 (1923); *Nielson* v. *Sponer*, 46 Wash. 14, 15, 89 Pac. 155 (1907). See *Miller* v. *Baker*, 68 Wash. 19, 23-24, 122 Pac. 604 (1912).

[147] *Hunter Land Co.* v. *Laugenour*, 140 Wash. 558, 572-575, 250 Pac. 41 (1926).

The court stated in a 1915 case that riparian owners do not have riparian rights to any particular quantity of water, so that when there is not enough for all proprietors who wish to use it, they must submit to an apportionment.[148] In a previous case the court said:

> While the distribution of the waters of the stream among the riparian owners, according to common-law principles, is most difficult, where the stream is long, the riparian owners numerous, and the quantity of water limited, yet in this case each of the parties owns the same quantity of land, of substantially the same character, their necessities and conditions are substantially the same, and an equal distribution of the water of the creek between them will mete out substantial justice as nearly as substantial justice can be attained.[149]

Decisions of the court have been to the effect that the privilege of storing water to the use of which a riparian owner is entitled is not within the riparian right if the detention results in unreasonable injury to other riparian proprietors, but may be lawful if such injury does not follow.[150]

(3) Riparian waters. Riparian rights apply to waters of nonnavigable streams[151] and lakes.[152] But the Washington Supreme Court has said: "We are of the opinion that common law riparian rights in navigable waters, if it can be

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[148] *Mally* v. *Weidensteiner*, 88 Wash. 398, 402, 153 Pac. 342 (1915).

[149] *Nesalhous* v. *Walker*, 45 Wash. 621, 625, 88 Pac. 1032 (1907). See *Farwell* v. *Brisson*, 66 Wash. 305, 308, 119 Pac. 814 (1911).

For a period of some 20 years, the landowners along a creek diverted substantially the same quantities of water for use of their respective tracts of land. Accordingly the trial court apportioned the water among them on the theory that this continued use by common consent ripened into a binding agreement, even without an express agreement to this effect. The supreme court believed that as a matter of law, this long continued diversion and use of all the water became determinative of the rights of the parties, particularly when such an apportionment seemed equitable, as it did in this case. *Villa* v. *Keylor*, 93 Wash. 164, 166, 160 Pac. 297 (1916).

[150] Decisions of the court in this regard are discussed in chapter 10 at notes 681-683. See also the discussion at note 606 thereof regarding storage for electric power purposes.

With respect to boating, swimming, fishing, and other similar rights of riparian proprietors on a nonnavigable lake, the court held in 1956 that such rights or privileges are owned in common, and that any proprietor or his licensee may use the entire water surface so long as he does not unreasonably interfere with the exercise of similar rights by other owners. *Snively* v. *Jaber*, 48 Wash. (2d) 815, 821-822, 296 Pac. (2d) 1015 (1956). See also *Botton* v. *State*, 69 Wash. (2d) 751, 420 Pac. (2d) 352 (1966), and *Ames Lake Community Club* v. *State*, 69 Wash. (2d) 769, 420 Pac. (2d) 363 (1966), with respect to the role of the State as a riparian, and its licensees, versus other riparians. And see *Bach* v. *Sarich*, 74 Wash. (2d) 575, 445 Pac. (2d) 648, 651 (1968), involving a zoning ordinance.

[151] *Brown* v. *Chase*, 125 Wash. 542, 553, 217 Pac. 23 (1923). See *Colburn* v. *Winchell*, 97 Wash. 27, 29, 165 Pac. 1078 (1917); *Bernot* v. *Morrison*, 81 Wash. 538, 549, 143 Pac. 104 (1914).

[152] *Proctor* v. *Sim*, 134 Wash. 606, 612-619, 236 Pac. 114 (1925). See *Snively* v. *Jaber*, 48 Wash. (2d) 815, 819-822, 296 Pac. (2d) 1015 (1956); *Bach* v. *Sarich*, 74 Wash. (2d) 575, 445 Pac. (2d) 648, 651 (1968); *Litka* v. *Anacortes*, 167 Wash. 259, 260-263, 9

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said that the common law recognized such rights, have not existed or been recognized in this state since the adoption of our constitution; at least so far as the upland owner having any right to occupy in any way the beds or shore lands of such waters or to take from such waters water for irrigation as against the state, its grantees, or those who have appropriated such water for purposes of irrigation in compliance with the laws of the state."[153]

Floodwaters of a stream that occur annually with practical regularity, and therefore cannot be said to be unprecedented or extraordinary, are part of the stream to which riparian rights attach.[154]

(4) Purpose of use of water. In an early case the State supreme court recognized the common law rule that every riparian proprietor has a right—equal to that of every other owner—to the use of the stream water as it is accustomed to flow, without diminution or alteration, "subject to the well recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural and manufacturing purposes."[155] In the primary uses of riparian water for domestic purposes, watering of domestic animals is closely associated with household uses.[156] But the court held in a 1916 case that use of waters of a stream to supply the domestic needs of inhabitants of a town was in no sense the exercise of a riparian right. As the use was not riparian, no recovery could be had for injuries thereto caused by the act of an upstream proprietor in facilitating the exercise of his own riparian right.[157]

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Pac. (2d) 88 (1932); *In re Martha Lake Water Co. No. 1*, 152 Wash. 53, 55-57, 277 Pac. 382 (1929); *Bernot* v. *Morrison*, 81 Wash. 538, 558, 143 Pac. 104 (1914).

The State supreme court has noted that while there is authority for the proposition that a riparian owner is one whose land abuts upon a river and a "littoral owner" is one whose land abuts upon a lake, under current usage in the Washington statutes and court decisions "riparian is an acceptable term as to lands abutting upon either rivers or lakes." *Botton* v. *State*, 69 Wash. (2d) 751, 420 Pac. (2d) 352, 354, n. 1 (1966).

[153] *State ex rel. Ham, Yearsley & Ryrie* v. *Superior Ct.*, 70 Wash. 442, 453, 126 Pac. 945 (1912). See also Johnson, R. W., "Riparian and Public Rights to Lakes and Streams," 35 Wash. L. Rev. 580, 601-605 (1960), and the *dictum* in *Botton* v. *State*, 69 Wash. (2d) 751, 420 Pac. (2d) 352, 355, n. 4 (1966).

[154] *Longmire* v. *Yakima Highlands Irr. & Land Co.*, 95 Wash. 302, 305-307, 163 Pac. 782 (1917); *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 609-610, 117 Pac. 466 (1911). In the opinion in the *Longmire* case the court said "it may be that the rule is" that there would be no riparian rights in unprecedented or extraordinary floodwaters, but emphasized that the facts were otherwise here. 95 Wash. at 305-306.

[155] *Benton* v. *Johncox*, 17 Wash. 277, 289-290, 49 Pac. 495 (1897).

[156] *Petition of Clinton Water Dist. of Island County*, 36 Wash. (2d) 284, 287, 218 Pac. (2d) 309 (1950); *Church* v. *Barnes*, 175 Wash. 327, 330, 27 Pac. (2d) 690 (1933). In one case, a decree required that enough water by bypassed to form a constant flow large enough to water approximately 50 head of the riparian owners' stock. Validity of the decree was sustained as against a contention that in failing to fix the quantity of water to be bypassed, the decree was vague and indefinite. *Wallace* v. *Weitman*, 52 Wash. (2d) 585, 588, 328 Pac. (2d) 157 (1958).

[157] *Van Dissel* v. *Holland-Horr Mill Co.*, 91 Wash. 239, 241, 157 Pac. 687 (1916). The

The reasonable use of stream waters by riparian owners for purposes of irrigation was consistently held to be consistent with the common law doctrine of riparian rights.[158] And the riparian owner's right to use stream water in producing electric power was specifically recognized and sustained.[159]

(5) Exercise of the riparian right. In an early riparian case, the Washington Supreme Court agreed that allowance must be made for some loss in transmission of water, but cautioned that the irrigator must take reasonable means to lessen it.[160] The court was sharply critical of the irrigation practices followed by one of the parties, and stated general principles as to conservation and proper use of water which an irrigator should follow.[161]

In *Osborn* v. *Chase*, the court said that a proposed change in point of diversion by a riparian proprietor may not be challenged by another riparian who is not prejudiced thereby.[162] In this case, owners of downstream riparian rights, who succeeded to the ownership of undeveloped lands at the head of the stream, sought to have the percentage of streamflow decreed to the upper purchased lands transferred to their downstream holdings for use thereon. Over the objection of other parties who owned no land lying between these ownerships, and who apparently would not be in any way prejudiced, the court allowed the transfer.

Interrelationships of the Dual Systems

From the earliest times in Washington, the dual systems of water rights—appropriation and riparian—were recognized and applied in actual controversies. Interrelationships of the two systems involved much litigation and led to many decisions by the State supreme court. Early court decisions indicated that one could claim rights to use water both as an appropriator and as a

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court cited *Rigney* v. *Tacoma Light & Water Co.*, 9 Wash. 576, 581, 38 Pac. 147 (1894), in which the court cited with approval an authority to the effect that diversion of water from a stream for the purpose of supplying a neighboring town with water is not a lawful riparian use, although the actual decision was that a riparian owner had no right to divert a stream permanently from its natural course for *any* purpose and thus deprive others of their rights therein. In *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 498, 513, 64 Pac. 735 (1901), it was held that a city located on a stream must purchase or condemn the rights of downstream riparian proprietors before diverting any of the water thereof to provide for the domestic needs of its citizens.

[158] *Neselhous* v. *Walker*, 45 Wash. 621, 624, 88 Pac. 1032 (1907); *Benton* v. *Johncox*, 17 Wash. 277, 289-290, 49 Pac. 495 (1897); *Hayward* v. *Mason*, 54 Wash. 653, 656-657, 104 Pac. 141 (1909).

[159] *Kalama Elec. Light & Power Co.* v. *Kalama Driving Co.*, 48 Wash. 612, 616-617, 94 Pac. 469 (1908). In this regard, see the discussion in chapter 10 at notes 605-606.

[160] *Shotwell* v. *Dodge*, 8 Wash. 337, 341, 36 Pac. 254 (1894).

[161] The court characterized defendant's irrigation practices as nothing more than allowing water to percolate through the ditch banks along which orchard trees and vegetables were growing, and observed, "This was not irrigation at all; much less, reasonable irrigation." *Id.*

[162] *Osborn* v. *Chase*, 119 Wash. 476, 479, 205 Pac. 844 (1922).

riparian proprietor. It was specifically held that a mere assertion of rights by appropriation is not antagonistic to and in effect a waiver of rights arising out of riparian ownership.[163]

The court has indicated from its earliest holdings that appropriations made on the public domain of the United States took precedence over riparian rights of lands that subsequently passed to private ownership.[164] A principle complementary to the foregoing—of equally vital importance—was early announced to the effect that an entryman who settled upon public land and acquired title thereto by complying with the laws of the United States was entitled to the common law rights of a riparian proprietor, as against subsequent appropriators of the water, from the date of his occupancy with intent to acquire title thereto from the Government.[165] These complementary principles were summarized in a decision rendered in 1923.[166]

Originally, there was derived the broad rule that "the doctrine of appropriation applies only to public lands, and when such lands cease to be public and become private property, it is no longer applicable."[167] This was reiterated in one form or another in many decisions and was actually applied on the pleadings in *Wallace* v. *Weitman*, decided in 1958.[168] In other cases decided in the meantime, however, the court rejected arguments that "a valid

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[163] *Nesalhous* v. *Walker*, 45 Wash. 621, 626, 88 Pac. 1032 (1907). In *Hutchinson* v. *Mt. Vernon Water & Power Co.*, 49 Wash. 469, 472, 95 Pac. 1023 (1908), plaintiffs based their right to the use of water on three grounds: (1) Riparian, (2) appropriation, (3) contract. As against an attempt to force them to elect to rely on one cause, the supreme court held that the cause of action for wrongful interference with one's right or title to water is one and indivisible, regardless of the sources through which plaintiffs might claim.

[164] *Geddis* v. *Parrish*, 1 Wash. 587, 589-592, 21 Pac. 314 (1889); reiterated in the opinions in many cases, e.g., *In re Sinlahekin Creek*, 162 Wash. 635, 642-643, 299 Pac. 649 (1931); *Hunter Land Co.* v. *Langenour*, 140 Wash. 558, 250 Pac. 41, 44, 46 (1926).

[165] *Benton* v. *Johncox*, 17 Wash. 277, 279-290, 49 Pac. 495 (1897). This became an established principle. *Bernot* v. *Morrison*, 81 Wash. 538, 544, 143 Pac. 104 (1914). "Riparian rights date from the first step taken to secure title from the government." *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924). With respect to school lands, see the discussion at note 129 *supra* and in chapter 10 at notes 82-84 and 279-280.

[166] *In re Doan Creek*, 125 Wash. 14, 20, 215 Pac. 343 (1923).

[167] *Benton* v. *Johncox*, 17 Wash. 277, 289, 49 Pac. 495 (1897). And to acquire a vested riparian right, a subsequent appropriator must resort to purchase or condemnation. *Church* v. *Barnes*, 175 Wash. 327, 328-330, 27 Pac. (2d) 690 (1933); *In re Martha Lake Water Co. No. 1*, 152 Wash. 53, 55-57, 277 Pac. 382 (1929); *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 498, 513, 64 Pac. 735 (1901).

[168] *Wallace* v. *Weitman*, 52 Wash. (2d) 585, 586-587, 328 Pac. (2d) 157 (1958). The court quoted the foregoing quoted words from the opinion in *Benton* v. *Johncox*, and held that under the facts in the instant case alleged by appellants in their affirmative defense—to the effect that the appropriation relied upon took place *after* all the land through which the stream flowed had come into private ownership—the defense of prior appropriation was not available to them and the demurrer was properly sustained. *Id.*

appropriation can be made only upon government lands."[169] Finally in 1959, some 9 months after the date of the decision in *Wallace* v. *Weitman* and without reference to the opinion in that case, the court said, "Defendants' contention that the doctrine of appropriation of water applies only to public lands has been rejected by this court."[170]

However, the court has imposed an important limitation upon the exercise of the riparian right as against competing appropriative rights. In 1923, in *Brown* v. *Chase*, the court said that while it had recognized the common law doctrine of riparian rights, it had also modified and enlarged upon that doctrine by engrafting upon it the necessity of beneficial use by the riparian owner, the question of relief to the riparian depending upon whether he was substantially damaged either presently or prospectively.

> [I]n consonance with the general needs and welfare of the state, especially in the arid and semiarid regions, and in harmony with the legislation upon the matter, we are now prepared to declare, instead of the mere loose and general expressions in some of our opinions, that (1) Waters of non-navigable streams in excess of the amount which can be *beneficially used, either directly or prospectively, within a reasonable time,* on, or in connection with riparian lands, are subject *to appropriation* for use on non-riparian lands.[171]

The principle so declared was followed in later decisions.[172] In one opinion it was stated that the common law rule of riparian rights "has been stripped of

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[169] *Weitensteiner* v. *Engdahl*, 125 Wash. 106, 113, 215 Pac. 378 (1923); *Hunter Land Co.* v. *Laugenour*, 140 Wash. 558, 570, 250 Pac. 41 (1926).

[170] *Drake* v. *Smith*, 54 Wash. (2d) 57, 61, 337 Pac. (2d) 1059 (1959).

[171] *Brown* v. *Chase*, 125 Wash. 542, 549, 553, 217 Pac. 23 (1923) (emphasis added). The court added, (2) "That where the supply of water in the stream is limited, the presumption is that the riparian lands require all of the waters of the stream, and the burden is upon the nonriparian appropriator of water to show that no riparian right will be injured by his appropriation. (3) That where the supply of water in the stream is more than ample for all possible riparian uses, the presumption is that the diversion by a nonriparian user will not injure any riparian right, and the burden is upon the riparian owner who claims that his riparian rights are being injured by the diversion of such water to prove substantial injury." *Id.* [This decision in 1923 was foreshadowed in *State ex rel. Liberty Lake Irr. Co.* v. *Superior Ct.*, 47 Wash. 310, 313-314, 91 Pac. 968 (1907), in which the court, in reviewing a proceeding for condemnation of a right of way and of riparian rights, indicated the word "needed" meant the quantity needed for irrigation within a "reasonable time–say two or three years–" which would depend on all of the particular circumstances.] A number of conjectured alternative meanings of the *Brown* v. *Chase* limitation on riparian rights are discussed in Corker, C. E., & Roe, C. B., Jr., "Washington's New Water Rights Law–Improvements Needed," 44 Wash. Law Rev. 85, 113-128 (1968).

[172] In *State* v. *American Fruit Growers, Inc.*, 135 Wash. 156, 161, 237 Pac. 498 (1925), the court approvingly referred to the emphasized language of *Brown* v. *Chase* mentioned above ("beneficially used, either directly or prospectively, within a reasonable time") and added, "In other words, the riparian owner, before he has any

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some of its rigors."[173] In another, the court observed that for years past, the trend of its decisions and the tenor of State legislation had been to restrict and narrow the common law of riparian rights; and that in view of the decision in *Brown* v. *Chase*, the "existing vested rights" which the statute preserved to the riparian owner could not have reference to the surplus waters of a stream. The doctrine of *Brown* v. *Chase* was expressly extended, with some possible limitations, to the surplus waters of nonnavigable lakes.[174] (And, as noted

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rights to protect, must, with reasonable certainty, show that, either at present or within the near future, he will make use of the water for irrigation purposes. * * *" See *United States* v. *Ahtanum Irr. Dist.*, 330 Fed. (2d) 897, 904-905 (9th Cir. 1964), rehearing denied, 338 Fed. (2d) 307, certiorari denied, 381 U.S. 924 (1965).

Although it did not deal specifically with this matter, see also the court's decision and statement in a 1970 case that "judicial and legislative developments have firmly established the preference for beneficial usage in concepts of both riparian and appropriative rights to water." *In re Stranger Creek & Tributaries in Stevens County*, 77 Wash. (2d) 649, 466 Pac. (2d) 508, 512-513 (1970), discussed in chapter 10 at note 84, as referred to in note 129 *supra.*

[173] *In re Alpowa Creek*, 129 Wash. 9, 13, 224 Pac. 29 (1924).

As against contentions of parties in another case that their riparian rights should be governed by the strict rules of the common law, the court acknowledged that some of its early decisions might lend support thereto, but concluded that the decision in *Brown* v. *Chase*, adhered to in subsequent cases, now governed the question. *In re Sinlahekin Creek*, 162 Wash. 635, 640-641, 299 Pac. 649 (1931).

[174] *Proctor* v. *Sim* 134 Wash. 606, 616-619, 236 Pac. 114 (1925),The court expressed the following possible limitations: "[O]ur discussion has reference only to a natural lake the surplus waters of which can be successfully used for irrigation purposes. We have nothing here to do with artificial ponds nor small ponds which are incapable of being extensively used for irrigation purposes. Whether the waters of such ponds or small lakes belong to the public or may be controlled by the state is not involved here. Nor does our discussion involve any rights of riparian owners on lakes such as the one involved here, except in so far as they may be affected by taking waters for irrigation and domestic purposes. It should also be remembered that the respondents had the permit of the state hydraulic engineer to take such waters as they used." 134 Wash. at 612-613. These possible limitations do not appear to have been mentioned in later decisions of the court citing the *Proctor* case in this regard. *Snively* v. *Jaber*, 48 Wash. (2d) 815, 296 Pac. (2d) 1015, 1018 (1956); *Botton* v. *State*, 69 Wash. (2d) 751, 420 Pac. (2d) 352, 357 (1966), which are referred to in note 150 *supra.* But in the *Botton* case the court mentioned another possible limitation. With respect to certain language used in the *Proctor* case regarding riparian rights in this and other regards, it said "this very broad statement may be limited to the arid portions of this state; and that, in subsequent cases in the western part of the state, a lowering of a lake or an interference with its riparian uses creates liabilities and, on occasion, a necessity for condemnation." 420 Pac. (2d) at 357-358. This however, was incorporated in a footnote addendum to the majority opinion in the *Botton* case which was said "not intended to be definitive or authoritative, but simply to indicate the limitations which have been placed on the broad and sweeping statements in *Proctor* v. *Sim*, 134 Wash. 606, 236 P. 114 (1925), and to indicate the recognition of the extent and value of the riparian rights of bathing, boating, swimming, and fishing in the nonarid portions of the state." 420 Pac. (2d) at 356-357.

earlier, the court indicated that a riparian right was inferior to an appropriation made on the public domain if the latter's priority date was earlier than the settlement and private acquisition of the riparian land from the public domain.[175] An even greater restriction regarding navigable waters also has been discussed earlier.[176])

Moreover, under Washington legislation enacted in 1967, anyone entitled to divert or withdraw water by virtue of his ownership of land abutting a stream, lake or watercourse "who abandons the same, or who voluntarily fails, without sufficient cause," to beneficially use all or any part of such right for any period of 5 successive years after the act's effective date (July 1, 1967) shall relinquish such right or portion thereof (which shall revert to the State and the affected waters become available for appropriation).[177] The Director of the Department of Ecology may, after notice and hearing, make an order determining that a water right, or some portion thereof, has been relinquished.[178]

The 1967 Washington legislation, as revised in 1969, also requires that anyone using or claiming the right to withdraw or divert and make beneficial use of public waters of the State other than under a permit or certificate from the Department of Ecology (or a predecessor agency) shall file a claim with the Department by June 30, 1974. Failure to do so, after the required notice by the Department, shall be conclusively deemed a waiver and relinquishment of the right.[179]

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[175] *In re Sinlahekin Creek*, 162 Wash. 635, 640-643, 299 Pac. 649 (1931). See the discussion at notes 164-166 *supra*.

[176] See the discussion at note 153 *supra*.

[177] Wash. Laws 1967, ch. 233, RCWA §§90.14.170 and 90.14.900 (Supp. 1974). "Sufficient cause" includes nonuse as a result of "Drought or other unavailability of water;" and "there shall be no relinquishment of any water right * * * If such right is used for a standby or reserve water supply to be used in time of drought or other low flow period so long as withdrawal or diversion facilities are maintained in good operating condition for the use of such reserve or standby water supply, or * * * If such right is claimed for a determined future development to take place either within fifteen years of the effective date of this act, or the most recent beneficial use of the water right, whichever date is later." RCWA §90.14.140. (Supp. 1974). Other factors constituting "sufficient cause" and other exceptions included in §90.14.140, which are applicable to both riparian and appropriative rights, are discussed in notes 106 and 109 *supra*.

[178] RCWA §90.14.130 (Supp. 1974). This is subject to appeal to an appropriate court, with the Director's findings of fact being prima facie evidence of such relinquishment. *Id.* §90.14.190.

[179] *Id.* §§90.14.010 to 90.14.121, discussed at notes 228-231 *infra*. This may present a question for registering unused riparian rights somewhat similar to the question regarding unused riparian rights in Alaska mentioned in the Alaska State summary at note 82 thereof. But in any event, a number of these unused rights might have been extinguished for 5 years' nonuse after July 1, 1967, under the statutory provision discussed above, prior to the final June 30, 1974, date for filing water rights claims.

Section 90.14.020 of this legislation declares, *inter alia*, "All rights to divert or withdraw water, except riparian rights which do not diminish the quantity of water

(*Continued*)

Ground Waters

Court decisions.—In an early case the Washington Supreme Court recognized as established doctrine that a flow underground would be protected the same as one upon the surface if it constituted a stream with a defined course and boundaries, but it concluded that this would not apply to water percolating through sand or gravel not within any limits defined by anything appearing on the surface or made to appear by investigation beneath the surface.[180] In 1935, in *Evans* v. *Seattle*, the court again rendered a decision distinguishing a definite underground stream from percolating waters. The court indicated that all ground waters are presumed to be percolating water and clear and convincing proof is required to overcome this presumption. The court held that in this case the evidence fell far short of being substantial evidence of an underground stream flowing in any distinct, permanent, well-known, and defined channel, or that the springs and surface waters in litigation were fed by anything other than percolating water. Hence, the law of percolating water must be applied.[181]

The court indicated that in an earlier (1913) case, *Patrick* v. *Smith*,[182] it had adopted the American rule of reasonable use or correlative rights in percolating waters, although it rejected what it contended to be a certain extreme rule in California. The court said:

> The limitations upon this rule are well illustrated by the Patrick Case, where the water was wasted for no good reason, and in other of the

(*Continued*)

remaining in the source such as boating, swimming, and other recreational and aesthetic uses must be subjected to the beneficial use requirement." With respect to the later types of riparian uses, see the discussion at note 150 *supra*. See also *Stempel* v. *Department of Water Resources*, 82 Wash. (2d) 109, 508 Pac. (2d) 166, 171 (1973).

The 1967 legislation contained another provision, that was repealed in 1969, which is discussed in chapter 10, note 527, par. 3.

In a 1970 case, *In re Stranger Creek & Tributaries in Stevens County*, 77 Wash. (2d) 649, 466 Pac. (2d) 508, 512-513 (1970), the State supreme court made the following general statement with respect to the Washington legislation regarding water resources and its amendments, including chapter 90.14: "These statutes and amendments to them attest to the legislature's apparent intention (1) that the state's water resources be put to their most beneficial use, and (2) that record be made of these usages so as to assure continuing beneficial use and protect against both foreign and domestic intrusion on Washington water rights. RCW 90.14. In at least the first of these areas, the legislative preference for protection of beneficial use has paralleled developments in our case law.

"For our present purposes, the point is that judicial and legislative developments have firmly established the preference for beneficial usage in concepts of both riparian and appropriative rights to water." This statement was made in furtherance of the court's decision, notwithstanding certain earlier opinions, that "the state may establish riparian rights in its trust lands, to the same extent that such rights could be established by a private owner," as discussed at note 129 *supra*.

[180] *Meyer* v. *Tacoma Light & Water Co.*, 8 Wash. 144, 146-147, 35 Pac. 601 (1894).

[181] *Evans* v. *Seattle*, 182 Wash. 450, 453-457, 47 Pac. (2d) 984 (1935).

[182] *Patrick* v. *Smith*, 75 Wash. 407, 134 Pac. 1076 (1913).

> already cited cases where such water was taken and appropriated for commercial purposes by one to the exclusion of other landowners. Nothing of that kind appears in this record. The fact is well established that the appellant city was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of extracting the gravel for use. Apparently, the gravel pit property was valuable for no other purpose than that of producing gravel, and the city, being the owner, had, we think, under the reasonable use and correlative rights doctrine, a legal right to so drain the gravel pit as to make the product thereof available for use without thereby incurring any liability to others.[183]

In *State* v. *Ponten*, decided in 1969, the court said that in *Evans* v. *Seattle*, discussed above, "we definitely aligned Washington with those states recognizing the correlative rights of landowners in the percolating water underneath their lands."[184] The court quoted, as an "excellent statement," the following from an early New Jersey case adopting the doctrine of "reasonable user:"

> "This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interefered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it thereby result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses."[185]

However, the Washington court concluded:

> In the present case the state acquired, either by eminent domain or purchases made under threat of it, such land in the Garden Springs area as it needed for its 6-lane freeway. It was not particularly interested in the character of the land, as to whether it was lush or arid or as to what was beneath the surface, except as it presented engineering problems in supporting tons of concrete over which motordriven vehicles might travel.
>
> The law of percolating waters contemplates no such use of the land above the waters. It was designed and developed to give landowners in an area correlative rights in the percolating waters beneath the surface in connection with the reasonable and anticipated uses of their

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[183] *Evans* v. *Seattle*, 182 Wash. 450, 459-460, 47 Pac. (2d) 984 (1935). See also *Bjorvatn* v. *Pacific Mechanical Constr. Co.*, 77 Wash. (2d) 563, 464 Pac. (2d) 432, 433 (1970).

[184] *State* v. *Ponten*, 77 Wash. (2d) 463, 463 Pac. (2d) 150, 153 (1969).

[185] 463 Pac. (2d) at 154, quoting *Meeker* v. *East Orange*, 77 N.J.L. 623, 74 Atl. 379, 385 (1909).

respective properties. The fact that the state had no use for the percolating waters underneath the land used for its 6-lane freeway, except to divert it, gave it no right to divert and waste * * * the percolating waters from the neighboring properties.

That there is a property right (correlative though it may be) in percolating waters is well established. The state in this case caused the loss of the percolating waters of other landowners for no beneficial use on its own land. * * * It is in this situation a condemnor taking valuable property for a public use which is completely foreign to its highest and best use. The state is in no sense a landowner entitled to divert the percolating water of other landowners in the area for a beneficial use of its own.[186]

In a 1970 case, the court said, among other things:

* * * as a general rule loss or inconvenience caused by interference with the natural movement of percolating waters which results from lawful and proper uses of, or operations upon, the containing land is damnum absque injuria unless liability has been created by statute. * * * But it should be observed that this rule applies only under circumstances where damage results from no more than a rightful appropriation or diversion of the percolating waters.

The freedom to interfere with percolating waters in the lawful and reasonable use of one's property was recently sustained but deemed inapplicable [in *State* v. *Ponten*, discussed above].[187]

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[186] 463 Pac. (2d) at 155-156. The court added, "The state is, of course, entitled to show in mitigation of damages that another source of supply has been made available, albeit a more expensive and perhaps less desirable one." 463 Pac. (2d) at 156.

The court said, "The *Evans* case is distinguished on the basis that there the city had not exercised the right of eminent domain, but had purchased a tract of 43 acres which had been in use for a considerable period as a gravel pit and which was not susceptible of any other profitable use. Its proper development required ditching which diverted percolating waters from the wells of the plaintiffs, who were adjoining property owners. The diversion of water caused by the natural development of the gravel-bearing property was properly held to be damnum absque injuria. The city made no use of the property other than any private owner would have made." 463 Pac. (2d) at 155.

The court also distinguished *Wilkening* v. *State*, 54 Wash. (2d) 692, 344 Pac. (2d) 204 (1969), as a case dealing with raising rather than lowering the water table, with the effect of improvements made by the State rather than with damages caused during construction, and with damages caused by the inadequate drainage of percolating waters after they came to the surface, relying on an earlier surface water case. 463 Pac. (2d) at 155. Regarding the *Wilkening* case, see also *Bjorvatn* v. *Pacific Mechanical Constr. Co.*, 77 Wash. (2d) 563, 464 Pac. (2d) 432, 434 (1970).

[187] "We held in *Ponten* that, since a damage had been imposed in the exercise of the constitutional power of eminent domain, the rule of negligence did not intrude; and that if a damaging to real property proximately results from the exercise of that power, it is compensable under the constitution no matter how great the care exercised by the condemnor." With respect to the instant case, the court said, *inter alia*, "Removal of lateral or subjacent support from adjoining property in the digging of a sewer ditch is a

These 1969 and 1970 cases were decided after the 1945 legislation discussed below. The majority opinions in these cases did not mention that legislation, but the partially dissenting opinion in the 1969 case and the opinion in another 1970 case did mention it. This is discussed below in connection with that legislation.[188]

Legislation.—In 1945, chapter 90.44 of the Washington statutes was enacted which provides: "This chapter regulating and controlling ground waters of the state of Washington shall be supplemental to chapter 90.03, which regulates the surface waters of the state, and is enacted for the purpose of extending the application of such surface water statute to the appropriation and beneficial use of ground waters within the state."[189]

As enacted in 1945, "ground waters" were defined for this purpose as "All bodies of water that exist beneath the land surface and that there saturate the interstices of rocks or other materials—that is, the waters of underground streams or channels, artesian basins, underground reservoirs, lakes or basins, whose existence or whose boundaries may be reasonably established or ascertained * * *."[190] All natural ground waters that have been thus defined and "all artificial ground waters that have been abandoned or forfeited" were declared to be public ground waters and subject to appropriation under the applicable legislation.[191]

Legislation in 1973 amended the above definition of ground waters to mean

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damaging under Const. art. 1, §16. Whether the damage resulted from a drying out process, a lowering of the water table, a release of physical pressure, or a combination of these and other physical forces, the fact remains that the defendants were not making an appropriation of percolating waters for their own use. They were digging a deep ditch for a public use in property adjoining that of the Bjorvatns and in doing so removed lateral and subjacent supports causing damage. The removal of lateral and subjacent support from adjoining property in the construction of a sewer for a municipality or subdivision of the state is, in our opinion, a damaging of property for a public use for which the condemnor must make just compensation. * * * The condemnor is liable for damages caused by the removal of lateral and subjacent support * * * so long as the digging of the ditch is shown to have been the direct and proximate cause of the removal." *Bjorvatn* v. *Pacific Mechanical Constr. Co.*, 77 Wash. (2d) 563, 464 Pac. (2d) 432, 434-435 (1970).

The court also said, "Metro was not fighting off surface and percolating waters and impeding their flow upon its land as was the situation in *Wilkening*," discussed in the preceding note. 464 Pac. (2d) at 434.

[188] See the discussion at notes 194-196 *infra.*

[189] Wash. Laws 1945, ch. 263, §1, p. 826; RCWA §90.44.020 (1962).

[190] Wash. Laws 1945, ch. 263, §3, p. 826; RCWA §90.44.035 (1962).

[191] *Id.* §90.44.040. The legislation further defined "natural ground water" as "[w]ater that exists in underground storage owing wholly to natural processes." It defined "artificially stored ground water" as "Water that is made available in underground storage artificially, either intentionally or incidentally to irrigation and that otherwise would have been dissipated by natural waste * * *." *Id.* §90.44.035. With respect to such water, see also the discussion at note 208 *infra.*

"All waters that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of this state, *whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves.*"[192] The amendatory act stated:

> It is the purpose of this 1973 amendatory act to state as well as reaffirm the intent of the legislature that "ground waters," as defined in chapter 263, Laws of 1945, means all waters within the state existing beneath the land surface, and to remove any possible ambiguity which may exist as a result of the dissenting opinion in State v. Ponten, 77 Wn. 2d 463 (1969), or otherwise with regard to the meaning of "ground waters" in the present wording of RCW 90.44.035. The definition set forth in section 2 of this 1973 amendatory act accords with the interpretation given by all of the various administrative agencies having responsibility for administration of the act since its enactment in 1945.[193]

In the 1969 case of *State* v. *Ponten*, cited in the legislature's statement of the purpose of its 1973 amendment, the partially dissenting opinion of Judge Neill had expressed the view that the original definition of ground waters in the 1945 legislation did not include percolating waters.[194] The majority opinion of the Washington Supreme Court in this case did not decide nor discuss this question nor did it mention any part of chapter 90.44. In a subsequent 1970 case the court said in *dictum* that "our Ground Water Code of 1945 (RCW 90.44) applies to all definable underground waters."[195] Neither this question

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[192] Wash. Laws 1973, ch. 94, §2; RCWA §90.44.035 (Supp. 1974). (Emphasis added.) Although the earlier definition apparently had not been altered by any of the Washington Legislature's session laws until the 1973 amendment, as incorporated in the Revised Code of Washington (authorized and approved by the legislature in Laws 1950, Ex. Sess., ch. 16, and Laws 1951, ch. 5) it was altered, in §90.44.010, to mean "water beneath the land surface, the existence and boundaries of which may be reasonably established or ascertained." However, the earlier definition was restored to its original language, quoted at note 190 *supra*, by the time of the July 1, 1961 version (Supp. 7/1/1961) of this definition in the Revised Code, in §90.44.035 thereof. Section 6 of Laws 1951, ch. 5, mentioned above, had provided that "in case of any omissions or inconsistency between any of the provisions of the revised code * * * and the laws existing immediately preceding this enactment, the previously existing laws shall control." See also Laws 1950, Ex. Sess., ch. 16 §2.

[193] Wash. Laws 1973, ch. 94, §1.

[194] *State* v. *Ponten*, 77 Wash. (2d) 463, 463 Pac. (2d) 150, 158 (1969). Judge Neill added that ground waters were presumed to be percolating waters not subject to the legislation. But he concluded the waters involved were subject to it.

[195] *In re Stranger Creek & Tributaries in Stevens County*, 77 Wash. (2d) 649, 466 Pac. (2d) 508, 512 (1970). The court went on to state that the 1917 water code applicable to surface waters and this 1945 ground water code attest to the legislature's apparent intention to promote beneficial use of water resources, as discussed in note 179 *supra*. As indicated there, these statements were made in furtherance of the court's decision regarding riparian rights in a surface stream.

nor any other part of chapter 90.44 appears to have otherwise been discussed or mentioned in the reported court decisions in Washington, except for some additional views expressed in the partially dissenting opinion in *State* v. *Ponten*.[196]

Appropriations of ground water under the 1945 ground water statute (chapter 90.44) shall be "subject to existing rights." Anyone claiming a vested right to withdraw public ground waters by virtue of prior beneficial use was given 3 years (which could be extended up to 2 more years for good cause) to apply for a "certificate of vested right" from the State administrative agency. After publication and findings sustaining the claimant's declaration, a certificate of approval was to be issued and recorded which shall have the same force and effect as an appropriative permit issued under the legislation, discussed below.[197] (In addition, claim-filing requirements enacted in 1967, discussed earlier with respect to surface watercourses, were made applicable to both "public surface and ground waters."[198])

The ground water legislation provides that it shall not affect or impair rights to appropriate surface waters and "the right of an appropriator and owner of surface water shall be superior to any subsequent right hereby authorized to be acquired in or to ground water" to the extent it may be affected.[199]

A permit is required for withdrawals of public ground waters and associated construction of wells or other works begun after the 1945 act's effective date (June 6, 1945)—except for stock-watering purposes, certain small domestic purposes and lawn and garden watering, and industrial uses not exceeding 5,000 gallons per day.[200] Applications for permits and rights to withdraw ground water are, with modifications, governed by the provisions of the appropriation statute regarding surface watercourses, discussed earlier.[201]

> No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation in the given basin, district, or locality to yield such water within a reasonable or feasible pumping lift in case of pumping developments, or within a reasonable or feasible reduction of pressure in the case of artesian developments. The [Director of the Department of Ecology] shall have the power to determine whether the granting of

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[196] In his partially dissenting opinion in *State* v. *Ponten*, discussed above, Judge Neill expressed the view, contrary to the trial court's opinion, that the application of the ground water appropriation statute is not limited to conflicting water-use situations. 463 Pac. (2d) at 158 (perhaps qualified at 159). The majority opinion of the court in this or other cases does not appear to have expressly considered this question. The court's majority opinion is discussed at notes 184-186 *supra*.

[197] RCWA § §90.44.040 and 90.44.090 (1962).

[198] RCWA §90.14.041 (Supp. 1974). Those claim-filing requirements are discussed under "Claim-filing Requirement," *infra*.

[199] RCWA §90.44.030 (1962).

[200] *Id.* §90.44.050.

[201] *Id.* §90.44.060.

> any such permit will injure or damage any vested or existing right or rights under prior permits * * *.[202]

Upon a showing of completion of construction in compliance with the terms of the permit, a "certificate of ground water right" shall be issued which shall include specified information and such additional information as may be reasonably required to establish compliance with the terms of the permit and the ground water legislation.[203]

The holders of valid ground water rights may be permitted, after notice and findings, to change the location of their wells or the manner or place of use, subject to certain restrictions and providing other existing rights are not impaired. If the withdrawal and use of a claimed or valid ground water right has discontinued for 5 years, the Director may presume it has been abandoned and require the owner or claimant to show cause why it should not be deemed abandoned and cancelled.[204] (In addition, legislation in 1967, discussed earlier with respect to surface watercourses, provides that holders of ground-water right and vested-right certificates who abandon the same or voluntarily fail without sufficient cause to beneficially use all or any part of the right for 5 successive years shall relinquish such right or portion thereof.[205] That legislation also provides that no rights to the use of ground water affecting either appropriated or unappropriated water may be acquired by prescription or adverse use.[206])

Prior appropriators, as against subsequent appropriators from the same ground water body, are given the right to have any withdrawals by a subsequent appropriator "limited to an amount that will maintain and provide a safe sustaining yield in the amount of the prior appropriation" to the extent of their beneficial use. Priorities shall be established separately for each ground water area, sub-area, or zone. The priority of a certificate of ground water right shall be the date of application, or of the earliest beneficial use of water for a certified vested ground water right.[207]

In accordance with the above priorities, the Director shall have jurisdiction to limit withdrawals by ground water appropriators so as to enforce the maintenance of a safe sustaining yield from the ground water body. For this purpose, he shall designate and modify ground water areas or sub-areas, and depth zones therein, as adequate factual data become available, and control withdrawals therefrom to prevent overdraft so far as feasible. Areas, sub-areas, or zones may be designated or modified, after notice and hearing, on the Director's own motion or on petition of a certain number or proportion of the

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[202] *Id.* §90.44.070.
[203] *Id.* §90.44.080.
[204] *Id.* §§90.44.100 and 90.44.190.
[205] RCWA §90.14.180 (Supp. 1974). See the discussion at notes 106-109 *supra.*
[206] RCWA §90.14.220 (Supp. 1974).
[207] RCWA §90.44.130 (1962).

ground water users. Within specified periods, after such designation or subsequent artificial storage, claimants of "artificially stored ground water" shall file declarations of such rights which, after notice and findings, shall be accepted or rejected by the Director. But his acceptance shall convey no right to withdraw such waters nor to impair existing or subsequent rights to the public ground waters.[208]

Hearings may be held at any time in designated ground water areas on the Director's own motion or on petition to determine whether the supply is adequate for current needs of the holders of valid ground water rights. If after notice and findings the supply is found inadequate, the Director shall order the aggregate withdrawals to be decreased for the term of such shortage, in conformity to their respective priorities unless altered by mutual agreement.[209]

The Director is authorized to take various actions to prevent the waste of water, including restrictions in permits issued, and he may require wells which contaminate other waters to be plugged or capped.[210]

One or more ground water supervisors may be appointed by the Director to operate under his supervision. Orders or decisions of the Director, ground water supervisors, and his other assistants are, of course, subject to appeal to the courts.[211]

Older legislation, enacted during the period from 1890 to 1901, provides that in areas where the use of water for irrigation is necessary or customary it is unlawful to allow an artesian well to flow during the period between October 15 and March 15 of each year, except for household, stock and domestic purposes. When anyone fails to cap his well properly during this period, anyone in lawful possession of land within 5 miles thereof may enter and cap it and all expenses incurred in so doing are a lien on the well.[212] This legislation also provides that anyone entitled to water from an artesian well may condemn a right of way for an irrigation ditch across intervening lands to the place of use.[213]

Statutory Adjudication Procedures

Statutory procedure.—The Washington statute governing the appropriation of water of watercourses contains provisions relating to the determination of water rights. The procedure begins either (1) with the filing of a petition to the Director of Ecology by one or more claimants of rights to divert any water within the State, or (2) when the Director believes that the public interest will be subserved by a determination of the rights involved. Thereupon it is the Director's function to prepare a statement of the facts and a plan or map of the

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[208] *Id.* With respect to such artificial ground waters, see the discussion at note 191 *supra.*
[209] RCWA §90.44.180 (1962).
[210] *Id.* §§90.44.110 and 90.44.120.
[211] *Id.* §§90.44.200 and 90.44.215.
[212] *Id.* §§90.36.020 to 90.36.050.
[213] *Id.* §90.36.010.

locality, and to file them in the appropriate county superior court. The statement shall contain names of all known claimants, a brief statement of pertinent facts, and the necessity for a determination of the rights.[214]

Summons shall be issued against all known and unknown claimants and served in the same manner as in civil actions. If any of the defendants cannot be found within the State, service upon them may be by publication in the manner provided. Each defendant is required to file with the clerk of the court, with a copy to the Director, a verified statement of specific essential facts relating to his claim.[215] On completion of service, the court makes an order referring the proceeding to the Director for the purpose of taking testimony by himself or deputy as referee. At the hearing the referee may subpoena witnesses and administer oaths. The Director files with the court a transcript of such testimony for adjudication thereon by the court, as well as all papers and exhibits received in evidence, and a complete report as in other cases of reference. After notice to those who have appeared in the proceeding, the court holds a hearing, prior to which written exceptions may be filed by any interested person. If no exceptions are filed, the court is required to enter a decree determining the rights of the parties according to the evidence and report of the Director, whether or not the parties have appeared therein. If exceptions are filed, the court proceeds (as in the case of reference of a suit in equity) with taking of further evidence or remand to the Director therefor at the court's discretion. Appeal may be taken to the supreme court or the court of appeals.[216] Any defendant who, after legal service, fails to appear and submit proof of his claim is estopped from subsequently asserting any right to use the water in question, except as determined by the decree.[217]

During the pendency of the proceedings or on appeal, if the court so orders, the water may be regulated in whole or in part according to the schedule of rights specified in the Director's report. This, however, is subject to the filing of a stay bond by an interested party, in which case the court orders regulation of the water in whatever way it deems just.[218]

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[214] *Id.* §90.03.110.

[215] *Id.* §§90.03.120 to 90.03.150.

[216] *Id.* §§90.03.160 to 90.03.190 and RCWA §90.03.200 (Supp. 1974).

[217] RCWA §90.03.220 (1962). The Washington Supreme Court expressed itself as "clearly of the opinion" that the water right statute vested the superior court with jurisdiction to adjudicate quantities of water and priorities of all claimants; that to accomplish this, all claimants legally served must appear and set up their claims; and that a defendant legally served (even though by publication rather than personal notice) but who fails to participate is estopped from asserting any right not determined by the decree. *Thompson* v. *Short*, 6 Wash. (2d) 71, 106 Pac. (2d) 720, 728 (1940). The court further indicated that when the required statement and map, described above, was filed by the State agency the court obtained jurisdiction (106 Pac. (2d) at 728), and that it did not appear that the sheriff acted fraudulently in failing to obtain personal service on certain absentee landowners and the preferred evidence attacking the verity of his return to this effect was insufficient to refute it even on a direct appeal, let alone in this attack on the decree in a collateral proceeding. 106 Pac. (2d) at 726 and 724-725.

[218] RCWA §90.03.210 (1962).

Upon entry of the decree, a certified copy is transmitted to the Director for entering on his records. The Director issues to each person whose rights of diversion are finally determined a certificate of the priority and purpose of his right, and of specified facets thereof.[219]

Effect of statute: Preexisting court jurisdiction.—The statute provides that a final decree of adjudication entered in any case decided "prior to taking effect of this act" (June 6, 1917), shall be conclusive among the parties thereto, and that the extent of use so determined shall be *prima facie* evidence of rights and priorities so fixed as against any person not a party to such decree.[220]

In a proceeding for contempt of court (not in a statutory adjudication suit), the defendant-appellant contended that the water rights statutue withdrew from the superior court all matters affecting adjudication of water rights except as provided therein. In answer to this, the Washington Supreme Court expressed its considered view that as between private parties, enforcement of water rights existing at the time of adoption of the water rights statute might be sought by a direct action in court. The State constitution included in the jurisdiction of the superior court all cases in equity; and equity jurisdiction to entertain suits for quieting title to use water, said the supreme court, is well settled. "The courts have plenary power to settle such disputes, and their power may be invoked to give redress in proper cases where there has not been a previous adjudication, either by an administrative board of the state or by a court having concurrent jurisdiction."[221]

Additional provisions regarding ground waters.—The ground water legislation enacted in 1945, discussed above under "Ground Waters," provides that the statutory adjudication procedure discussed above is applicable to ground waters and it provided that thereafter in any proceedings for the determination of rights to use surface waters or ground waters, or both, all appropriators of ground water or surface water in the particular basin or area may be included as parties, as pertinent. Determinations of ground water rights shall include the priority and quantity of water to which each appropriator who is a party to the proceedings shall be entitled. The level below which the ground water body shall not be drawn down by appropriators shall either be determined or jurisdiction shall be reserved to determine a safe sustaining water yield as needed from time to time to preserve the appropriator's rights and prevent depletion of the ground water body.[222]

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[219] *Id.* §§90.03.230 and 90.03.240.

Some decisions of the Washington Supreme Court in regard to this legislation, in addition to the one discussed in note 217 *supra*, are discussed in chapter 15 at notes 352 and 380-381. See also the discussion in note 97 *supra*.

[220] RCWA §90.03.170 (1962).

[221] *State ex rel. Roseburg* v. *Mohar*, 169 Wash. 368, 371-375, 13 Pac. (2d) 454 (1932). See *In re Crab Creek*, 194 Wash. 634, 79 Pac. (2d) 323, 327 (1938); *Thompson* v. *Short*, 6 Wash. (2d) 71, 106 Pac. (2d) 720, 728 (1940).

[222] RCWA §§90.44.220 and 90.44.230 (1962). See notes 227-231 *infra* regarding claim-filing requirements applicable to surface and ground waters.

Administration of Water Rights and Distribution of Water

The Washington legislation governing the appropriation of water of watercourses contains the following provisions regarding the administration of water rights and distribution of water. Other provisions applicable to ground waters have been discussed above under "Ground Waters."

The Director of Ecology is directed to appoint water masters whenever he finds the interests of the State or the water users require them. He also shall designate the watermaster districts for or in which they shall serve, from time to time as required. The districts are subject to boundary revision, or to complete abandonment, as local conditions may indicate to be expedient. The watermasters are under the supervision of the Director, and must be technically qualified in knowledge of elementary hydraulics and irrigation and ability to measure flowing water.[223] Under the Director, watermasters divide the water supply of their districts among the several conduits and reservoirs using the supply pursuant to their rights of priority. They may open, close, and fasten headgates and regulate controlling works of reservoirs to prevent excessive use, and may make arrests.[224]

For administration of streams, the water rights of which have been adjudicated, and for such periods as local conditions warrant to provide the most practical supervision and to best protect water rights, the Director shall appoint a stream patrolman—with approval of the district watermaster if there is one—on application of interested parties who make a reasonable showing of necessity. The powers of a stream patrolman are the same as those of a watermaster but are confined to regulation of a designated stream or streams. He is under the supervision of the Director or the district watermaster and must enforce such special rules and regulations as the Director may prescribe.[225]

Penalties are provided, among other things, for wilfully interfering with, injuring or destroying headgates or structures, or for wilfully using or conducting water into one's ditch which has been denied him by the watermaster or other competent authority.[226]

A claim-filing requirement, stated to be an aid to efficient administration of the State's waters, is discussed immediately below.

Claim-filing Requirement

Washington legislation enacted in 1967, as amended in 1969, requires that anyone using or claiming the right to withdraw or divert and make beneficial use of public surface or ground waters of the State other than under a permit

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[223] RCWA §90.03.060 (Supp. 1974).

[224] *Id.* §90.03.070 and RCWA §90.03.090 (1962). See also §§90.03.430 to 90.03.450 (1962) regarding some provisions regarding partnership ditches.

[225] RCWA §90.08.040 (1962).

[226] RCWA §90.03.410 (Supp. 1974).

or certificate from the Department of Ecology (or a predecessor agency) shall file a claim with the Department by June 30, 1974. Failure to do so, after required notice by the Department,[227] shall be conclusively deemed a waiver and relinquishment of the right. The Department is required to maintain a Water Rights Claims Registry.[228] The stated purpose of this legislation is "to provide adequate records for efficient administration of the state's waters, and to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use."[229]

However, the filing of a claim does not constitute an adjudication of the claimed right.[230] The claim shall be admissable in a general adjudication of water rights as *prima facie* evidence of the times of use and quantity of water as of the year of filing "if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the statement of claim. A statement of claim shall not otherwise be evidence of the priority of the claimed water right."[231]

Wyoming

Governmental Status

Wyoming became a Territory on July 5, 1868,[1] and was admitted to the Union by an act of Congress approved July 10, 1890.[2]

State Administrative Agencies

The Wyoming constitution, which became effective with statehood, directed the legislature to divide the State into four water divisions. It also provided for a Board of Control, to be comprised of the State Engineer and the superintendents of the four water divisions. The Board was given, under such regulations as may be prescribed by law, "the supervision of the waters of the state and their appropriation, distribution, and diversion, and of the various officers connected therewith." The State Engineer "shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution."[3]

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[227] Which includes specified notice through newspapers, television, radio, county courthouse postings, notices to press services, and notices sent along with tax-due statements of county treasurers in 1972.

[228] RCWA § § 90.14.010 to 90.14.121 (Supp. 1974).

[229] *Id.* § 90.14.010.

[230] *Id.* § § 90.14.010 to 90.14.121.

[231] *Id.* § 90.14.081. This section includes special provisions applicable to certain small uses. A knowingly overstated claim shall constitute a misdemeanor. *Id.* § 90.14.121.

[1] 15 Stat. 178 (1868).

[2] 26 Stat. 222 (1890).

[3] Wyo. Const. art. VIII, § § 2, 4, and 5.

Pursuant to this constitutional directive, the legislature divided the State into four divisions and provided for the appointment of a superintendent for each division.[4] The Board of Control has the responsibility for creating water districts within each water division.[5] The Governor appoints a water commissioner for each district, if needed.[6]

Various aspects of the functions of the Board of Control, the State Engineer, Division Superintendents, and water commissioners are discussed under succeeding topics.

Appropriation of Water of Watercourses

Recognition of doctrine of prior appropriation.—(1) Territorial legislation. In a 1903 water rights case, the Wyoming Supreme Court called attention to the fact that its previous irrigation decisions referred to the 1875 Territorial legislation as the first expression of the legislature on the subject, and that that act constituted the earliest attempt in Wyoming to regulate it.[7] But, the court went on to say, earlier declarations and presumptions tended to illustrate prevailing customs as to the use of water, its necessity in the community, and the public recognition given thereto. The following statutes enacted at the first session of the Territorial Assembly in 1869—neither of which used the term appropriation—were cited.

(a) 1869 acts. A chapter devoted to the organization of corporations provided that the certificate of incorporation for a company organized to construct a ditch to carry water to be used for mining, milling, or irrigation of lands must specify the stream from which water would be taken, point of diversion, line of the ditch, and use to which the water was to be applied. The ditch company was given a right-of-way and the right to run the water from the named stream through the ditch. The proposed line was not to interfere with any other ditch having prior rights; and water was not to be diverted to the detriment of the miners, mill-men, or others along the stream "who may have a priority of right."[8]

A chapter on mining provided for posting and filing notice of claim for water privileges to be exercised by means of a ditch, and specified fractions of which were to be completed within specified periods of time until at least one-half of the entire length of the ditch should be completed, "after which it shall be considered real estate." A right-of-way over any road, ditch, or mine was accorded to anyone conducting a ditch into or through any mining district, provided that vested rights of use were not to be interfered with nor their mines damaged.[9]

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[4] Wyo. Stat. Ann. § § 41-54 (1957) and 41-55 (Supp. 1973).
[5] Wyo. Stat. Ann. §41-61 (1957).
[6] *Id.* §41-62.
[7] *Willey* v. *Decker*, 11 Wyo. 496, 526, 73 Pac. 210 (1903).
[8] Wyo. Laws 1869, ch. 8, § § 28 and 29.
[9] Wyo. Laws 1869, ch. 22, § § 15-18.

(b) 1875 irrigation act.[10] Section 1, which became section 1317 of the Revised Statutes of 1887, provided that all claimants or holders of possessory rights or title to land within Wyoming *on the bank or margin* or *in the neighborhood of any stream* should be entitled to the use of the water thereof for purposes of irrigation, to the full extent of the soil, for agricultural purposes. This section remained in the statutes until specifically repealed in the water appropriation law enacted by the first State legislature.[11]

This 1875 statute, like those of 1869, did not use the term "appropriation" of water or "appropriative right." On the contrary, it impressed some observers as leaning toward the riparian doctrine, although the Wyoming Supreme Court construed the section literally as not confined to riparian owners but as extending to all claimants of land in the neighborhood.[12] In any event, ownership of land rather than ditch construction was made the foundation of the water right.[13] The statute did provide that nothing therein contained should be so construed as to impair the prior vested rights of any miller, ditch owner, or other person to use the waters of any watercourse to which the legislation related.

Other sections of the 1875 act accorded a right-of-way over other lands to the stream if necessary because of topography, with the right of condemnation if landowners refused to cooperate. The act also provided for appointment of commissioners to apportion water of a stream when the streamflow should not be sufficient to supply the continual wants of the entire country through which it passed. The right to lift water mechanically over the streambank for irrigation—to be condemned if necessary—was granted by section 7, which became section 1322 of Revised Statutes of 1887.

(c) 1886 irrigation act.[14] This was specifically and unqualifiedly a water appropriation statute of considerable length and detail, which was declared to apply to all cases in which water of natural streams was appropriated for beneficial purposes.

The chief subjects of the 1886 legislation were that the water of every natural stream not previously appropriated within the Territory was declared to be the property of the public and was dedicated to the use of the people, subject to appropriation. The act provided a procedure for appropriating water; every intending appropriator thereafter was required to follow it, his appropriation being initiated by filing in the county records a statement of his intentions. It established irrigation districts, by stream drainage areas, and provided for the appointment of a water commissioner for each such district for the purpose of dividing the waters in his jurisdiction among the several

[10] Wyo. Comp. Laws, ch. 65 (1876). Approved December 10, 1875.

[11] Wyo. Laws 1890-91, ch. 8, §49.

[12] *Moyer* v. *Preston*, 6 Wyo. 308, 318-320, 44 Pac. 845 (1896), discussed at notes 138-140 *infra.*

[13] Mead, E., "Irrigation Institutions" 248 (1903).

[14] Wyo. Laws 1886, ch. 61.

ditches therein according to their respective priorities. Jurisdiction of suits to adjudicate water rights was vested in the district courts, all claimants of water rights being required to file statements therein; and a special water rights adjudication procedure was provided, with appeal to the supreme court.

Following are some other important provisions of the 1886 law. Owners of conduits and reservoirs were authorized to conduct water into and along any natural stream and to withdraw it at any desired point, due allowance for transmission losses to be determined by the water commissioner subject to court review. The act authorized the construction of reservoirs for the purpose of storing unappropriated water not needed for immediate use. Corporations were declared to have all rights to the use of water that were accorded to natural persons.

(d) 1888 irrigation-appropriation-Territorial Engineer act.[15] This statute, enacted near the end of the Territorial regime, laid the foundation for what was soon to follow—broad State administrative control over water matters, with a specific constitutional basis promptly supplemented by legislative direction. The Territorial act provided for the appointment of a Territorial Engineer to serve for a period of 2 years commencing April 1, 1888. Elwood Mead, who served until statehood as Territorial Engineer, became the first State Engineer of Wyoming.

The Territorial Engineer was given general supervision of the diversion and division of streamflow, and of the work of the district water commissioners. His office was made a depository for certificates of adjudication and decrees of water rights, but he was not vested with supervision over acts of appropriating water; intending appropriators were required to file statements of their claims in county records within 90 days after commencement of construction. The declaration of public ownership of water in the 1886 act was repeated, with some variation in wording but none in principle. Preference in use of water in time of scarcity was accorded to domestic use over any other, and to agriculture over manufacturing. Section 14 limited the priority to the quantity of water necessarily used for irrigation or other beneficial purposes, irrespective of ditch capacity; and it provided for abandonment of rights pertaining to water not used, or to surplus water refused by the appropriator to others, during any 2 successive years. Section 15 provided that surplus water should be furnished at reasonable rates, to be fixed if desired by a board of water commissioners. With the exception of sections 14 and 15, the entire act of 1888 was repealed in the State water statute of 1890.[16]

(2) State constitution. According to Elwood Mead—who was the first State Engineer of Wyoming and who held that office for 8 years—the accumulated water rights complications at the time of statehood made irrigation one of the most important questions to be considered at the constitutional convention.[17]

[15] Wyo. Laws 1888, ch. 55.
[16] Wyo. Laws 1890-91, ch. 8, § 49.
[17] Mead, *supra* note 13, at 252.

Fortunately, he said, among the members of this body were a number of men unusually well-informed on the subject, who sought not only to correct past mistakes but to create a system suited to the needs of the future.[18]

The constitution of Wyoming declares an exceptionally large number of principles pertaining to water. The theme is public control of water and water rights, under principles of State ownership of water, subject to individual rights of prior appropriation and use for beneficial purposes. The Declaration of Rights states that water being essential to industrial prosperity, of limited amount, and easy of diversion from natural channels, its control must be in the State which, in providing for its use, shall equally guard all the various interests involved.[19] Other sections of the Declaration of Rights both provide for and safeguard exercise of the right to condemn private property needed for installation and use of water facilities.[20]

All of article VIII of the constitution is devoted to irrigation and water rights. The water of all natural streams, springs, lakes, or other collections of still water within the State is declared to be the property of the State.[21] Priority of appropriation for beneficial uses gives the better right; and no appropriation is to be denied except when the public interest demands it.[22] The constitution also provides for a centralized administrative system for the acquisition, supervision, and distribution of water. See "State Administrative Agencies," above.

Municipal corporations are granted "the same right as individuals" to acquire rights by prior appropriation and otherwise to use water for domestic and municipal purposes, and to exercise the power of eminent domain therefor under laws which the legislature is directed to enact.[23]

(3) State legislation. Immediately upon attaining statehood, Wyoming produced the most comprehensive statute pertaining to public control of water under principles of prior appropriation that had been up to that time enacted in the West. Colorado had already pioneered in establishing special statutory procedures for adjudicating appropriative water rights solely by court action, and for administering adjudicated rights through a centralized State agency which reached out to every adjudicated stream in the jurisdiction.[24] But Wyoming went further, and created a central State administrative agency which not only exercised comprehensive control over the distribution of water to

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[18] See the pithy account of Dr. Mead's work in introducing his "startling proposals" for State water rights control, which were accepted and embodied in the Wyoming constitution and which have heavily influenced the basic water doctrines of most other Western States, in Trelease, F. J., "Trends in the Law of Prior Appropriation," Proc. Water Law Conferences, Univ. of Tex. 206, 208-209 (1952, 1954).

[19] Wyo. Const. art. I, § 31.

[20] *Id.* § § 32 and 33.

[21] *Id.* art. VIII, § 1.

[22] *Id.* § 3.

[23] *Id.* art. XIII, § 5.

[24] See the Colorado State summary.

appropriators, but received and acted upon applications for permits to appropriate water under an exclusive procedure, and adjudicated water rights by means of orders or decrees which were final unless appealed to the courts.[25]

(4) Court decisions. Specific judicial recognition of the appropriation doctrine was given by the Wyoming Supreme Court in *Moyer* v. *Preston*, where the riparian doctrine was held to be unsuited to Wyoming requirements and never to have obtained in the jurisdiction, for the practical reason that the doctrine of prior appropriation was better adapted to the dry climate and arid soil existing in Wyoming.[26] At the turn of the century, the opinion in *Farm Investment Company* v. *Carpenter*[27] repeated the recognition of the appropriative principle and included a summary of the Wyoming water legislation from 1875 to 1890. Later the court said, "[I]t will be observed that the doctrine of prior appropriation is established as a rule of imperative necessity, and the outgrowth of the custom of the earlier settlers upon the public lands for the purpose of mining or rendering the soil available for cultivation."[28]

Procedure for appropriating water: Early methods.—Before a statutory procedure had been provided for appropriating water in Wyoming, appropriations were made as elsewhere in early western settlements by diverting the water and applying it to beneficial use. The simple formality of posting a notice at the point of diversion, while not required, was probably used in many instances. In 1869 the first Territorial Legislative Assembly passed an act relating to mining, which contained a requirement that notices of claim of a water privilege must be posted at both the beginning and end of the ditch, that a copy be filed in the county records, and that specified fractions of ditch length be completed within specified periods of time.[29] The irrigation law of 1886 required every intending appropriator to record with county officers a statement of his proposed project, to begin it within 60 days thereafter, and to prosecute it diligently and continuously to completion.[30] Two years later, the 1886 provision was repealed and a requirement was substituted that the intending appropriator file a statement of his claim with the county clerk

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[25] Wyo. Laws 1890-91, ch. 8. When this statute was enacted, recognition of the doctrine of prior appropriation in Wyoming had been accorded by the Territorial legislature and by general custom throughout the jurisdiction. Only a few months before the enactment, the State constitution with its many specific declarations on the matter had gone into effect. Presumably, this first State legislature was more concerned with the many complex details of new procedures than with further declarations of substantive water appropriation law which could add little to what the constitution had already declared.

[26] *Moyer* v. *Preston*, 6 Wyo. 308, 318-321, 44 Pac. 845 (1896). The decision in *Frank* v. *Hicks*, 4 Wyo. 502, 524-529, 531-532, 35 Pac. 475 (1894), dealt particularly with the nature of a water right in the arid region, its relation to land, and its conveyance with the land to which appurtenant or separately therefrom.

[27] *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 122-129, 137-139, 61 Pac. 258 (1900).

[28] *Willey* v. *Decker*, 11 Wyo. 496, 519, 73 Pac. 210 (1903).

[29] Wyo. Laws 1869, ch. 22, §§15-18.

[30] Wyo. Laws 1886, ch. 61, §13.

within 90 days after beginning work, the priority to relate back to the date of commencement if the work were prosecuted diligently and continuously to completion.[31] This was the last Territorial legislation on the subject.

Procedure for appropriating water: Current method.—The current Wyoming method of initiating and completing an appropriation of water under the supervision of State administrative officers—which was the first of this type in the West, and became the prototype of most water appropriation procedures established since—was provided by the first State legislature in 1890,[32] and has been amended from time to time.

(1) Exclusiveness of procedure. The water appropriation statute provides that before beginning any work in connection with an intended appropriation, application must be made to the State Engineer for a permit; and that wilful diversion or use of water to the detriment of others without compliance with law is a misdemeanor.[33]

In 1949, the Wyoming Supreme Court referred to an earlier holding that no water right may be initiated under present laws except pursuant to a permit, and declared that therefore the requirement of such permit is mandatory.[34] The reference was to a case decided in 1925, in which it was conceded that with respect to a certain ditch the provisions of the law had not been followed.[35] The court held that under the constitution and the legislation of 1890, a lawful appropriation of water could not be made without an application for a permit and a granted permit; that the requirements were in the public interest, and were reasonable insofar at least as questioned in the instant case; and that the statute is constitutional in this respect.

(2) Appropriable waters. The Wyoming constitution declares the water "of all natural streams, springs, lakes or other collections of still water" within the boundaries of the State to be the property of the State.[36] In the section of the appropriation statute relating to attachment of water rights to the land or object for which acquired, the legislature used the phrase "Water being always the property of the state * * *."[37]

Applications to appropriate the public water of the State shall be made to the State Engineer as discussed below under "(5) Procedural steps."[38]

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[31] Wyo. Laws 1888, ch. 55, §§ 12 and 18.

[32] Wyo. Laws 1890-91, ch. 8.

[33] Wyo. Stat. Ann. §41-201 (1957).

[34] *Laramie Rivers Co.* v. *LeVasseur*, 65 Wyo. 414, 431, 202 Pac. (2d) 680 (1949). See also *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 388, 395, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[35] *Wyoming Hereford Ranch* v. *Hammond Packing Co.*, 33 Wyo. 14, 29-36, 236 Pac. 764 (1925).

[36] Wyo. Const. art. VIII, §1.

[37] Wyo. Stat. Ann. §41-2 (1957).

[38] Matters related to the question of appropriable waters are also discussed under "Restrictions and preferences in the appropriation of water," *infra.*

(3) Who may appropriate water. "Any person, association or corporation" may acquire an appropriative right under the Wyoming statute.[39]

The State constitution provides that "Municipal corporations shall have the same right as individuals to acquire rights by prior appropriation and otherwise to the use of water for domestic and municipal purposes * * *."[40]

The Wyoming Supreme Court has indicated that a common carrier of water, or a public utility, may initiate appropriative rights for the diversion of water to be used by its consumers.[41]

(4) Purpose of use of water. In Wyoming water law no limitation is prescribed as to the purpose for which water may be appropriated, so long as it is a "beneficial use." The nature of the proposed use must be stated in the application.[42] If the proposed appropriation is for irrigation purposes, acreages must be stated.[43]

Statutory preference provisions are discussed later under "Restrictions and preferences in appropriation of water—(3) Preferred uses of water."

(5) Procedural steps. The Wyoming Supreme Court thus summarized the "essential requisites" underlying the procedural steps in appropriating water: "A water right is acquired by an appropriation of water in good faith, initiated by the appropriator or his agent in the manner prescribed by law, pursuing the construction of works in connection with it, if necessary, with reasonable diligence, and applying the water to beneficial use within a reasonable time."[44] The statutory procedure provides the practical means for implementing these principles under public supervision.

Before commencing construction, enlargement, or extension of any water conduit, or performing any work in connection with a proposed appropriation of public water of the State, the intending appropriator must make an application to the State Engineer for a permit therefor. Any person who willfully diverts or uses water to the detriment of others without compliance with law is guilty of a misdemeanor.[45]

The application may be either approved or rejected by the State Engineer, depending upon the circumstances, as noted below under "Restrictions and preferences in the appropriation of water." If approved, periods of time for beginning and completing construction work (completion not to exceed 5 years), for applying the water to beneficial use, and for submitting final proof of appropriation are to be stated in the permit, but may be extended for good

[39] Wyo. Stat. Ann. §41-201 (1957).

[40] Wyo. Const. art. XIII, §5.

[41] *State* v. *Laramie Rivers Co.*, 59 Wyo. 9, 41-46, 136 Pac. (2d) 487 (1943). This is discussed in chapter 8 at note 613. This case was distinguished in *Wheatland Irr. Dist.* v. *Pioneer Canal Co.*, 464 Pac. (2d) 533, 537 (1970).

[42] Wyo. Stat. Ann. §41-201 (1957).

[43] Wyo. Stat. Ann. §41-202 (Supp. 1973).

[44] *State* v. *Laramie Rivers Co.*, 59 Wyo. 9, 39, 136 Pac. (2d) 487 (1943).

[45] Wyo. Stat. Ann. §41-201 (1957). See §41-202 (Supp. 1973), regarding procedures for making and correcting applications.

cause shown.[46] "After issuance of the permit under legislative authority and completion of the work according to the terms of the permit, the board of control may adjudicate said water rights upon proof of beneficial use * * *."[47]

Final proof of perfection of the appropriation may be submitted before the superintendent of the water division in which the water right involved is situated or, when more expedient, before certain other officials.[48] At an advertised time it is opened to public inspection by interested claimants, who have the right to "contest against any of the proposed adjudications according to the provisions of sections 41-176 to 41-179 * * *."[49] The superintendent transmits the proofs of appropriation and accompanying documents to the Board of Control which, at its next regular meeting, considers the matter. If satisfied that the appropriation has been perfected in accordance with the permit and that there are no conflicts, the Board shall issue to the permittee a certificate of appropriation (of the same character as certificiates issued under the special statutory adjudication procedure discussed later).[50] There are statutory procedures for correcting permits for errors or otherwise, within limitations, before or after the Board's adjudication of the matter.[51]

An applicant who feels aggrieved by the State Engineer's action may appeal informally in writing to the Board of Control, which notifies all interested parties and holds a hearing. From the order or determination of the Board, aggrieved parties may appeal to the district court.[52]

(6) Priority. The priority of an appropriation initiated and perfected under the current Wyoming statute dates from the filing of the application in the State Engineer's office. This applies both to appropriations of the direct flow of streams[53] and to rights to store water,[54] discussed below under "(8) Storage of water." Priorities of rights to surplus water of streams acquired under a 1945 law date from March 1, 1945.[55]

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[46] Default in any of the statute's requirements in this regard shall work a forfeiture and the State Engineer may, after required notice, cancel the inchoate permit. Wyo. Stat. Ann. §41-206 (Supp. 1973). Some questions regarding the coordination of these provisions with other legislation regarding statutory abandonment and forfeiture are discussed in note 128 *infra*. Court decisions regarding the question of gradual development are discussed at notes 59-62 *infra*.

[47] As provided by §41-211, discussed immediately below. Wyo. Stat. Ann. §41-152 (1957).

See note 206 *infra* regarding tabulations of adjudicated rights.

[48] Wyo. Stat. Ann. §41-211 (Interim Supp. 1974). Division superintendents are discussed under "State Administrative Agencies," *supra*.

[49] Wyo. Stat. Ann. §41-211 (Interim Supp. 1974).

[50] *Id.*, referring to §41-189 which is discussed at note 192 *infra*.

[51] Wyo. Stat. Ann. §41-213 (Supp. 1973).

[52] Wyo. Stat. Ann. §41-216 (1957).

[53] *Id.* §41-212.

[54] *Id.* §41-35.

[55] Wyo. Laws 1945, ch. 153, Stat. Ann. §§41-184 and -187 (1957). This law is discussed at note 82 *infra*.

Priorities under the Territorial law of 1888 dated from commencement of the work—or of necessary surveys preliminary thereto—provided the requirements of the law were complied with. This may have been implied in the 1886 law as well.[56]

Under the doctrine of prior appropriation, priority in time of making the appropriation gives the better right.[57] The statutes provide some exceptions to the original rule of "First come, first served" (see "Restrictions and preferences in appropriation of water," below). However, established priorities form the basis of distribution of stream waters of the State.[58]

(7) Gradual development and future use. The Wyoming Supreme Court has said:

> To constitute an appropriation there must exist not only an intent to take the water, but that intent must be accompanied or followed by some open physical demonstration, and there must ultimately be an application to some beneficial use, the initial act must also be followed up with reasonable diligence, and the purpose consummated without unnecessary delay in order that, by the doctrine of relation, the time of appropriation may relate back to such initial proceeding.[59]

In several cases, the court recognized the principle of gradual development and future use of appropriated water. The court said that "an application may properly be made when it is made in good faith and with an actual bona fide intention and a present design to appropriate the water for a beneficial use, though contemplated in the future, and when it is not made for the purpose of mere speculation or monoply."[60]

When principles of mining law were extended to irrigation, the court explained, the fact became accepted that limitation of an appropriation of water to the capacity of the original ditch was not rigid. It was frequently impractical to accomplish construction of works and appropriation of water to beneficial use within a short time; some flexibility was justified, within the limits of reasonableness of time consumed, with respect not only to irrigation, but to municipal purposes as well.[61] And in considering whether a land and water development company—which covered thousands of acres of which all could not possibly have been settled and reclaimed at once—had abused its right of gradual development, the supreme court stated its belief that courts should not take it upon themselves to declare that the right was taken from the

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[56] Wyo. Laws 1888, ch. 55, §12, Laws 1886, ch. 61, §13. See *Whalon* v. *North Platte Canal & Colonization Co.*, 11 Wyo. 313, 344, 71 Pac. 995 (1903).

[57] *Willey* v. *Decker*, 11 Wyo. 496, 510, 73 Pac. 210 (1903).

[58] *Laramie Irr. & Power Co.* v. *Grant*, 44 Wyo. 392, 412, 13 Pac. (2d) 235 (1932).

[59] *Moyer* v. *Preston*, 6 Wyo. 308, 321, 44 Pac. 845 (1896).

[60] *Scherck* v. *Nichols*, 55 Wyo. 4, 18, 95 Pac. (2d) 74 (1939), quoted with approval in *Lake DeSmet Res. Co.* v. *Kaufmann*, 75 Wyo. 87, 99, 292 Pac. (2d) 482 (1956).

[61] *Van Tassel Real Estate & Live Stock Co.* v. *Cheyenne*, 49 Wyo. 333, 357-359, 54 Pac. (2d) 906 (1936), citing *Holt* v. *Cheyenne*, 22 Wyo. 212, 137 Pac. 876 (1914).

company as a matter of law by the mere fact that the development was slow.[62]

(8) Storage of water. Application for a permit to construct a reservoir for impounding unappropriated waters of the State for beneficial uses must be made to the State Engineer by any person, corporation, association, or organization of any character before commencing construction of works or performing any work in connection therewith.[63] Statutory provisions governing the handling of applications for permits to appropriate direct streamflow are applicable to such storage permits, except that an enumeration of lands proposed to be irrigated is not required in the "primary permit" for storage purposes. Furthermore, "any party or parties desiring to appropriate such stored water to particular lands may file with the state engineer an application for permit to be known herein as the secondary permit." The application therefor refers to the reservoir for a supply of water, and the State Engineer is not to approve the application and issue a secondary permit until the applicant presents evidence that he has agreed with the reservoir owners for a permanent and sufficient interest in the reservoir to impound enough water for the purposes of the appropriation. When beneficial use is completed and is perfected under the secondary permit, the Division Superintendent takes proof of the water user thereunder, and the final certificate of appropriation refers to both the ditch described in the secondary permit and the reservoir described in

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[62] *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 401-406, 100 Pac. (2d) 124, 142, rehearing denied, 102 Pac. (2d) 745 (1940). See *Laramie Rivers Co.* v. *LeVasseur*, 65 Wyo. 414, 424-425, 202 Pac. (2d) 680 (1949). In the *Campbell* case, the court appears to have been referring in this regard to an earlier version (R.S. 1931, § 122-409) of the statutory forfeiture provision regarding inchoate permits discussed in note 46 *supra*. 100 Pac. (2d) at 142. The earlier version was rather similar, although it did not expressly authorize the State Engineer to cancel a forfeited inchoate permit. The court also said, *inter alia*, that under the statutes "the state engineer may extend the time for completing irrigation works for more than five years, and apparently for an indefinite time, except perhaps in case of abuse of the right of extension. He would, doubtless, have considerable discretion." 100 Pac. (2d) at 142, referring to an earlier, similar version (R.S. 1931, § 122-409) of the statute that is discussed at note 46 *supra*. The court also indicated that the abandonment and forfeiture statute discussed at note 122 *infra* seems, primarily at least, to apply only to a perfected right, not an inchoate right, as discussed in note 128 *infra*. However, that statute was repealed and replaced with a new provision in 1973, set out at note 124 *infra*. If it applies to inchoate as well as perfected rights, this could be a significant change and there might be some questions in coordinating its provisions with the other provisions regarding inchoate permits, as discussed in note 128 *infra*.

[63] Wyo. Stat. Ann. § 41-26 (1957). This section includes some special provisions regarding reservoirs solely for stock purposes with no more than a 20 acre-feet capacity and 20-foot dam height. Sections 41-73 and -74 provide that "plans for any diversion dam across the channel of a running stream, above five feet in height, or of any other diversion dam intended to retain water above ten feet in height, shall be submitted to the state engineer for his approval," and the State Engineer may inspect such construction and order alterations for the safety of persons residing on or owning lands in the vicinity.

the primary permit.[64] Priority of the right to store water under the statute dates from the filing of the application in the State Engineer's office.[65]

The Wyoming Supreme Court has expressed the opinion that the primary permit contemplates the authority from the State to construct a reservoir, and the secondary permit is the State's authority to appropriate to beneficial use the waters impounded in the reservoir.[66]

The use of water stored under the provisions of the statute may be acquired under such terms as shall be agreed upon by and between the parties in interest. Water may be withdrawn for beneficial use by those entitled to it at such times as they may elect.[67] Sale of any portion of the reservoir capacity carries with it a proportionate share in the reservoir and appurtenant works.[68] Unless attached to particular lands by deed or other instrument of conveyance, reservoir rights may be transferred for use elsewhere.[69]

In addition to the provisions for sale and for lease of portions of the overall right to use waters impounded in a reservoir, the Wyoming law provides for furnishing excess stored water to applicants on a public utility basis—at reasonable rates subject to special public regulation, and the storage permittee may be compelled to do so by court proceedings. This applies to water impounded by a reservoir owner over and above the quantity necessarily used for irrigation or other beneficial purposes in connection with his own lands.[70] Nevertheless, the State supreme court has indicated that the storage right is limited to such amount as can be beneficially used by the storage permittee and such users,[71] and is limited to one filling of the reservoir each year.[72] The statute provides for use of the bed of a watercourse for the purpose of carrying stored water from a reservoir to the consumer thereof. Necessary adjustments are to be made by the district water commissioner.[73]

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[64] *Id.* §41-27.

[65] *Id.* §41-35.

[66] Under the circumstances of this case, in which the reservoir owners and persons intending to use its impounded waters were the same, the court indicated that the statute was not mandatory but was only permissive, and its procedures need not be followed in such a case. But there was no debatable question whether or not a secondary permit had been granted. *Condict* v. *Ryan*, 79 Wyo. 211, 225-230, 333 Pac. (2d) 684 (1958), rehearing denied, 79 Wyo. 231, 234-235, 335 Pac. (2d) 792 (1959), discussed in chapter 7 at note 641.

[67] Wyo. Stat. Ann. §41-28 (1957).

[68] *Id.* §41-34.

[69] *Id.* §41-37, discussed at notes 112-113 *infra.*

[70] *Id.* §§41-39 to -41. This is discussed in chapter 7 at notes 698-700.

An earlier enactment (§41-47), discussed in chapter 7 at note 697, has been repealed. Laws 1973, ch. 176, §2.

[71] *Kearney Lake, Land & Res. Co.* v. *Lake DeSmet Res. Co.*, 475 Pac. (2d) 548, 550 (Wyo. 1970).

[72] *Wheatland Irr. Dist.* v. *Pioneer Canal Co.*, 464 Pac. (2d) 533, 539-540 (Wyo. 1970).

[73] Wyo. Stat. Ann. §41-29 (1957). District commissioners are discussed under "State Administrative Agencies," *supra.*

Legislation enacted in 1973 provides that the holder or owner of a right to the direct use of the natural unstored flow of a surface stream may store such direct flow provided no other Wyoming appropriator is thereby injured or affected. The permission of the State Board of Control shall be obtained, upon request to the State Engineer, who may prescribe necessary or desirable rules and regulations.[74]

Restrictions and preferences in appropriation of water.—(1) Constitutional restrictions. The Wyoming constitution provides, "No appropriation shall be denied except when such denial is demanded by the public interests."[75]

(2) Statutory restrictions. The State Engineer is required to approve all applications in proper form which contemplate application of the water to a beneficial use, provided that the proposed use does not tend to impair the value of existing rights or would be otherwise detrimental to the public welfare. If there is no unappropriated water in the proposed source, or if the proposed use conflicts with existing rights or threatens to prove detrimental to the public interest, it is the duty of the State Engineer to reject the application.[76]

Before approving or rejecting an application, the State Engineer may require such information as will enable him to properly guard the public interests. In case of proposals to divert more than 25 cubic feet per second or to reclaim more than 1,000 acres of land, facts necessary to enable a determination of financial ability and good faith may be required.[77] An application may be limited by the State Engineer to a lesser period of time for construction and application of water to beneficial use than is requested.[78] Statutory provisions and court decisions regarding the completion of construction work and application of water to beneficial use are discussed above.[79]

The water rights statute provides initially that no allotment for the direct use of the natural unstored flow of any stream shall exceed one cubic foot per second for each 70 acres of land for which the appropriation may be made.[80]

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[74] Wyo. Laws 1973, ch. 203, § 1, Stat. Ann. § 41-29.1 (Supp. 1973).

[75] Wyo. Const. art. VIII, § 3.

[76] Wyo. Stat. Ann. § 41-203 (1957).

[77] *Id.* § 41-205.

[78] Wyo. Stat. Ann. § 41-206 (Supp. 1973).

[79] See the discussion at notes 46-52 and 59-62 *supra.*

[80] Wyo. Stat. Ann. § 41-181 (1957).

The Wyoming Supreme Court has indicated that the original, similar State statutory proviso, which referred only to rights adjudicated under State laws, did not have the effect of so limiting the quantity of water under rights initiated under Territorial laws and adjudicated by decree of the Territorial courts. Those rights were limited by the quantity fixed in the decrees and reasonably necessary for the stated irrigated acreage of each. *Quinn* v. *John Whitaker Ranch Co.*, 54 Wyo. 367, 92 Pac. (2d) 568, 570-572 (1939). But the court indicated, citing an early State Engineer's report, that relatively few such rights were so adjudicated by the Territorial courts. 92 Pac. (2d) at 571. The court referred to an earlier case concerned with rights initiated in the Territorial period

(*Continued*)

Legislation dating from 1935 has further provided that any water of a stream in excess of all appropriations therefrom shall be divided among them in proportion to the acreage covered by their respective permits, provided it is beneficially used.[81] And legislation enacted in 1945 also has provided for distribution to existing appropriators of "surplus water" flowing in Wyoming streams—surplus water being defined as the quantity at any time "in excess of the total amount required to furnish to all existing appropriations from said stream system the maximum amount of water for which all said appropriations have been granted, whether by permit or by adjudicated decree as of March 1, 1945."[82] The surplus water right to use up to one cubic foot per second for each 70 acres of land (which is an additional amount equal in maximum amount to the maximum limit for direct use of the natural unstored flow, discussed above)—but not to exceed the applicant's "proportionate share of the total quantity of previously appropriated water from said stream"—attaches to all original direct flow rights previously adjudicated or under permit, with priority as of March 1, 1945. Unadjudicated rights acquire the surplus right as the original is perfected. Appropriation of surplus water with priority senior to water rights acquired after such date is perfected when the beneficiary has applied the water to beneficial use. Permits issued or water rights granted after such date shall be subject to the adjudication of surplus water as provided in the 1945 legislation.

Legislation enacted in 1965 further provides that a "supplemental supply water right," defined as "a permit or certificate of appropriation for the diversion, from a stream, of water from a new source of supply for application to lands for which an appropriation of water from a primary source already exists," may be allowed with the approval of the State Engineer or State Board of Control and under such regulations or conditions as may be prescribed. But the total amount to be diverted at any one time both under the primary

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but *not* adjudicated by the Territorial court, which indicated that even without the subsequently enacted statutory limitation on usage such rights could be limited to some quantity found to be sufficient for the purpose of the appropriation and that in the absence of evidence of need for any larger quantity the statutory limitation could be properly applied by the Board of Control in adjudicating such rights. *Nichols* v. *Hufford*, 21 Wyo. 487, 133 Pac. 1084, 1087 (1913), discussed in the *Quinn* case 92 Pac. (2d) at 571. In the *Quinn* case, the court intimated (again citing an early State Engineer's report) that such prestatehood rights were adjudicated similarly to rights initiated after statehood by the Board's determinations (which the court said were "usually, perhaps invariably" made) that no more than the statutory limit was needed for such prestatehood rights. See also Comment, "Determining Quantity in Irrigation Appropriations," 4 Land & Water Law Rev. 501, 502-503 (1969).

[81] Wyo. Laws 1935, ch. 105, §1, Stat. Ann. §41-181 (1957). As altered by the 1945 legislation discussed below, this section now ends with the proviso "except as hereinafter provided" by the 1945 legislation.

[82] Wyo. Laws 1945, ch. 153, Stat. Ann. §§41-181 to -188 (1957). The definition is in §41-182.

appropriation and such supplemental supply appropriation shall not exceed one cubic foot per second for each 70 acre tract so irrigated.[83]

(3) Preferred uses of water. Preferred uses include rights for domestic and transportation purposes, steam power plants, and industrial purposes. Existing rights not preferred may be condemned to supply water for preferred uses other than steam power plants and industrial purposes. Preferred water uses have preference in the following order: First, drinking purposes for both man and beast; second, municipal purposes; third, steam engines and general railway use, culinary, laundry, bathing, refrigeration (including manufacture of ice), steam and hot water heating plants, and steam power plants; and fourth, industrial purposes. Use for irrigation is superior and preferred to any use where water turbines or impulse water wheels are installed for power purposes.[84] A change to a preferred use may be made with the approval of the State Board of Control, after notice and hearing if necessary before the appropriate Division Superintendent and his report to the Board, and payment of just compensation as directed by the Board.[85]

The Wyoming Supreme Court has held that a change to a preferred use under this statute conveys only the rights pertaining to the use that is the subject of the condemnation, and does not operate to subordinate the rights of other users to the preferred use if the rights of these other users are not likewise acquired or condemned.[86] In other words, simply changing a use of water to a preferred use does not alter the priority of its right.

Some other aspects of the Wyoming appropriative right.—(1) Nature of the right. "A water right is a right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state relating thereto, and in conformity with the rules and regulations dependent thereon."[87]

As stated by the Wyoming Supreme Court in 1943, the "essential requisites" of a water right not only under the Wyoming statute, but in general as well, are that it is acquired by an appropriation of water in good standing, initiated by the appropriator or his agent in the manner prescribed by law, pursuing the construction of works in connection with it, if necessary, with reasonable

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[83] Wyo. Laws, ch. 136, §1 (1965), Stat. Ann. §41-10.3 (Supp. 1973). The 1945 and 1965 legislation are both discussed in Comment, "Determining Quantity in Irrigation Appropriations," 4 Land & Water Law Rev. 501, 504-505 (1969).

Another matter, excess stored water, is discussed at note 92 *supra*. The definition of surplus stream flow discussed above does not apply to that situation. *Lake DeSmet Res. Co.* v. *Kaufmann*, 75 Wyo. 87, 93, 292 Pac. (2d) 482 (1956). Nor does the supplemental supply right pertain to stored water. Wyo. Stat. Ann. §41-10.3 (Supp. 1973).

[84] Wyo. Stat. Ann. §41-3 (1957).

[85] *Id.* §41-4. Division superintendents are discussed under "State Administrative Agencies," *supra*.

[86] *Newcastle* v. *Smith*, 28 Wyo. 371, 376-378, 205 Pac. 302 (1922).

[87] Wyo. Stat. Ann. §41-2 (1957).

diligence, and applying the water to beneficial use within a reasonable time.[88]

Water rights are property, just as is land;[89] and a suit to determine rights to the use of water is in effect a suit to quiet title to real estate.[90]

Water flowing in a stream is not the property of the appropriator; but his right to use the water based on his prior appropriation is a property right.[91] The flowing water is owned by the State which, however, holds it in trust for the use of the people, subject to appropriation for beneficial uses.[92]

(2) Relation of the appropriative right to land. (a) Necessity of land on which to make use of water. In an early case, the Wyoming Supreme Court said that "* * * a water right for purposes of irrigation can no more exist where there is no land to be irrigated than can an easement for the passage of light to ancient windows exist where there never were any windows."[93]

(b) Location of benefited land. As previously stated (see "Recognition of doctrine of prior appropriation"), the Territorial irrigation law of 1876 accorded water rights to holders of land contiguous to or in the neighborhood of any stream,[94] but the water appropriation act of 1886[95] and subsequent statutes disregarded such restriction and left the appropriation of water open for use of any land in the jurisdiction, regardless of location with respect to the source of supply.

(c) Appurtenance of right to land. The statutes provide, "Water being always the property of the state, rights to its use shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives public recognition, under the law and the administration provided thereby."[96]

The State supreme court has indicated that a water right appurtenant to the land on which the water is used is part and parcel of the realty and, unless separated therefrom by some lawful process, passes with the land on convey-

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[88] *State* v. *Laramie Rivers Co.*, 59 Wyo. 9, 39, 136 Pac. (2d) 487 (1943). See also *Scherck* v. *Nichols*, 55 Wyo. 4, 20-21, 95 Pac. (2d) 74 (1939); *Moyer* v. *Preston*, 6 Wyo. 308, 321, 44 Pac. 845 (1896); *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 122, 61 Pac. 258 (1900).

[89] *Merrill* v. *Bishop*, 74 Wyo. 298, 312-313, 287 Pac. (2d) 620 (1955).

[90] *Hunziker* v. *Knowlton*, 78 Wyo. 254, 255-256, 324 Pac. (2d) 266 (1958). See *Frank* v. *Hicks*, 4 Wyo. 502, 524-525, 531, 35 Pac. 475 (1894).

[91] *Johnston* v. *Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 227-228, 79 Pac. 22 (1904).

[92] *Lake DeSmet Res. Co.* v. *Kaufmann*, 75 Wyo. 87, 99, 292 Pac. (2d) 482 (1956), referring to article VIII, §1 of the Wyoming constitution, discussed at note 36 *supra*. See also *Willey* v. *Decker*, 11 Wyo. 496, 533-534, 73 Pac. 210 (1903); *Hunziker* v. *Knowlton*, 78 Wyo. 241, 252, 322 Pac. (2d) 141 (1958); *Day* v. *Armstrong*, 362 Pac. (2d) 137, 145 (1961).

[93] *Frank* v. *Hicks*, 4 Wyo. 502, 532, 35 Pac. 475 (1894).

[94] Wyo. Laws 1876, ch. 65.

[95] Wyo. Laws 1886, ch. 61.

[96] Wyo. Stat. Ann. §41-2 (1957).

ance thereof. "Whoever grants a thing grants by implication that which is necessary to the beneficial use and enjoyment of the thing granted."[97]

However, reservoir water rights, according to the statute, do not attach to any particular lands except by deed or other sufficient instrument of conveyance executed by the reservoir owners.[98]

Restrictions or procedures in changing the place of use of water under direct flow and reservoir water rights are discussed later under "(7) Change in exercise of water right—(b) Change in place or purpose of use of water."

(3) Extent of the right. Beneficial use is declared to be the basis, the measure, and the limit of the right to use water at all times, not exceeding the statutory limits noted earlier under "Restrictions and preferences in appropriation of water." The law does not recognize an appropriation of water not applied or intended to be applied to a beneficial use, nor a greater quantity of water than is reasonably required for such purpose.[99]

An appropriation made on a main stream extends to the waters of its tributaries.[100]

(4) Relative rights of senior and junior appropriators. A senior appropriator has the right as against junior appropriators to insist that he receive the entire quantity of water to which his right entitles him if he can make beneficial use of it.[101] But an upstream junior appropriator is not required to release water into the stream to supply a prior appropriator below at times when the quantity reaching the latter's headgate would be of no material benefit to him.[102]

(5) Rotation in use of water. A statute provides that holders of water rights may rotate in the use of the supply of water to which they are collectively entitled, or a single water user who holds rights of different priority may do so, "provided that all water rights subject to rotation are in priority,"[103] and provided in all cases that the rotation plan can be effectuated without injury to other appropriators. Prior written notice of intention to engage in such

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[97] *Frank* v. *Hicks*, 4 Wyo. 502, 526, 35 Pac. 475 (1894). But the quoted rule, which is applicable to a grant of a freehold interest, does not apply to an assignment of a leasehold interest for a term of years. *King* v. *White*, 499 Pac. (2d) 585, 589 (Wyo. 1972). The *King* case involved a lessee of school lands from the State.

[98] Wyo. Stat. Ann. §41-37 (1957). See chapter 8 at notes 185-186 and 244.

[99] *Nichols* v. *Hufford*, 21 Wyo. 477, 487-488, 491-492, 133 Pac. 1084 (1913). An appropriator cannot acquire a right that permits him to use more than is reasonably necessary for his beneficial purposes. *Quinn* v. *John Whitaker Ranch Co.*, 54 Wyo. 367, 378, 92 Pac. (2d) 568 (1939). See also *State* v. *Laramie Rivers Co.*, 59 Wyo. 9, 43-44, 136 Pac. (2d) 487 (1943); *Lake DeSmet Res. Co.* v. *Kaufmann*, 75 Wyo. 87, 93, 292 Pac. (2d) 482 (1956).

[100] *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 412-413, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).

[101] *Johnston* v. *Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 227-228, 79 Pac. 22 (1904).

[102] *Mitchell Irr. Dist.* v. *Whiting*, 59 Wyo. 52, 70-79, 136 Pac. (2d) 502 (1943).

[103] The quoted proviso was added in the 1973 recreation of this statute, discussed below.

enterprise must be given to the appropriate district water commissioner. As recreated in 1973, this statute provides that the written permission of the water commissioner shall be obtained, he shall enforce its provisions according to its terms, and the State Engineer may adopt rules and regulations necessary to efficiently administer this statute.[104]

In an early case decided before such a statutory provision was enacted, the Wyoming Supreme Court found no evidence that such an alternating use had been detrimental to other parties, and observed that such an agreement between appropriators as tenants in common did not seem objectionable in itself.[105]

(6) Water exchanges. Prior to 1973, the Wyoming statutes provided that appropriators of waters of a stream or spring, or of collections of still water, could agree among themselves to acquire either storage or direct flow water from another source, either to fully satisfy their appropriations or to accomplish fuller use of the State's water resources, provided that the rights of other appropriators would not be adversely affected.[106] If prior appropriators were not injured, junior appropriators could divert from a stream, for irrigation, industrial, or municipal purposes, direct flow to which downstream seniors were entitled, in lieu of an equal quantity of water stored by the upstream juniors in reservoirs located below their lands and discharged into the stream above the lands of the downstream seniors. The exchange had to be authorized by secondary permit from the State Engineer.[107]

In 1973, the statutes were changed to provide that any appropriator owning a valid water right to use surface, reservoir, or ground waters, may petition the State Engineer for an order allowing an exchange and the use of such water from another source "where the source of the appropriation is at times insufficient to fully satisfy such appropriation, or better conservation and utilization of the state's water can be accomplished, or the appropriator can develop appropriable water but cannot economically convey it to its point of use." If such an appropriator arranges by agreement with another appropriator for the delivery and use of such water from another source, the agreement shall accompany the petition. The legislation provides, among other things:

> It is the policy of the state to encourage exchanges. The state engineer shall not issue an exchange order if it appears that the proposed exchange would adversely affect other appropriators, or if the proposed exchange would, in the opinion of the state engineer, be too difficult to administer or would be adverse to the public interest. All exchanges are subject to the requirements of beneficial use and equality of water

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[104] Wyo. Stat. Ann. §41-70 (Supp. 1973). District commissioners are discussed under "State Administrative Agencies," *supra.*

[105] *Johnston* v. *Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 237, 79 Pac. 22 (1904).

[106] Wyo. Stat. Ann. § §41-5 to -8 (1957).

[107] Wyo. Stat. Ann. § §41-42 and -43 (Supp. 1971) and 41-44 (1957).

> exchanged, and no exchange will be allowed unless a sufficient quantity of make-up water is introduced to replace the water diverted and withdrawn under the exchange.[108]

(7) Change in exercise of water right. (a) Change in point of diversion. Legislation enacted in 1965 provides that anyone having previously acquired an adjudicated or unadjudicated right to the beneficial use of stream water may change the point of diversion and means of conveyance upon applying for and obtaining the permission of the State Board of Control, if the water right has been adjudicated, or of the State Engineer if it is unadjudicated. No such permission shall be granted "unless the right of other appropriators shall not be injuriously affected thereby."[109]

(b) Change in place or purpose of use of water. Wyoming legislation dating from 1909, as amended, with various exceptions[110] declares, "Water rights for the direct use of natural unstored flow of any stream cannot be detached from the lands, place, or purpose for which they are acquired."[111] This, however, does not apply to reservoir water rights. Unless attached to particular lands by deed or other instruments of conveyance,[112] reservoir rights may be transferred for beneficial use elsewhere.[113]

Legislation enacted in 1973 added more exceptions to those referred to above.[114] And other 1973 legislation, as amended in 1974, provides more generally:

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[108] Wyo. Laws 1973, ch. 160, repealing and recreating §41-5, and repealing §§41-6 to -8 and 41-42 to -44; Stat. Ann. §41-5 (Supp. 1973).

[109] Wyo. Laws 1965, ch. 138, §1, Stat. Ann. §41-10.4 (Supp. 1973). This statute includes certain provisions regarding petitions, notices, hearings and appeals. Unless written consents of intervening appropriators and owners of ditches or facilities involved in the proposed change are secured and attached to the petition, a hearing and notice to such appropriators and owners is required.

See chapter 9 at note 165, in note 167, and at notes 177 and 188 regarding such changes prior to this legislation.

[110] These exceptions include acquisition of water for preferred uses (see "Restrictions and preferences in appropriation of water—(3) Preferred uses of water," *supra*) or for highway and certain other temporary purposes, correction of errors in permits and certificates of appropriation, certain water exchanges (discussed at notes 106-108 *supra*), and replacement of irrigated lands submerged by certain reservoirs. Wyo. Stat. Ann. §§41-2 and -3 (1957), 41-5, -9, -10.1 to -10.2:1, and -213 (Supp. 1973). Pre-1909 water rights perhaps are also excepted and there are other possible exceptions. See Chapter 9, note 206. Regarding pre-1909 rights, also see chapter 8 at notes 141-143.

[111] Wyo. Stat. Ann. §41-2 (1957).

[112] See the discussion at note 98 *supra*.

[113] Wyo. Stat. Ann. §41-37 (1957), discussed in chapter 7 at note 639 and in chapter 8 at notes 144-146. See also *Kearney Lake, Land & Res. Co.* v. *Lake DeSmet Res. Co.*, 475 Pac. (2d) 548, 551 (Wyo. 1970).

[114] See the exceptions (and possible exceptions) referred to in note 110 *supra*. The exceptions added in 1973 pertain to situations "[w]here lands are taken out of

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> * * * (a) When an owner of a water right wishes to change a water right from its present use to another use, or from the place of use under the existing right to a new place of use, he shall file a petition requesting permission to make such a change. * * * The board may require that an advertised public hearing or hearings be held at the petitioner's expense. * * * The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators. The board of control shall consider all facts it believes pertinent to the transfer which may include the following:
>
> (i) The economic loss to the community and the state if the use from which the right is transferred is discontinued;
>
> (ii) The extent to which such economic loss will be offset by the new use;
>
> (iii) Whether other sources of water are available for the new use.
>
> (b) In all cases where the matter of compensation is in dispute, the question of compensation shall be submitted to the proper district court for determination.[115]

This new provision is entitled "Procedure to change use or place of use," and is located in the statutes immediately below a long-standing statutory procedure for change of use in connection with the acquisition of water through condemnation for a preferred use.[116] And specific procedures for changing the use or place of use with respect to various other situations exempt from the statutory restriction discussed above[117] are included in the statutes pertaining thereto.[118] As noted above, some other exceptions and associated procedures

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(*Continued*)

agricultural production as the necessary result of acquisitions for railroad roadbed construction, highway construction, mining or petroleum extraction operations or industrial site acquisitions or lands taken by proceedings in eminent domain or which have become impracticable to irrigate by reason of any of the foregoing conditions." Wyo. Laws 1973, ch. 189, §1, Stat. Ann. §41-9.1 (Supp. 1973).

Other 1973 legislation changed the procedures for exchange of water, mentioned as another exception in note 110 *supra*. Wyo. Laws 1973, ch. 160, §1, enacting Stat. Ann. §41-5 (Supp. 1973) and repealing §§41-6 to -8 and 41-42 to -44. In this regard. see the discussion at note 108 *supra*.

[115] Wyo. Laws 1973, ch. 1970, §1, as amended by Laws 1974, ch. 23, §1, Stat. Ann. §41-4.1 (Interim Supp. 1974). The 1974 amendment, *inter alia*, added the last sentence of para. (a) in the quoted statute and changed "shall be allowed" to "may be allowed" in the previous sentence. The 1974 law provided that it would not apply to nor affect petitions pending before the Board as of Feb. 1, 1974. Laws 1974, ch. 23, §3.

[116] See note 110 *supra*.

[117] See the discussion at notes 110-111 *supra*.

[118] See Wyo. Stat. Ann. §41-5 (Supp. 1973) (regarding certain exchange agreements); §41-9 (1957) (regarding replacement of irrigated lands submerged by certain

were enacted by other legislation the same year (1973) that the more general procedure was enacted.[119] The legislation appears to be rather unclear as to how this more general statutory procedure is to be coordinated with the procedures that are specifically applicable to particular situations.

(8) Loss of water right. (a) Abandonment and forfeiture. In a 1939 case, the Wyoming Supreme Court said, "An abandonment of a water right * * * must be voluntary."[120] The court added that abandonment cannot be accomplished through enforced discontinuance of the use of water—when nonuse results from circumstances not under the appropriator's control.[121]

The water rights statute provided that in case the owners of any ditch, canal, or reservoir utilized in connection with their appropriations of water

> shall fail to use the water therefrom for irrigation or other beneficial purposes during any five successive years, they shall be considered as having abandoned the same, and shall forfeit all water rights, easements and privileges, appurtenant thereto, and the water formerly appropriated by them may be again appropriated for irrigation and other beneficial purposes, the same as if such ditch, canal or reservoir had never been constructed * * *.[122]

Whether this statute contemplated the necessity of an intention to abandon the right, or forfeiture without such intention, was apparently first discussed by the Wyoming Supreme Court in 1925 but was not finally settled until a 1960 case when the court said, "We think that intent is not essential to a forfeiture under the provisions of" this statute.[123] This statutory provision was repealed in 1973 and replaced with a new provision which reads:

> Where the holder of an appropriation of water from a surface, underground or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for the beneficial purposes for which it was appropriated, whether under an adjudicated or unadjudicated right, during any five successive years, he is considered as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto.[124]

Procedure is provided by which any water user who might be affected by a declaration of abandonment of existing water rights may bring about a legal

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reservoirs); §41-10.1 (Supp. 1973) (regarding acquisition of water for highway and certain other temporary purposes); and §41-213 (Supp. 1973) (regarding correction of errors in permits and certificates of appropriation).

See §41-37 (1957) regarding transfer of reservoir rights mentioned at note 113 *supra*.

[119] See Wyo. Stat. Ann. §41-9.1 (Supp. 1973), discussed at note 114 *supra*.

[120] *Scherck* v. *Nichols*, 55 Wyo. 4, 24, 95 Pac. (2d) 74 (1939).

[121] 55 Wyo. at 23-24.

[122] Wyo. Stat. Ann. §41-47 (1957).

[123] *Ward* v. *Yoder*, 355 Pac. (2d) 371, 376, rehearing denied, 357 Pac. (2d) 180 (Wyo. 1960). See the discussion in chapter 14 at notes 360-362. Note 362 discusses some questions involved in the 1968 *Yentzer* case.

[124] Wyo. Laws 1973, ch. 176, Stat. Ann. §41-47.1 (Supp. 1973).

declaration of such abandonment. He presents his case in writing to the Board of Control which, if the facts justify, refers it to the appropriate division superintendent for a formal hearing, taking of testimony, and report back to the Board.[125] Parties who undertake to have water rights declared abandoned are known as contestants; the water right holders are contestees. The case is finally heard before the Board of Control which enters an order either declaring the right in question abandoned, either wholly or partially, or declining to do so. Certified copies of the declaration are delivered to both contestants and contestees, any of whom may appeal to an appropriate court.[126]

This procedure is rather similar to the previous procedure,[127] but certain changes have been made, including the addition of a provision that "The board has exclusive original jurisdiction in water right abandonment proceedings";[128] and an alternate statutory procedure is now provided whereby the State Engineer may initiate forfeiture proceedings:

> When any appropriator has failed, intentionally or unintentionally, to use any portion of surface, underground or reservoir water appropriated by him, whether under an adjudicated or unadjudicated right, for a period of five successive years, the state engineer may initiate

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[125] Division superintendents are discussed under "State Administrative Agencies," *supra.*

[126] Wyo. Stat. Ann. §41-47.1 (Supp. 1973).

[127] The prior procedure is described in chapter 14 at notes 280-281. Wyo. Stat. Ann. §§41-48 to -53 (1957), repealed by Laws 1973, ch. 176, §2.

[128] Wyo. Stat. Ann. §41-47.1 (Supp. 1973). Under the former provision, the Wyoming Supreme Court in the 1970-71 *Kearney Lake* case resorted to a doctrine of "primary jurisdiction" in the Board of Control (versus a court), as discussed in chapter 14 at notes 284-288.

See the discussion in chapter 14 at note 282, regarding the decision in the 1966 *Yentzer* case that under the former provision administrative declarations of "abandonment" could be made either in whole or in part. While the particular statutory language "or in part", referred to in the quotation from the 1968 opinion in chapter 14, note 282, does not appear in the current provision, it employs the words "either wholly or partially" as noted above in the text.

Chapter 14, note 281, refers to some further court constructions of the former statutory provision with respect to storage water rights and other matters. See also *Bruegman* v. *Johnson Ranches, Inc.*, 520 Pac.(2d) 489 (Wyo. 1974). In one such case, as discussed in chapter 14 at note 158, the court said that "while there may be exceptions, the statute of non-user seems, primarily at least, to apply only to a perfected right in case a water right is initiated under a permit and not to an inchoate right, since the statute gives the State Engineer the right not only to extend but also to cancel a permit." *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 400, 402, 100 Pac.(2d) 124, 102 Pac.(2d) 745 (1940). If the 1973 legislation quoted above means by "adjudicated or unadjudicated right" to include as an "unadjudicated right" an inchoate permit (see the discussion at note 47 *supra* regarding the statutory adjudication of the perfection of such permits) this could be a significant change from the earlier version of this legislation as construed in the *Campbell* case. It also might present some questions in coordinating this statutory forfeiture provision with the statutory

> forfeiture proceedings against such appropriator with the state board of control, to determine the validity of the unused right.[129]

The Board's secretary refers the matter to the appropriate Division Superintendent for a hearing and a report back to the Board, in a manner generally similar to the procedure initiated by affected water users, as briefly described above. But certain specific provisions are included in the alternate procedure initiated by the State Engineer, including the following provisions: "The board shall vote by secret written ballot to declare the right in question forfeited or to decline to do so. Any forfeiture requires three affirmative votes * * *" and the State Engineer shall not participate as a voting member of the Board. Such proceedings shall not be initiated by the State Engineer after the use of a water right, easement, or privilege has occurred.[130]

> Any time within two years after the date the board has entered an order forfeiting a water right, any person who can demonstrate to the satisfaction of the board by written petition, proof, or affidavits, that he was an owner, lessee or beneficiary of the forfeited right, that he had no actual or constructive notice of the forfeiture hearings, and that he has been damaged thereby, may require the board to reopen the case for a determination of whether such right shall remain forfeited or be reactivated without loss of priority.
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> * * * *
>
> Nothing in this section shall be construed to allow the state engineer to initiate forfeiture proceedings against water rights which are being put to beneficial use, wholly or in part.[131]

Both alternate statutory procedures include a provision that "The total absence of water to divert during an irrigation season precludes the inclusion of any such period of nonuse resulting therefrom in the computation of the successive five-year period."[132]

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provisions associated with other legislation pertaining specifically to the forfeiture of inchoate permits, mentioned at and in note 46 *supra*. They provide that while the time for construction of works (to be stated in the permit) shall not exceed 5 years, the time for completing such construction and making beneficial use of the water may be extended for good cause shown. (What the court said in the *Campbell* case, with respect to an earlier version of the statute that was similar in this respect, is discussed in note 62 *supra*. Other related factors were considered by the court. 100 Pac.(2d) at 142-143.) Even though the holder of an inchoate permit or "unadjudicated right" fails to put the water to beneficial use for 5 years, his right may not be subject to forfeiture under the 1973 legislation if he is validly proceeding under an extension granted under the other legislation pertaining to inchoate permits and their perfection or forfeiture. But the 1973 legislation does not expressly deal with this question.

[129] Wyo. Stat. Ann. §41-47.2 (Supp. 1973).

[130] But any use of a contested water right, easement, or privilege, or portion thereof, on or after the date of notice of the Division Superintendent's hearing shall be inadmissable as evidence of beneficial use in any of the hearings and appeals.

[131] Wyo. Stat. Ann. § §41-47.2(g) and (j) (1973).

[132] *Id.* § §41-47.1 and 41-47.2.

(*Continued*)

(b) Adverse possession and use. In *Campbell* v. *Wyoming Development Company,* the Wyoming Supreme Court questioned the possibility of acquiring a prescriptive title to the use of water in Wyoming after the current water right statute was enacted, in 1890, but did not settle the question.[133] The supreme court held that a certain finding of the trial court "wholly fails to show a prescriptive right in the plaintiffs adverse to the rights of the defendant company, for possession, to ripen into a prescriptive title, must be actual, open, hostile, exclusive and continuous for the period prescribed by statute." Then, said the court, "We do not mean to intimate, or seem to concur in the view, that a prescriptive title to water may be acquired in this State, particularly since 1890, when the legislature enacted a law requiring the initiation of all water rights to be pursuant to a permit from the State Engineer. We do not need to enter into that question in this case." In denying petition for rehearing in the *Campbell* case, some further comments were made concerning prescription. The court indicated that mere use of water, however long continued, did not give rise to a title by prescription; claimants in addition were bound to show a substantial invasion of the lawful owner's rights and its extent during a continuous prescriptive period. And the adverse use must have been made with the knowledge and acquiescence of the owner. Commenting that counsel had again argued the question of prescription at length, the court declined to add anything to what had been said in the original opinion to the effect that on the facts of the case, no prescriptive title had been obtained prior to an adjudication in 1892, but did state, "The only possible question is as to prescription since that time, if a prescriptive title may be obtained at all in this state, which we refused to decide."[134]

(*Continued*)

See chapter 14 at notes 283 and 362, regarding the matter of nonavailability of water as discussed in the 1968 *Yentzer* case, construing the former statutory provision. And see chapter 14 at notes 312-313, regarding the matter of enforced discontinuance of water use as discussed in cases construing the former statute.

[133] *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 394-395, 413-415, 100 Pac. (2d) 124 (1940), rehearing denied, 102 Pac. (2d) 745 (1940).

[134] The *Campbell* case was subsequently referred to by the court in a 1958 case, although again without settling this question. The court said that even if plaintiff's claim had been based on use of irrigation water, "use of the water would not, standing alone, give them any rights to title by prescription," citing the *Campbell* case. *Hunziker* v. *Knowlton*, 78 Wyo. 241, 322 Pac. (2d) 141, 145 (1958), rehearing denied, 78 Wyo. 254, 324 Pac. (2d) 266 (1958). The question of whether a prescriptive right could be acquired after the enactment of the 1890 water right statute was not discussed.

In a 1966 case the plaintiff claimed to have acquired by prescription an easement for a water ditch across defendant's lands. The Wyoming Supreme Court, without referring to the *Campbell* case, said, *inter alia*, that the "acquisition of an easement by prescription in this jurisdiction is governed by the common law." The court referred to various requisite elements of acquiring such an easement by prescription and noted that in *Gustin* v. *Harting*, 20 Wyo. 1, 121 Pac. 522, 527 (1912), it was said, "The actual and continuous use of an easement, as of right, for the period of limitation for bringing an

(c) Estoppel and laches. Questions of estoppel were considered in the decision in a case involving abandonment and forfeiture. The State supreme court held that estoppel should be pleaded; but in view of the condition of the pleadings on this appeal it was thought best to ignore their defects. Plaintiffs claimed that a certain reservoir of defendants had been abandoned and that defendants were estopped to make any claims to it. However, the conduct of the plaintiffs in relation to the property—recognizing and acquiescing in the fact that defendants owned the reservoir and the prior rights therein and that they had the privilege of reparing it and using the water thereafter—had not been such as to substantiate their claim of estoppel.[135]

In another case, the court held that the doctrine of laches could properly be invoked to bar a cause of action to cut off several defendants from receiving water under a certain project where the plaintiff or their predecessors had stood by and observed an industrial company and its grantees in their attempts, through expenditures of money and labor, to transform arid waste lands into productive fields over a period of many years. The court indicated that a delay in enforcing one's right so as to work a disadvantage to another may constitute

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action to dispossess the claimant, creates the presumption of a grant." In this regard, the court said, "The presumption is not conclusive, but the owner of the servient estate has the burden of rebutting it by showing that the use was permissive." The court indicated that for the acquisition of an easement by prescription the requirement of "exclusive use" "simply means that exercise of the right shall not be dependent upon a similar right in others. The use may be shared with the owner of the servient estate * * *." The court cited as examples certain out-of-State cases and other authorities and said, "Referring specifically to irrigation ditches, it appears that the view expressed in the foregoing authorities is in harmony with the public policy of this state as declared in §41-254, W.S. 1957. The provisions of the section, of course, are not applicable here, but they do contemplate that a joint user may acquire an interest in an irrigation ditch by prescription. Adherence to the elements mentioned in the Haines case provides a sufficient test." *White* v. *Wheatland Irr. Dist.*, 413 Pac. (2d) 252, 254, 259-260 (1966), citing *Haines* v. *Galles*, 76 Wyo. 411, 303 Pac. (2d) 1004 (1956). The cited statute, which pertains to the relative interests of joint owners of irrigation ditches, canals and reservoirs, provides, *inter alia*, how their relative shares of the total adjudicated water rights for such works shall be established and that no action for recovery of title to such works can be brought after 10 years from the recording of the final certificates of appropriation if the interested water users mentioned therein, or their successors, "have had continuous, open, adverse and undisputed possession of such irrigation works." Wyo. Stat. Ann. §41-254 (1957). Hence, prescriptive rights apparently may at least be acquired for such limited purposes.

In a 1914 case, the State supreme court indicated that in the absence of an express statutory provision conferring the right to acquire title to municipal property by adverse use as against the municipality, which property is held by it in trust for its inhabitants, such right would be denied. *Holt* v. *Cheyenne*, 22 Wyo. 212, 232-234, 137 Pac. 876 (1914). This is discussed in chapter 14 at note 694.

[135] *Sturgeon* v. *Brooks*, 73 Wyo. 436, 459-462, 281 Pac. (2d) 675 (1955). Equitable estoppel in relation to the revocability of an executed parol license was mentioned in *Gustin* v. *Harting*, 20 Wyo. 1, 20-21, 121 Pac. 522 (1912).

laches and bar its assertion. The lapse of time must be so great and the relations of the parties such that it would be inequitable to permit its assertion.[136]

Repudiation of the Riparian Water-Use Doctrine

In a few decisions rendered around the turn of the 20th century, the Wyoming Supreme Court persistently and effectively laid at rest any contention that the riparian water-use doctrine had been a part of the water law of the jurisdiction either before or after the attainment of statehood.[137] In the first of these cases, *Moyer* v. *Preston*, Moyer claimed that Preston could secure no rights by prior appropriation superior to his own interests as a riparian owner.[138] Moyer held a patent from the Government; and he relied on the Wyoming statute of 1875,[139] which purported to grant to holders of land on the banks or margin or in the neighborhood of any stream the use of water thereof for purposes of agriculture under irrigation. However, the Wyoming Supreme Court determined that this section did not mean riparian owners only, but extended to all those who claimed land in the neighborhood.[140] Also, said the court, later legislation showed that riparian owners were to have no rights distinct from those of other landowners unless through the doctrine of prior appropriation. It was concluded that riparian rights were unsuited to the requirements and necessities of Wyoming and never did obtain there. On the other hand, the court felt that the principle that the right to use water for beneficial purposes depends upon a prior appropriation was better adapted to the dry climate and arid soil existing in Wyoming. Four years later, the court again declared the prevailing doctrine to be that a right to the use of water may be acquired by priority of appropriation for beneficial purposes, in contravention to the common law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream that runs through or adjacent to his lands.[141] After another 3 years, the court again emphasized the prevailing concept of prior appropriation in Wyoming, and said, "In this State, on the other hand, the common law doctrine concerning the rights of a riparian

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[136] *Anderson* v. *Wyoming Dev. Co.*, 60 Wyo. 417, 154 Pac. (2d) 318, 345-346 (1944), quoting from an earlier Wyoming case, C.J.S., and a United States Supreme Court case. In another Wyoming case the court concluded that a claim of statutory forfeiture was barred by the defense of laches where *inter alia* the allegedly forfeited right had not been attacked by the plaintiff or anyone else for approximately a quarter of a century. *Horse Creek Conservation Dist.* v. *Lincoln Land Co.*, 54 Wyo. 320, 92 Pac. (2d) 572, 578-579 (1939).

[137] The doctrine of riparian rights may, however, encompass more than just the right to use water. See chapter 6 at notes 154-156. With respect to riparian ownership of nonnavigable streambeds, see *Day* v. *Armstrong*, 362 Pac. (2d) 137, 146-147 (Wyo. 1961).

[138] *Moyer* v. *Preston*, 6 Wyo. 308, 318-320, 44 Pac. 845 (1896).

[139] Wyo. Comp. Laws (1876), ch. 65, § 1.

[140] This is also discussed at note 13 *supra.*

[141] *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 122, 61 Pac. 258 (1900).

owner in the water of a natural stream has been held to be unsuited to our conditions; and this court has declared that the rule never obtained in this jurisdiction."[142]

Ground Waters

Court decisions.—Very few decisions of the Wyoming Supreme Court have pertained to ground water. In the earliest one, *Hunt* v. *Laramie*, decided in 1919, the court said, among other things, that "percolating waters developed artificially by excavation and other artificial means, as was done in this case, belong to the owner of the land upon which they are developed * * *."[143] The court indicated that the evidence showed that the water supply, a spring, was not a natural spring but had been developed by digging into a subsurface formation of percolating waters. The court said that one "could, of course, appropriate only public waters of the state, and, as the spring in question was not a natural spring, he could acquire no rights by his application" for an appropriation permit under the legislation discussed earlier under "Appropriation of Water of Watercourses."[144]

In a case decided in 1940, *Binning* v. *Miller*, which dealt with waste and seepage water that had gathered in a draw, the court said that in the *Hunt* case "we held that percolating water developed artificially by excavations is not subject to appropriation."[145] In a subsequent case, which dealt with seepage from an irrigation drainage ditch, the court again referred to the first quotation above from the *Hunt* case regarding percolating ground waters, but said:

> Such statement, isolated from the facts in the case and from the background of the cases therein cited, might, as here contended, be taken to authorize a view far broader than that intended by the court. Without research of the record to determine what was there meant by "percolating water," the decision, as we analyze it, basically stands for a single principle, i.e., that one who by excavation and effort brings to the surface waters which would not otherwise be available will not be deprived of them by one who has contributed nothing to their production.[146]

Legislation. The Wyoming Legislature enacted a brief statute regarding underground percolating water in 1945[147] which was replaced in 1947 by more comprehensive legislation.[148] That legislation created a prior appropriation system with respect to all underground waters, with an exemption for certain

[142] *Willey* v. *Decker*, 11 Wyo. 496, 510, 515, 73 Pac. 210 (1903).

[143] *Hunt* v. *Laramie*, 26 Wyo. 160, 181 Pac. 137, 140 (1919).

[144] The court referred to the constitutional provision discussed at note 36 *supra.*

[145] *Binning* v. *Miller*, 55 Wyo. 451, 102 Pac. (2d) 54, 59 (1940).

[146] *Bower* v. *Big Horn Canal Assn.*, 77 Wyo. 80, 307 Pac. (2d) 593, 598 (1957).

A 1966 case construing an aspect of the ground water legislation discussed below is mentioned in note 162 *infra.*

[147] Wyo. Laws 1945, ch. 139, W.C.S. 1945 §§ 71-404 to -407.

[148] Wyo. Laws 1947, ch. 107, W.C.S.A. §§ 71-268 to -275, -404 to -408, and -708 (Supp. 1949).

domestic and stock uses. It provided for registration (with the State Engineer) of claimed prior appropriations. It also provided for registration of the construction of new wells. No permit was required, but a provision for adjudication of the priorities of ground water appropriations was included.[149]

Legislation in 1957 replaced the 1947 legislation.[150] It included a permit requirement for ground water users subsequent to March 1, 1958, provided for the designation of "critical" areas, later called "control" areas, and made various other modifications. Its provisions, as subsequently amended and supplemented in various respects, are discussed immediately below.[151]

In order to protect his vested rights, anyone claiming such a right acquired before April 1,1947, must have filed a statement with the State Engineer on or before December 31, 1957; anyone claiming a right acquired on or after April 1, 1947, must have registered his well with the State Engineer before the effective date of this act.[152] Existing wells for stock or domestic use, as defined in the legislation, were declared to be vested rights provided a statement of claim had been filed prior to December 31, 1972.[153]

Anyone intending to acquire the right to beneficial use of any underground water after March 1, 1958, shall, before commencing construction of any well, file an application for a permit to make an appropriation, with the State Engineer.[154] An application for a permit for a well "in any areas not designated as a [control] area"[155] shall be granted "as a matter of course," if the proposed use is beneficial and if the State Engineer finds that the proposed means of diversion or construction are adequate. However, a 1969 amendment provides that if the State Engineer finds that such granting of the permit would

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[149] The 1945 and 1947 legislation is discussed in Note, "Rights of Wyoming Appropriators in Underground Water," 1 Wyo. L. J. 111 (1947), and Note, "Constitutionality of the Underground Water Statute," 3 Wyo. L. J. 140 (1949).

The time for filing claimed prior appropriations was extended by Wyo. Laws 1949, ch. 22, and Laws 1951, ch. 115.

[150] Wyo. Laws 1957, ch. 169, Stat. Ann. § § 41-121 to -147 (1957), as amended.

[151] " 'Underground water' means any water, including hot water and geothermal steam, under the surface of the land or the bed of any stream, lake, reservoir, or other body of surface water, including water that has been exposed to the surface by an excavation such as a pit." "All springs and spring waters where the yield does not exceed 25 gallons per minute and where the use is for domestic or stock purposes only, shall be considered as ground water" and perfection of the right to such use "shall be made in accordance with the laws pertaining to ground water." Wyo. Stat. Ann. § § 41-121 and -121.1 (Supp. 1973, as amended and as enacted in 1973, respectively). And special provisions were added in 1973 pertaining to "by-product water," developed as a by-product of some nonwater-related economic activity such as oil well separator systems or dewatering of mines. *Id.* § § 41-121.2 and -121.3.

[152] *Id.* § 41-122.

[153] *Id.* § 41-138. See § 41-122.

[154] Wyo. Stat. Ann. § 41-138 (1957).

[155] Procedures applicable to "control" areas, called "critical" areas until 1973, are discussed below.

not be in the public interest, he may deny the application, subject to review at the next meeting of the Board of Control.[156]

If the permit is granted, construction shall be completed and the water put to beneficial use within 3 years, subject to extension for a showing of good cause. Upon completion of the work and its investigation by the State Engineer, the Board of Control "may consider for adjudication the underground water rights upon proof of beneficial use," in the same manner as for rights in surface watercourses.[157]

The priority of appropriation of ground water obtained on or subsequent to March 1, 1958, shall date from the filing of the application for permit in the State Engineer's office.[158] But the appropriator's right under each ground water permit "does not include the right to have the water level or artesian pressure at the appropriator's point of diversion maintained at any level or pressure higher than that required for maximum beneficial use of the water in the source of supply" and "the state engineer may issue any permits subject to such conditions as he may find to be in the public interest."[159] Moreover, ground water rights are subject to the same preferences; unpreferred rights may be condemned and changed to a preferred use in the same manner as rights in surface watercourses,[160] although this provision expressly shall not impair the rights of municipal corporations to condemn ground waters or rights for necessary public purposes.[161] Other provisions specify that ground water appropriations for stock or domestic use (as defined therein, and subject to

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[156] Wyo. Laws 1969, ch. 100, § 1, Stat. Ann. § 41-139 (Supp. 1973).

[157] And in the interest of orderly adjudication procedure, the adjudication of any well may be ordered, and if, upon one year's notice, the appropriator whose well is to be adjudicated refuses to supply the required information, his well may be tagged and locked. Wyo. Stat. Ann. § § 41-142 and -143 (Supp. 1973).

[158] The priority of appropriation of ground water obtained prior to April 1, 1947, shall date from the time of completion of the well; priority of appropriation of ground water obtained subsequent to April 1, 1947, and prior to March 1, 1958, shall date from the filing of registration in the State Engineer's office. *Id.* § 41-144. See the discussion at note 152 *supra.*

Where ground waters in different acquifers, or waters in surface and ground water sources, are so interconnected as to constitute one source of supply, their respective water rights shall be correlated into a single schedule of priorities. Wyo. Stat. Ann. § 41-133 (1957).

Any ground water appropriator may change the location of his well within the same acquifer without loss of priority by securing the approval of the Board of Control if he has an adjudicated right, or if it is unadjudicated, from the State Engineer, subject to appeal to a court by aggrieved persons. Wyo. Stat. Ann. § 41-134 (Supp. 1973).

Legislative provisions regarding exchanges and forfeiture of rights to use surface or ground waters are discussed at notes 108 and 124 *supra*, respectively. Wyo. Stat. Ann. § 41-136 (1957), regarding forfeiture of ground water rights, was repealed by Laws 1973, ch. 176, § 2.

[159] Wyo. Stat. Ann. § 41-141 (Supp. 1973).

[160] Preferred uses are discussed at notes 84-86 *supra.*

[161] Wyo. Stat. Ann. § 41-123 (1957).

certain limitations if such an appropriation is for multiple purposes) shall have a preferred right over all other uses, regardless of their priority dates. The State Engineer, on the complaint of the operator of an adequate well[162] developed solely for such purposes, may order that other ground water appropriators, if found to be interfering unreasonably with such well, shall cease or reduce their withdrawals, unless they furnish at their expense sufficient water at the former place of use. This shall apply irrespective of whether the wells are in a "control area", discussed below. In case of interference between two wells (both of which are using water for such stock or domestic use), the one with the earlier priority shall have the better right.[163]

Any appropriator of either underground or surface water alleging interference with his water right by a junior ground water right may file a complaint with the State Engineer. He shall investigate and ascertain whether the alleged interference exists and "may suggest various means of stopping, rectifying or ameliorating the interference or damage caused thereby." Any interested appropriator dissatisfied with the results of this procedure may proceed under the Administrative Procedure Act.[164] If a hearing is held, it shall be before the appropriate Division Superintendent,[165] who shall report to the Board of Control, which shall issue an order including findings of fact and conclusions of law.[166]

The State Engineer, among other things, also may require wells to be so constructed as to prevent waste of ground water and to be so equipped that their flow can be stopped when not in use.[167]

The Board of Control may designate as a "control area" any underground water district or subdistrict in which (1) the use of ground water is approaching a use equal to the current recharge rate, (2) ground water levels are declining or have declined excessively, (3) conflicts between users are occurring or foreseeable, (4) the waste of water is occurring or may occur, or (5) other conditions exist or may arise requiring regulation in the public interest.[168] Prior to an amendment in 1973, such an area was called a "critical area," which was to be so designated for substantially the same reasons.[169]

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[162] In *Bishop* v. *Casper*, 420 Pac. (2d) 446 (1966), the Wyoming Supreme Court concluded a complaint was defective because it did not allege that the citizen had "an adequate well."

[163] Wyo. Stat. Ann. §§41-124 and -128 (Supp. 1973). Their priority shall date from completion of the well if properly registered before Dec. 31, 1972 (see the discussion at note 153 *supra*), or, if registered after that date, from the filing or registration with the State Engineer. *Id.* §41-144.

[164] *Id.* §41-128, referring to §§9-276.19 to 9-276.33.

[165] Division Superintendents are discussed under "State Administrative Agencies," *supra.*

[166] *Id.* §41-128.

[167] *Id.* §41-126(g).

[168] *Id.* §41-129.

[169] The previous legislation in this regard and its former procedures are discussed in chapter 19 at notes 293-297.

Whenever the State Engineer has information leading him to believe that any underground water district or subdistrict should become a control area, he shall report to the Board of Control, which shall hold a hearing. If it decides to designate an area as a control area, it shall define the area geographically and strategically. Thereafter, "the state engineer may, without hearings or other proceedings, refuse to grant permits for the drilling of any wells within the control area,"[170] and "the appropriate superintendent shall proceed with the adjudication of unadjudicated wells within the control area."[171] Subject to required notice, hearing, consideration of objections or contests, and appeals, the Board of Control shall determine and record priorities and other aspects of rights within the area and issue certificates of appropriation.[172]

Applications to appropriate ground water in a controlled area may be granted and a permit issued by the State Engineer (subject to required notice, hearing on objections, and appeals) only if he finds[173] that (1) there are unappropriated waters in the proposed sources, (2) the means of diversion and construction would be adequate, (3) the well's location would not conflict with any well-spacing or well-distribution regulations (discussed below), and (4) the proposed use would not be detrimental to the public interest.[174]

The State Engineer "may make regulations concerning the spacing, distribution and location of wells in critical [control] areas."[175] He may, on his own motion, and shall on the petition of 20 or one-tenth of the appropriators from a control area, cause a hearing to be held to determine whether the ground water in such area is adequate for the needs of all appropriators in the area. If the State Engineer shall find after the hearing[176] that the ground water in the area is insufficient for all the appropriators, he may adopt by order one or more of the following corrective controls:[177] (1) close the control area to further appropriation or reopen it for further appropriation; (2) determine permissible total withdrawals for each day, month, or year, and apportion among the appropriators—insofar as may reasonably be done—in accordance with the relative dates of priority of their rights; (3) if he finds that withdrawals by junior appropriators have a material adverse effect upon the supply needed by senior appropriators, he may order junior appropriators to

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[170] Wyo. Stat. Ann. §41-129 (Supp. 1973). A "control area advisory board" shall be created for the area. *Id.* §41-130.

[171] *Id.* §41-131(a).

[172] "The priority of appropriation shall be the determining factor in adjudicating underground water * * * except as modified by section 41-141," which is discussed at note 159 *supra.* Wyo. Stat. Ann. §41-131(d) (Interim Supp. 1974).

[173] After receiving advice from the Control Area Advisory Board mentioned in note 170 *supra.*

[174] Wyo. Stat. Ann. §41-140 (Supp. 1973).

[175] *Id.* §41-126(e).

[176] And after receiving the advice of the Control Area Advisory Board.

[177] He may temporarily adopt such corrective controls wherever it appears immediate regulation is required.

cease or reduce withdrawals; (4) he may require and specify a system of rotation of use of ground water in the control area if he finds that cessation or reduction of junior appropriations will not result in proportionate benefits to senior appropriators; (5) he may institute well-spacing requirements if permits are granted to develop new wells. Appropriators of ground water may agree to a method or scheme of control of withdrawals, apportionment, well spacing, rotation, or proration, subject to the approval of the State Engineer. The State Engineer shall encourage and may approve such agreements so long as he finds they would not be detrimental to the public interest or to the rights of others.[178]

Special Statutory Adjudication Procedures

Territorial procedure.—The irrigation water rights act of 1886 provided that jurisdiction of suits to adjudicate water rights should be vested in the district courts, and required all claimants of water rights to file statements in the proper courts. It also provided a special water rights adjudication procedure in the district courts, with appeal to the Wyoming Supreme Court.[179] This Territorial procedure was replaced by that enacted in the State statute of 1890.[180]

Current State procedure.—The article in the Wyoming Statutes which contains the adjudication procedure discussed below is entitled "Adjudication."[181] Both that term and "determination" are used in the body of the statute to indicate this function of the Board of Control.[182] The State supreme court held that under the Wyoming water rights statutes, the term "adjudication" is generally considered the equivalent of "determination" and is used interchangeably with it.[183]

The first State legislature vested the Board of Control with authority to adjudicate rights to use stream waters in the State.[184] The Board's constitu-

[178] His approval shall be with the advice of the Control Area Advisory Board. Wyo. Stat. Ann. §41-132 (Supp. 1973).

[179] Wyo. Laws 1886, ch. 61.

[180] Wyo. Laws 1890-91, ch. 8.

[181] Wyo. Stat. Ann. §41-165 *et seq.* (1957).

[182] For example, Wyo. Stat. Ann. §41-174 (1957) provides, "[T]he state board of control shall, as provided by law, proceed to adjudicate and determine the rights of the various claimants to the use of water upon any stream or other body of water * * *."

[183] *Campbell* v. *Wyoming Dev. Co.*, 55 Wyo. 347, 378, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940); *Laramie Irr. & Power Co.* v. *Grant*, 44 Wyo. 392, 414, 13 Pac. (2d) 235 (1932).

[184] Wyo. Laws 1890-1891, ch. 8.

Under provisions which are still extant, the Board was given the duty at its first meeting to make proper arrangements for beginning the determination of priorities of water rights to decide the streams to be first adjudicated, to begin on streams most used for irrigation, and to continue making determinations as rapidly as practicable until all claims for appropriation on record shall have been adjudicated. *Id.* §20, Stat. Ann. §§41-159 and -165 (1957).

An adjudication in the process of perfecting a permit to appropriate water of a

tional membership includes the State Engineer, as president, and the superintendents of the four water divisions.[185] In initiating the adjudication of a stream, the Board fixes a time when the State Engineer will begin measuring the stream and the diversion ditches, and a time and place for beginning the taking of testimony by the appropriate Division Superintendents as to rights of claimants. Notice thereof is published and all claimants on record are notified by registered mail and are required by law to submit verified statements of the details of their appropriative claims.[186] The examination of the stream, ditches, and irrigated lands is then made by or under the direction of the State Engineer[187] and testimony is taken by the Division Superintendent.[188]

On completion of the taking of testimony, all evidence is opened to inspection by the claimants.[189] Contests that are filed by owners of irrigation works or claimants of interest in the stream are heard by the Division Superintendent, who may compel the attendance of witnesses to give testimony.[190]

Upon the completion of the State Engineer's stream measurement and receipt of the Division Superintendent's evidence, the Board of Control issues an order determining and establishing the several priorities of rights to use the stream water, the amounts of the appropriations, and the character and kind of uses. Each priority shall date from the time of appropriation.[191] Each party represented in the determination is then issued a certificate, indicating, among other things, the priority date and number of the appropriation, the amount of water appropriated, and, if the appropriation is for irrigation, a legal description of the land to be irrigated.[192]

The final orders or decrees of the Board in the adjudication proceeding are conclusive as to all prior appropriations and rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication, subject to rehearings, reopening of orders or decrees, and appeals to the courts.[193] Pending an appeal to the district court, the water is divided in

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watercourse is discussed at notes 47-52 *supra*. And for related matters, see, e.g., the discussions at note 109 *supra* regarding authorization of changes in points of diversion and at note 126 *et seq. supra* regarding declarations of abandonment and forfeiture.

Various statutory adjudication procedures regarding ground waters are discussed above under "Ground Waters—Legislation," notably at notes 157 and 171-172 *supra*.

[185] See "State Administrative Agencies," *supra*.

[186] Wyo. Stat. Ann. § § 41-165 to -170 (1957).

[187] *Id.* § 41-180.

[188] *Id.* § 41-172.

[189] *Id.* § 41-173.

[190] *Id.* § § 41-176 and -177.

[191] *Id.* § 41-181.

[192] Wyo. Stat. Ann. § 41-189 (Interim Supp. 1974).

[193] Wyo. Stat. Ann. § 41-190 (1957); *Parshall* v. *Cowper*, 22 Wyo. 385, 394, 143 Pac. 302 (1914). The adjudication by the Board as to the quantity of water to which an

(*Continued*)

accordance with the Board's order.[194] The operation of the decree appealed from may be stayed by that court upon the filing of a bond by the appellant.[195]

In the adjudication and determination of water rights, it is the duty of all claimants interested therein to appear and submit proof of their claims. Any claimant who fails to appear and submit such proof "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said stream theretofore claimed by him."[196] However, any claimant upon whom no service of notice was made, other than by newspaper publication, may, within 1 year following the decree or order of the Board, have the same opened to give proof of his appropriation. Notice of such opening must be given to all interested parties and it must appear to the satisfaction of the Board that the petitioning claimant had no actual notice of the original proceedings.[197]

Whenever the rights to the waters of any stream and all its tributaries have been adjudicated in different proceedings, the Board of Control may open to public inspection all proofs or evidence of appropriation of water and the findings of the Board in relation thereto. Any person may then contest the claims in the manner provided for in an original adjudication proceeding, provided that contests may not be maintained between appropriators who were parties to the same adjudication proceedings in the original hearings.[198] Upon the completion of testimony taken under this provision, the Division Superintendent forwards all testimony and evidence to the Board which then proceeds in accordance with the statutory provisions applicable to contests in original adjudication proceedings.[199]

The validity of this adjudication procedure has been sustained by the

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(*Continued*)
appropriator is entitled is as conclusive upon the water distributors as is its determination of priorities, with the exception that the water official may regulate a headgate so as to prevent waste. For the purpose of governing these officials in the discharge of their duties in dividing water between appropriators, the Board's adjudication is as conclusive as though an appeal had been taken and a decree entered by the court. Until set aside or modified in a proper proceeding in which interested parties are given opportunity to be heard, the Board's order is final and binding upon the water officials. *Parshall* v. *Cowper*, 22 Wyo. 385, 394, 143 Pac. 302 (1914). Ordinarily a definite adjudication should be made only for water that has been applied to beneficial use. *Laramie Rivers Co.* v. *LeVasseur*, 65 Wyo. 414, 424-425, 202 Pac. (2d) 680 (1949).

See note 206 *infra* regarding tabulations of adjudicated water rights.

[194] Wyo. Stat. Ann. §41-200 (1957).
[195] *Id.* §41-197.
[196] *Id.* §41-174.
[197] *Id.*
[198] *Id.* §41-175.
[199] *Id.* §41-179.

Wyoming Supreme Court. The court has indicated that this procedure is not exclusive of jurisdiction of the courts.[200]

Administration of Water Rights and Distribution of Water

Statutory provisions.—The Board of Control, created by the State constitution, administers water rights and distribution of water. It is composed of the State Engineer, as president, with the superintendents of the four water divisions as members.[201] Pursuant to this constitutional direction, the legislature divided the State into four divisions,[202] and provided for the appointment of a superintendent for each division.[203]

The Board of Control has the responsibility for creating water districts within the water divisions,[204] each district having a water commissioner appointed by the Governor, if needed.[205] Each Division Superintendent has general control of the water commissioners within his division, and, under the general control of the State Engineer, the Division Superintendent has charge of regulating and controlling "the storage and use of water under all rights of appropriation which have been adjudicated by the board of control or by the courts, and * * * under all permits approved by the state engineer whether the rights acquired thereunder have been adjudicated or not."[206]

The powers and duties of district water commissioners include dividing, regulating, and controlling stream waters within their districts by closing or partially closing and fastening headgates and regulating controlling works of reservoirs according to the respective priorities of the ditches and reservoirs, and to prevent waste of water or use in excess of an appropriator's right.[207]

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[200] See chapter 15, notes 277-285 for a discussion of court decisions expressing these and other judicial views regarding this statutory adjudication procedure. See also *Anita Ditch Co.* v. *Turner*, 389 Pac. (2d) 1018 (Wyo. 1964).

[201] Wyo. Const. art. VIII, § § 2, 4, and 5.

[202] Wyo. Stat. Ann. § 41-54 (1957).

[203] Wyo. Stat. Ann. § 41-55 (Supp. 1973).

[204] Wyo. Stat. Ann. § 41-61 (1957).

[205] *Id.* § 41-62.

[206] *Id.* § 41-57. See *Laramie Rivers Co.* v. *LeVasseur*, 65 Wyo. 414, 426-427, 202 Pac. (2d) 680 (1949).

Legislation enacted in 1955 and amended in 1969 provides that revised tabulations of adjudicated water rights in each of the water divisions shall be compiled and edited at such times as the president of the Board of Control deems necessary, with supplements thereto every two years. Wyo. Stat. Ann. § § 41-161 to -163 (Supp. 1973). As discussed at note 3 *supra*, the State Engineer is the president of the Board.

[207] They also may require reservoirs to be filled whenever practicable and water is available for storage. Wyo. Stat. Ann. § § 41-63 and -64 (Supp. 1973).

See the discussion at notes 103-108 *supra* regarding rotation in use of water and water exchanges.

See Wyo. Stat. Ann. § 41-64 (Supp. 1973) and § § 41-252 to -259 (1957) with respect to jointly held ownership interests in various irrigation ditches, canals, or reservoirs. See also the discussion at notes 67-74 *supra* regarding reservoirs.

District water commissioners have power to make arrests,[208] and may employ assistants in case of emergency.[209]

Upon the request of the State Engineer, the Attorney General shall bring suit on behalf of the State for any unlawful appropriation, diversion, or use of State waters, or the waste or loss of State waters. "A showing of injury in such suits shall not be required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction."[210]

Any person injured by an act of a water commissioner, or by his failure to act, may appeal to the Division Superintendent and thence to the State Engineer, and from the latter's decision to the district court.[211]

Any person who deems himself injured or discriminated against by an order or regulation of the Division Superintendent may appeal to the State Engineer who, after hearing the case, has the power through the Division Superintendent to suspend, amend, or confirm the order.[212]

Judicial views of administrative authority. The Wyoming Supreme Court has said, "That the state may supervise and control the appropriation, diversion and distribution of the public waters, and impose that duty upon administrative officers, is settled by our former decisions * * *." The court also said,

> By such supervision no rights of private property are invaded, but, under the police power of the state, in the interest of the public welfare, and for the protection of private as well as public rights, property intended to be used for no other purpose than that of diverting public waters is regulated; and it is a mistaken notion that through such regulation private property is taken for either public or private use, within the meaning of the constitutional provision prohibiting such taking without just compensation.[213]

The district water commissioner acts simply as an administrative officer in exercising the police power of the State. His authority to divide the water of streams according to priorities of the parties is not authority to take property away from one party and give it to another. The presumption ordinarily is in favor of the regularity of the commissioner's action.[214] He is not authorized to

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[208] Wyo. Stat. Ann. §41-65 (1957).

[209] Wyo. Stat. Ann. §41-69 (Supp. 1973).

[210] *Id.* §41-1.22.

[211] *Id.* §41-63.

[212] Wyo. Stat. Ann. §41-60 (1957).

[213] *Hamp* v. *State*, 19 Wyo. 377, 118 Pac. 653, 657, 662 (1911). See also *Van Buskirk* v. *Red Buttes Land & Live Stock Co.*, 24 Wyo. 183, 195, 156 Pac. 1122, 160 Pac. 387 (1916).

[214] *Laramie Irr. & Power Co.* v. *Grant*, 44 Wyo. 392, 410, 412, 13 Pac. (2d) 235 (1932). However, the presumption may be overcome by evidence that he did not distribute water according to established priorities. *Merrill* v. *Bishop*, 69 Wyo. 45, 58-59, 61-62, 237 Pac. (2d) 186 (1951). It is of course true, said the supreme court in the *Merrill* case, that the duty of water officials to regulate and distribute the waters of Wyoming are mandatory; but that does not mean that it may be done in an illegal manner, nor that the determination of water officials as to what is legal is final. "They are not above

determine priorities—one of the functions of the Board of Control—but it may become necessary and proper for him to ascertain whether, and to what extent, a prior appropriator is injured by a diversion above him on the same stream or on a tributary. The only subject of this inquiry is to be able to fairly make a temporary distribution of the water in conformity with the adjudicated priorities.[215] Nor has he authority to determine whether or not a water right has been forfeited or abandoned—another of the functions of the Board of Control—nor to prevent an appropriator from lawfully diverting the full quantity of water awarded to him by the Board when he wishes to use it for the purpose for which it was awarded.[216] But the commissioner may regulate a headgate so as to prevent waste.[217]

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the law." 69 Wyo. at 61. See also *Hunziker* v. *Knowlton*, 78 Wyo. 241, 322 Pac. (2d) 141, 145 (1958).

In addition, the statute creating the office of water commissioner and prescribing his duties does not make such remedy exclusive; nor does it either expressly or by implication abrogate any of the common law remedies of one who has been wrongfully deprived of the use of water to which he is entitled. The right of action for damages and/or injunction remains. *Van Buskirk* v. *Red Buttes Land & Live Stock Co.*, 24 Wyo. 183, 190-197, 209-210, 156 Pac. 1122, 160 Pac. 387 (1916). See *Kearney Lake, Land & Res. Co.* v. *Lake De Smet Res. Co.*, 487 Pac. (2d) 324, 327 (Wyo. 1971).

[215] *Ryan* v. *Tutty*, 13 Wyo. 122, 133, 78 Pac. 661 (1904); *Parshall* v. *Cowper*, 22 Wyo. 385, 393-394, 143 Pac. 302 (1914).

[216] *Parshall* v. *Cowper*, 22 Wyo. 385, 395-396, 143 Pac. 302 (1914).

[217] 22 Wyo. at 394, discussed in note 193 *supra*.

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Conness v. Pacific Coast Joint Stock Land Bank, 46 Ariz. 338, 50 Pac.(2d) 888 (1935) ..... II: 372

Dalton v. Rentaria, 2 Ariz. 275, 15 Pac. 37 (1887) ..... II: 433
Day v. Buckeye Water Conservation & Drainage Dist., 28 Ariz. 466, 237 Pac. 636 (1925) ..... I: 471; III: 167
Diedrich v. Farnsworth, 100 Ariz. 269, 413 Pac.(2d) 774 (1966) ..... I: 84; II: 551
Egan v. Estrada, 6 Ariz. 248, 56 Pac. 721 (1899) ..... II: 361, 383
England v. Ally Ong Hing, 105 Ariz. 65, 459 Pac.(2d) 498 (1969) ..... I: 317; III: 164
Ernst v. Superior Ct. of Apache County, 82 Ariz. 17, 307 Pac.(2d) 911 (1957) ..... III: 166
Farmers Inv. Co. v. Pima Min. Co., 111 Ariz. 56, 523 Pac.(2d) 487 (1974) ..... III: 175
Fourzan v. Curtis, 43 Ariz. 140, 29 Pac.(2d) 722 (1934) ..... I: 229, 441, 497 II: 597; III: 164
George v. Gist, 33 Ariz. 93, 263 Pac.10 (1928) ..... II: 332, 414; III: 170
Gila Water Co. v. Green, 27 Ariz. 318, 232 Pac. 1016 (1925) ..... I: 258; II: 265; III: 169
Gila Water Co. v. Green, 29 Ariz. 304, 241 Pac. 307 (1925) ..... I: 374, 377; II: 262, 265, 317; III: 169
Globe v. Shute, 22 Ariz. 280, 196 Pac. 1024 (1921) ..... I: 34, 46, 54
Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598 (1904) ..... I: 146, 547, 563, 566, 568, 599, 626; II: 262, 331; III: 165, 167, 168, 170
Green & Griffin Real Estate & Inv. Co. v. Salt River Valley Water Users' Assn., 25 Ariz. 354, 217 Pac. 945 (1923) ..... I: 457, 480
Gross v. MacCornack, 75 Ariz. 243, 255 Pac.(2d) 183 (1953) ..... II: 358, 369, 597
Hamblin v. Woolley, 64 Ariz. 152, 167 Pac.(2d) 100 (1946) ..... II: 597
Haning v. Porter, 6 Ariz. 171, 54 Pac. 584 (1898) ..... III: 164
Hargrave v. Hall, 3 Ariz. 252, 73 Pac. 400 (1891) ..... I: 568
Hill v. Lenormand, 2 Ariz. 354, 16 Pac. 266 (1888) ..... III: 170
Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460 (1904) ..... III: 171
Jarvis v. State Land Dept., 106 Ariz. 506, 479 Pac.(2d) 169 (1970) ..... III: 172-173, 175-176
Jarvis v. State Land Dept., City of Tucson, 104 Ariz. 527, 456 Pac.(2d) 385 (1969) ..... III: 172-173, 175
Lambeye v. Garcia, 18 Ariz. 178, 157 Pac. 977 (1916) ..... II: 569
Landers v. Joerger, 15 Ariz. 480, 140 Pac. 209 (1914) ..... II: 266
Lassen v. Harpham, 2 Ariz. App. 478, 410 Pac.(2d) 100 (1966) ..... II: 660
Maricopa County M.W.C. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 Pac.(2d) 369 (1931) ..... I: 29, 31-32, 38-39, 41, 51, 60, 62, 64, 99, 137, 160, 162, 236, 284, 374, 383-384; II: 633, 635; III: 163, 170-172
Maricopa County M.W.C. Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 367, 7 Pac.(2d) 254 (1932) ..... I: 578; II: 213, 246, 505, 515, 633; III: 168
Maricopa County M.W.C. Dist. v. Warford, 69 Ariz. 1, 206 Pac.(2d) 1168 (1949) ..... I: 84, 608; II: 551
McKenzie v. Moore, 20 Ariz. 1, 176 Pac. 568 (1918) ..... I: 256; II: 596
Miller v. Douglas, 7 Ariz. 41, 60 Pac. 722 (1900) ..... I: 626-627; III: 168
Mullen v. Gross, 84 Ariz. 207, 326 Pac.(2d) 33 (1958) ..... II: 597; III: 166
Olsen v. Union Canal & Irr. Co., 58 Ariz. 306, 119 Pac.(2d) 569 (1941) ..... I: 479, 563, 566, 568; III: 167
Parker v. McIntyre, 47 Ariz. 484, 56 Pac.(2d) 1337 (1936) ..... I: 258, 317, 374; II: 597; III: 164-165
Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 Pac. 369 (1926) ..... I: 5, 445, 558, 563, 608, 627; II: 212-213, 246, 505, 515; III: 163, 167, 168, 170, 171
Ramirez v. Electrical Dist. No. 4, 37 Ariz. 360, 294 Pac. 614 (1930) ..... I: 152
Roosevelt Irr. Dist. v. Beardsley Land & Inv. Co., 36 Ariz. 65, 282 Pac. 937 (1929) ..... II: 551
Salt River Valley Water Users' Assn. v. Kovacovich, 3 Ariz. App. 28, 411 Pac.(2d) 201 (1966) ..... I: 646; III: 169
Salt River Valley Water Users' Assn. v. Norviel, 29 Ariz. 360, 241 Pac. 503 (1925) ..... I: 558, 627; III: 168
Santa Cruz Res. Co. v. Ramirez, 16 Ariz. 64, 141 Pac. 120 (1914) ..... I: 493, 575; II: 566
Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 Pac. 332 (1901) ..... I: 146, 160-161, 264, 562, 566, 599, 626; III: 163, 165, 167, 168

Southern Pac. Co. v. Proebstel, 61 Ariz. 412, 150 Pac.(2d) 81 (1944) ..... I: 76, 84
Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 Pac.(2d) 764 (1955) .... III: 175
State v. Bonelli Cattle Co., 11 Ariz. App. 412, 464 Pac.(2d) 999 (1970) ..... I: 193
State v. Gunther & Shirley Co., 5 Ariz. App. 77, 423 Pac.(2d) 352 (1967) ..... I: 193; III: 171
State v. Jacobs, 93 Ariz. 336, 380 Pac.(2d) 998 (1963) ..... I: 193; III: 171
Stuart v. Norviel, 26 Ariz. 493, 226 Pac. 908 (1924) ..... III: 177
Sullivan v. Jones, 13 Ariz. 229, 108 Pac. 476 (1910) ..... II: 194
Tattersfield v. Putnam, 45 Ariz. 156, 41 Pac.(2d) 228 (1935) ..... I: 160, 265, 317, 441, 457; III: 163-165, 167, 170
Taylor v. Tempe Irr. Canal Co., 21 Ariz. 574, 193 Pac. 12 (1920) ..... II: 505
Tucson v. Koerber, 82 Ariz. 347, 313 Pac.(2d) 411 (1957) ..... II: 432, 434, 551
Wall v. Superior Ct. of Yavapai County, 53 Ariz. 344, 89 Pac.(2d) 624 (1939) ..... I: 498, 574, 575
Wedgworth v. Wedgworth, 20 Ariz. 518, 181 Pac. 952 (1919) .... II: 433, 569; III: 170
Whiting v. Lyman Water Co., 59 Ariz. 121, 124 Pac.(2d) 316, 129 Pac.(2d) 995 (1942) ..... I: 479, 563, 566, 568, 569; III: 167

California

Akin v. Spencer, 21 Cal. App.(2d) 325, 69 Pac.(2d) 430 (1937) ..... II: 33, 413
Albaugh v. Mt. Shasta Power Corp., 9 Cal.(2d) 751, 73 Pac.(2d) 217 (1939) ..... I: 496; II: 413, 422
Alhambra Addition Water Co. v. Mayberry, 88 Cal. 68, 25 Pac. 1101 (1891) ..... I: 208; III: 202
Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379 (1887) ..... II: 331, 342, 344, 389, 415
Allen v. California Water & Tel. Co., 29 Cal.(2d) 466, 176 Pac.(2d) 8 (1946) ..... II: 468, 505, 516, 591, 671, 673; III: 205, 210, 307
Alpaugh Irr. Dist. v. County of Kern, 113 Cal. App.(2d) 286, 248 Pac.(2d) 117 (1952) ..... II: 413, 416, 673
Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645 (1890) ..... I: 266, 458, 474; II: 37, 48, 55, 106, 112, 134, 331, 332, 346, 351, 352, 359, 367, 388, 402, 417, 437; III: 196, 199
American Co. v. Bradford, 27 Cal. 360 (1865) ..... II: 357, 365, 369, 403
Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907) .... I: 43; II: 16, 35, 40, 49, 50, 56, 57, 70, 71, 76, 85, 135, 154, 198, 234, 384, 385, 584, 590; III: 180, 200
Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623 (1883) ..... II: 39, 431
Anderson v. Baumgartner, 4 Cal.(2d) 195, 47 Pac.(2d) 724 (1935) ..... I: 630; II: 259, 273
Antioch v. Williams Irr. Dist., 188 Cal. 451, 205 Pac. 688 (1922) ..... I: 127, 155, 259, 449, 529; II: 25, 62, 79, 118, 134, 208; III: 199, 200, 204
Archer v. Los Angeles, 19 Cal.(2d) 19, 119 Pac.(2d) 1 (1941) ..... I: 94
Armstrong v. Payne, 188 Cal. 585, 206 Pac. 638 (1922) ..... II: 371, 372, 388
Arrington v. Liscom, 34 Cal. 365 (1868) ..... II: 342
Arroyo Ditch & Water Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874 (1909) ..... II: 141, 666, 669
Arroyo Ditch & Water Co. v. Dorman, 137 Cal. 611, 70 Pac. 737 (1902) ..... II: 141
Ayer v. Grondoni, 45 Cal. App. 218, 187 Pac. 137 (1919) ..... II: 377
Bank of Visalia v. Smith, 146 Cal. 398, 81 Pac. 542 (1905) ..... I: 457
Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589 (1902) ..... II: 86, 599; III: 198
Barnes v. Marshall, 68 Cal. 569, 10 Pac. 115 (1886) ..... I: 93
Barrows v. Fox, 98 Cal. 63, 32 Pac. 811 (1893) ..... I: 208, 498, 512, 647; III: 202
Bartlett v. O'Connor, 102 Cal. XVII, 4 Cal. U. 610, 36 Pac. 513 (1894) ..... II: 670; III: 209

Barton Land & Water Co. v. Crafton Water Co., 171 Cal. 89, 152 Pac. 48 (1915) ..... I: 61; II: 667
Barton v. Pierce, 131 Cal. App. 33, 20 Pac.(2d) 736 (1933) ..... II: 266
Barton v. Riverside Water Co., 155 Cal. 509, 101 Pac. 790 (1909) ..... II: 249, 686, 687
Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553 (1906) ..... II: 366
Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442 (1899) ..... I: 536, 540; II: 33, 91, 106, 110, 115, 139, 396, 397
Baxter v. Gilbert, 125 Cal. 580, 58 Pac. 129 (1899) ..... I: 398, 447; II: 202
Bazet v. Nugget Bar Placers, 211 Cal. 607, 296 Pac. 616 (1931) ..... II: 298, 417, 424, 426
Bear River & Auburn Water & Min. Co. v. New York Min. Co., 8 Cal. 327 (1857) ..... I: 167, 254, 449, 452, 526; II: 206, 207, 209; III: 182
Beckett v. Petaluma, 171 Cal. 309, 153 Pac. 20 (1915) ..... II: 342, 345, 347
Bernick v. Mercy, 136 Cal. 205, 68 Pac. 589 (1902) ..... II: 106
Biddle Boggs v. Merced Min. Co., 14 Cal. 279 (1859) ..... II: 430, 431, 434
Bigelow v. Merz, 57 Cal. App. 613, 208 Pac. 128 (1922) ..... II: 77, 87
Big Rock Mut. Water Co. v. Valvermo Ranch Co., 78 Cal. App. 266, 248 Pac. 264 (1926) ..... I: 145, 441; II: 370
Bishel v. Faria, 342 Pac.(2d) 278 (Cal. App. 1959) ..... I: 41, 136
Bishel v. Faria, 53 Cal.(2d) 254, 347 Pac.(2d) 289, 1 Cal. Rptr. 153 (1959) ..... I: 41, 136
Bloss v. Rahilly, 16 Cal.(2d) 70, 104 Pac.(2d) 1049 (1940) ..... II: 69, 312, 587, 589, 590
Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 Pac. 908 (1897) ..... II: 50, 52, 53
Bohn v. Albertson, 107 Cal. App.(2d) 738, 238 Pac.(2d) 128 (1951) ..... I: 122
Bray v. Superior Ct., 92 Cal. App. 428, 268 Pac. 374 (1928) ..... III: 213
Bree v. Wheeler, 129 Cal. 145, 61 Pac. 782 (1900) ..... II: 370
Brown v. Mullin, 65 Cal. 89, 3 Pac. 99 (1884) ..... I: 398, 491, 496
Burr v. MacLay Rancho Water Co., 154 Cal. 428, 98 Pac. 260 (1908) ..... II: 636, 672, 673; III: 210
Burr v. MacLay Rancho Water Co., 160 Cal. 268, 116 Pac. 715 (1911) ..... II: 249, 636, 669, 671, 672, 679, 681, 683
Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 992 (1894) ..... II: 420
Burrows v. State, 260 Cal. App.(2d) 29, 66 Cal. Rptr. 868 (1968) ..... II: 555
Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143 (1858) ..... I: 255, 449, 569, 604, 605; II: 207, 272, 585
Butte T.M. Co. v. Morgan, 19 Cal. 609 (1862) ..... I: 629
California Pastoral & Agric. Co. v. Madera Canal & Irr. Co., 167 Cal. 78, 138 Pac. 718 (1914) ..... I: 11, 500; II: 37, 353, 391, 404, 417, 424, 438
California Water Serv. Co. v. Edward Sidebotham & Son, Inc., 202 Cal. App.(2d) 256, 37 Cal. Rptr. 1 (1964) ..... II: 638, 675
Callison v. Mt. Shasta Power Corp., 123 Cal. App. 247, 11 Pac.(2d) 60 (1932) ..... II: 118
Campbell v. Ingram, 37 Cal. App. 728, 174 Pac. 366 (1918) ..... I: 530
Campbell v. West & Mathis, 44 Cal. 646 (1872) ..... II: 373
Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co., 78 Cal. App.(2d) 900, 178 Pac.(2d) 844 (1947) ..... II: 70, 83, 85, 88, 89, 132, 226, 234, 514; III: 195, 196, 201, 209
Cave v. Crafts, 53 Cal. 135 (1878) ..... I: 208, 455; III: 203
Cave v. Tyler, 133 Cal. 556, 65 Pac. 1089 (1901) ..... I: 208; III: 202
Cave v. Tyler, 147 Cal. 454, 82 Pac. 64 (1905) ..... II: 665, 666, 716
Cederburg v. Dutra, 3 Cal. App. 572, 86 Pac. 838 (1906) ..... I: 44
Chapman v. Sky L'Onda Mut. Water Co., 69 Cal. App.(2d) 667, 159 Pac.(2d) 988 (1945) ..... II: 420
Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171 (1896) ..... II: 50, 83, 126; III: 201
Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066 (1892) ..... II: 77, 599
Cheda v. Southern Pac. Co., 22 Cal. App. 373, 134 Pac. 717 (1913) ..... II: 355, 421
Cheesman v. Odermott, 113 Cal. App.(2d) 26, 271 Pac.(2d) 157 (1954) ..... II: 570

Chowchilla Farms v. Martin, 219 Cal. 1, 25 Pac.(2d) 435 (1933) .....I: 76, 90, 96, 98; II: 66, 68; III: 197
Chrisman v. Southern Cal. Edison Co., 83 Cal. App. 249, 256 Pac. 618 (1927) ... I: 150
Chuck v. Alves, 124 Cal. App.(2d) 144, 268 Pac.(2d) 94 (1954) .....II: 412
Churchill v. Rose, 136 Cal. 576, 69 Pac. 416 (1902) .....II: 78, 595, 600
Churchill v. Russell, 148 Cal. 1, 82 Pac. 440 (1905) ..... I: 486; II: 437
Clear Lake Water Co. v. Superior Ct. of Mendocino County, 33 Cal. App.(2d) 710, 92 Pac.(2d) 921 (1939) ..... I: 75
Clement v. State Reclamation Bd., 35 Cal.(2d) 628, 220 Pac.(2d) 897 (1950)... I: 86, 94
Cohen v. La Canada Land & Water Co., 142 Cal. 437, 76 Pac. 47 (1904) ... II: 602, 671, 681, 692; III: 210
Cohen v. La Canada Land & Water Co., 151 Cal. 680, 91 Pac. 584 (1907) .....II: 692
Coachella Valley County Water Dist. v. Stevens, 206 Cal. 400, 274 Pac. 538 (1929) .....II: 142, 682
Colberg Inc. v. State, 67 Cal.(2d) 408, 432 Pac.(2d) 3, 62 Cal. Rptr. 401 (1967) ..... I: 119
Collier v. Merced Irr. Dist., 213 Cal. 554, 2 Pac.(2d) 790 (1931) .....I: 77, 90; II: 27, 222, 223, 247, 248, 515
Colorado Power Co. v. Pacific Gas & Elec. Co., 218 Cal. 559, 24 Pac.(2d) 495 (1933) .....II: 128, 129, 218, 234, 335, 418; III: 200, 201
Conger v. Weaver, 6 Cal. 548 (1856) .....I: 167, 254, 385, 452, 526; II: 119; III: 182, 183
Consolidated People's Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 269 Pac. 915 (1928) ..... I: 481, 565, 566
Coombs v. Reynolds, 43 Cal. App. 656, 185 Pac. 877 (1919) .....II: 542
Copeland v. Fairview Land & Water Co., 165 Cal. 148, 131 Pac. 119 (1913).....I: 143, 150; II: 35, 141
Corona Foothill Lemon Co. v. Lillibridge, 8 Cal.(2d) 522, 66 Pac.(2d) 443 (1937) .....II: 671, 681; III: 210
Correa v. Frietas, 42 Cal. 339 (1871) .....II: 334, 569, 570
Cory v. Smith, 206 Cal. 508, 274 Pac. 969 (1929) ..... II: 33, 395-397; III: 202
Costello v. Bowen, 80 Cal. App.(2d) 621, 182 Pac.(2d) 615 (1947) ..... I: 29, 31, 33, 66, 67, 71, 84; II: 536
County of Tuolumne v. State Bd. of Equalization, 206 Cal. App.(2d) 352, 24 Cal. Rptr. 113 (1962) .....II: 215
Cowell v. Armstrong, 210 Cal. 218, 290 Pac. 1036 (1930) ....II: 86, 111; III: 198, 199
Cox v. Clough, 70 Cal. 345, 11 Pac. 732 (1886) .....II: 365, 372
Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762 (1903) .....II: 132
Crain v. Hoefling, 56 Cal. App.(2d) 396, 132 Pac.(2d) 882 (1942) .....II: 356, 404
Crandall v. Woods, 8 Cal. 136 (1857).....I: 167, 168, 254, 255, 262, 452, 526, 528; II: 21, 119, 378; III: 182
Crane v. Stevinson, 5 Cal.(2d) 387, 54 Pac.(2d) 1100 (1936) .....I: 317; II: 57, 69, 76, 202, 251, 313, 585, 587, 589, 590; III: 185, 192, 197
Creighton v. Evans, 53 Cal. 55 (1876) .....II: 197
Crews v. Johnson, 202 Cal. App.(2d) 256, 21 Cal. Rptr. 37 (1962) ..... I: 131
Crooker v. Benton, 93 Cal. 365, 28 Pac. 953 (1892) ..... I: 455, 471
Cross v. Kitts, 69 Cal. 217, 10 Pac. 409 (1886) .....II: 635, 666, 670
Crowell v. Armstrong, 210 Cal. 218, 290 Pac. 1036 (1930) .....II: 82
Crum v. Mt. Shasta Power Corp., 117 Cal. App. 586, 4 Pac.(2d) 564 (1931) .....II: 33, 73, 76, 116, 120, 223, 254
Crum v. Mt. Shasta Power Corp., 124 Cal. App. 90, 12 Pac.(2d) 134 (1932) .....II: 223, 247
Crum v. Mt. Shasta Power Corp., 220 Cal. 295, 30 Pac.(2d) 30 (1934) .....II: 30, 33, 73, 76, 82, 118, 208; III: 195, 206
Dannenbrink v. Burger, 23 Cal. App. 587, 138 Pac. 751 (1913) .... I: 577, 648; II: 569
Davey v. Grigsby, 51 Cal. App. 220, 196 Pac. 296 (1921) .....II: 352
Davis v. Gale, 32 Cal. 26 (1867) ..... I: 527, 635, 638; II: 268, 277, 360, 378
Davis v. Martin, 157 Cal. 657, 108 Pac. 866 (1910) .....II: 334, 569, 570
Deetz v. Carter, 232 Cal. App.(2d) 851, 43 Cal. Rptr. 321 (1965) .....II: 109, 111

De LaCuesta v. Bazzi, 47 Cal. App.(2d) 661, 118 Pac.(2d) 909 (1941) .....II: 420
De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198 (1889) ...I: 293, 368, 385; III: 184
De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001 (1907) ..... II: 598, 679, 684
Department of Pub. Works v. Superior Ct., 197 Cal. 215, 239 Pac. 1076 (1925) ..... I: 315
Dougherty v. Creary, 30 Cal. 290 (1866) .....II: 334, 569
Drake v. Tucker, 43 Cal. App. 53, 184 Pac. 502 (1919) ..... II: 33, 106, 109, 110, 126; III: 198
Dripps v. Allison's Mines Co., 45 Cal. App. 95, 187 Pac. 448 (1919) .....I: 449, 451, 501; II: 60, 208
Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907) .....I: 67, 73; II: 18, 25, 30, 33, 39, 73, 77, 99, 212, 298, 417; III: 196
Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 110 Pac. 927 (1910) .....I: 386; II: 37, 438; III: 184
Duckworth v. Watsonville Water & Light Co., 170 Cal. 425, 150 Pac. 58 (1915) ...I: 260, 386; II: 37, 60, 438; III: 184, 196
Duvall v. White, 46 Cal. App. 305, 189 Pac. 324 (1920) .....II: 60
East Bay Municipal Util. Dist. v. State Dept. of Pub. Works, 1 Cal.(2d) 476, 35 Pac.(2d) 1027 (1934) .....I: 320, 330, 411, 416; II: 215; III: 188
Eckel v. Springfield Tunnel & Dev. Co., 87 Cal. App. 617, 262 Pac. 425 (1927) .....II: 77, 127, 515, 599, 603, 673, 685, 692
E. Clemens Horst Co. v. New Blue Point Min. Co., 177 Cal. 631, 171 Pac. 417 (1918) ..... I: 139; II: 69, 585, 589
E. Clemens Horst Co. v. Tarr Min. Co., 174 Cal. 430, 163 Pac. 492 (1917) .....II: 69, 331, 413, 414, 587, 589
Eddy v. Simpson, 3 Cal. 249 (1853) .....I: 137, 168, 170, 234, 396, 445, 452, 526; II: 570, 585; III: 182
Eden Township County Water Dist. v. Hayward, 218 Cal. 634, 24 Pac.(2d) 492 (1933) .....II: 249, 423, 682
Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704 (1886) ..... I: 90
Elms v. Los Angeles, 58 Cal. 80 (1881) .....II: 148, 153
Elsinore v. Temescal Water Co., 36 Cal. App.(2d) 116, 97 Pac.(2d) 274 (1939) .....I: 359; II: 73, 121; III: 198, 199
Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587 (1891) ..... I: 256, 258, 455; II: 602
Erickson v. Queen Valley Ranch Co., 22 Cal. App.(3d) 578, 99 Cal. Rptr. 446 (1971) .....III: 191, 193
Esmond v. Chew, 15 Cal. 137 (1860) ..... I: 449; II: 207
Evans v. Ross, 67 Cal. XIX, 2 Cal. U. 543, 8 Pac. 88 (1885) .....II: 330, 378
Evans Ditch Co. v. Lakeside Ditch Co., 13 Cal. App. 119, 108 Pac. 1027 (1910) .....II: 352, 356, 357, 374, 377, 417
Everett v. Davis, 18 Cal.(2d) 389, 115 Pac.(2d) 821 (1941) .....I: 76, 84; II: 536, 538, 541
Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811 (1907) .....II: 684
Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 Pac. 444 (1927) .....I: 155, 156; II: 22, 23, 25, 26, 46, 116, 127, 192, 289; III: 194
Farley v. Spring Valley Min. & Irr. Co., 58 Cal. 142 (1881) .....I: 208; III: 203
Farmer v. Ukiah Water Co., 56 Cal. 11 (1880) ..... I: 455, 474
Fawkes v. Reynolds, 190 Cal. 204, 211 Pac. 449 (1922) ..... I: 150
Feliz v. Los Angeles, 58 Cal. 73 (1881) ..... II: 148-151, 153, 156
Fell v. M. & T., Inc., 73 Cal. App.(2d) 692, 166 Pac.(2d) 642 (1946) .....II: 570
Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137 (1907) .....II: 154
Felsenthal v. Warring, 40 Cal. App. 119, 180 Pac. 67 (1919) ..... I: 491
Ferrea v. Knipe, 28 Cal. 340 (1865) .....I: 187; II: 7, 28, 106, 112, 113; III: 194, 198, 199
Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054 (1900) ..... I: 90
Fleming v. Bennett, 18 Cal.(2d) 518, 116 Pac.(2d) 442 (1941) ..... II: 451, 468, 524; III: 211, 214

Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570 (1900) ..... I: 486; II: 437, 599
Forest Lakes Mut. Water Co. v. Santa Cruz Land Title Co., 98 Cal. App. 489, 277 Pac. 172 (1929) ..... II: 36; III: 196
Frazee v. Railroad Comm'n, 185 Cal. 690, 201 Pac. (1921) ..... II: 16, 35, 36; III: 180
Fresno Canal & Irr. Co. v. People's Ditch Co., 174 Cal. 441, 163 Pac. 497 (1917) ..... II: 25, 234, 384
Frey v. Lowden, 70 Cal. 550, 11 Pac. 838 (1886) ..... II: 504, 519
Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024 (1895) ..... I: 143, 149
Fuller v. Azusa Irrigating Co., 138 Cal. 204, 71 Pac. 98 (1902) ..... I: 565
Furtado v. Taylor, 86 Cal. App.(2d) 346, 194 Pac.(2d) 770 (1948) ..... II: 374
Galbreath v. Hopkins, 159 Cal. 279, 113 Pac. 174 (1911) ..... II: 336
Gallatin v. Corning Irr. Co., 163 Cal. 405, 126 Pac. 864 (1912) ..... I: 90, 518; II: 48, 234
Gallegher v. Montecito Valley Water Co., 101 Cal. 242, 35 Pac. 770 (1894) ... I: 633, 638
Garbarino v. Noce, 181 Cal. 125, 183 Pac. 532 (1919) ..... II: 426
Gause v. Pacific Gas & Elec. Co., 60 Cal. App. 360, 212 Pac. 922 (1923) ..... I: 458
Gibson v. Puchta, 33 Cal. 310 (1867) ..... I: 649
Gilroy v. Kell, 67 Cal. App. 734, 228 Pac. 400 (1924) ..... II: 377
Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 Pac.(2d) 5 (1933) ..... I: 15, 90; II: 242; III: 205
Gould v. Eaton, 117 Cal. 539, 49 Pac. 577 (1897) ..... II: 23, 37, 85, 135, 198, 384, 438, 635, 690; III: 200
Gould v. Stafford, 91 Cal. 146, 27 Pac. 543 (1891) ..... II: 27, 37, 91, 134, 139
Grattan v. Wiggins, 23 Cal. 16 (1863) ..... II: 341, 342, 347
Gray v. Magee, 108 Cal. App. 570, 292 Pac. 157 (1930) ..... II: 316
Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 Pac. 1024 (1917) ..... I: 43, 63, 102, 105
Green v. Carotto, 72 Cal. 267, 13 Pac. 685 (1887) ..... II: 66
Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. 1034 (1904) ..... I: 485; II: 276
Gurnsey v. Antelope Creek & Red Bluff Water Co., 6 Cal. App. 387, 92 Pac. 326 (1907) ..... II: 390
Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449 (1905) ..... II: 77, 78, 132, 135, 204, 205, 595, 598-600
Hahn v. Curtis, 73 Cal. App.(2d) 382, 166 Pac.(2d) 611 (1946) ..... II: 336, 403
Haight v. Costanich, 184 Cal. 426, 194 Pac. 26 (1920) ..... I: 208, 287, 378, 493, 496, 585; II: 214, 215; III: 184, 203
Hails v. Martz, 28 Cal.(2d) 775, 172 Pac.(2d) 52 (1946) ..... II: 336, 354
Hale v. McLea, 53 Cal. 578 (1879) ..... II: 106, 666
Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 Pac. 675 (1916) ..... II: 58, 85, 89; III: 195
Hall v. Webb, 66 Cal. App. 416, 226 Pac. 403 (1924) ..... I: 75; II: 74, 77, 432
Hand v. Carlson, 138 Cal. App. 202, 31 Pac.(2d) 1084 (1934) ..... I: 260, 641
Hand v. Clease, 202 Cal. 36, 258 Pac. 1090 (1927) ..... I: 630; II: 309
Hann v. DeVaurs, 97 Cal. App.(2d) 841, 218 Pac.(2d) 996 (1950) ..... I: 40, 49; II: 586, 587
Hannah v. Pogue, 23 Cal.(2d) 849, 147 Pac.(2d) 572 (1944) ..... II: 419
Hanson v. McCue, 42 Cal. 303 (1871) ..... I: 445, 528; II: 34, 395, 397, 666, 669, 670
Happy Valley Land & Water Co. v. Nelson, 169 Cal. 694, 147 Pac. 966 (1915) ..... I: 558, 638
Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18 (1895) ..... II: 33, 397
Harris v. Harrison, 93 Cal. 676, 29 Pac. 325 (1892) ..... II: 86, 89, 91, 112, 132; III: 195, 199
Hart v. Burnett, 15 Cal. 530 (1860) ..... II: 147, 155, 156
Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528 (1893) ..... I: 572
Heil v. Sawada, 187 Cal. App.(2d) 633, 10 Cal. Rptr. 61 (1960) ..... I: 452; II: 208
Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535 (1888) ..... I: 78, 127; II: 79, 234

Heilbron v. Kings River & Fresno Canal Co., 76 Cal. 11, 17 Pac. 933 (1888) .....II: 355
Heilbron v. Last Chance Water Ditch Co., 75 Cal. 117, 17 Pac. 65 (1888) .....II: 27
Heilbron v. The 76 Land & Water Co., 80 Cal. 189, 22 Pac. 62 (1889) .....II: 24, 135
Heinkel v. McAllister, 133 Cal. App.(2d) 500, 248 Pac.(2d) 438 (1952) ....II: 363, 364
Hellman Commercial Trust & Savings Bank v. Southern Pac. Co., 190 Cal. 626, 214 Pac. 46 (1923) ..... I: 68
Helvey v. United States Bldg. & Loan Assn. of Los Angeles, 81 Cal. App.(2d) 647, 184 Pac.(2d) 919 (1947) .....II: 263, 278
Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 Pac. 607 (1926) .....I: 11, 48, 51, 65, 67, 75, 90, 209; II: 7, 24, 25, 33, 45, 77, 84, 89, 95, 113, 116, 117, 127, 128, 289, 334, 667; III: 195, 198, 199, 201, 203, 204
Higgins v. Barker, 42 Cal. 233 (1871) ..... I: 528; II: 227
Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 Pac. 395 (1903) ..... I: 552, 565, 566
Hill v. King, 8 Cal. 336 (1857) .....I: 167, 168, 187, 262, 579; II: 2, 81, 82, 194, 216; III: 181, 182, 194
Hill v. Newman, 5 Cal. 445 (1855) .....I: 152, 168, 187, 254, 262; II: 2, 26, 119; III: 181, 194
Hill v. Smith, 27 Cal. 476 (1865) ..... I: 448
Hillside Water Co. v. Los Angeles, 10 Cal.(2d) 677, 76 Pac.(2d) 681 (1938) .....II: 249, 516, 672, 674; III: 205
Hoffman v. Stone, 7 Cal. 46 (1857) .....I: 151, 167, 254, 452, 569, 602; II: 216, 272; III: 181, 192
Holmes v. Nay, 186 Cal. 231, 199 Pac. 325 (1921) .....I: 208; II: 16, 30, 33, 34, 37, 57, 76, 77, 125, 134, 196, 202, 205, 396, 585, 590, 599, 603; III: 180, 195, 200, 201, 202
Horton v. Goodenough, 184 Cal. 451, 194 Pac. 34 (1920) ..... I: 86; II: 540
Hubbs & Miner Ditch Co. v. Pioneer Water Co., 148 Cal. 407, 83 Pac. 253 (1906) .....II: 358, 426
Hudson v. Dailey, 156 Cal. 617, 105 Pac. 748 (1909) ..... II: 40, 397, 671, 672, 690-693, 695; III: 197
Hudson v. West, 47 Cal.(2d) 823, 306 Pac.(2d) 807 (1957) .....II: 412
Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424 (1908) .....I: 60, 398, 518; II: 25, 269, 312, 384, 558, 584, 667
Hufford v. Dye, 162 Cal. 147, 121 Pac. 400 (1912) .....I: 11, 441, 492, 499, 500, 502, 574, 619; II: 132, 314; III: 192
Hunceker v. Lutz, 65 Cal. App. 649, 224 Pac. 1001 (1924) .....II: 334
In re Maas, 219 Cal. 442, 27 Pac.(2d) 373 (1933) .....II: 672, 684
In re Thomas' Estate, 147 Cal. 236, 81 Pac. 539 (1905) ..... I: 458, 552, 565
Inyo Consol. Water Co. v. Jess, 161 Cal. 516, 119 Pac. 934 (1912) .....I: 585; II: 214; III: 183
Irrigated Valleys Land Co. of Cal. v. Altman, 57 Cal. App. 413, 207 Pac. 401 (1922) .....II: 430, 435, 437
Irwin v. Phillips, 5 Cal. 140 (1855) .....I: 168, 187, 234, 254, 255, 396; II: 2; III: 182, 183, 194
Ivanhoe Irr. Dist. v. All Parties, 47 Cal.(2d) 597, 306 Pac.(2d) 824 (1957) ..... I: 142
Ivanhoe Irr. Dist. v. All Parties & Persons, 53 Cal.(2d) 692, 350 Pac. (2d) 69, 3 Cal. Rptr. 317 (1960) ..... I: 142; II: 215
Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119 (1893) .....II: 558
Jensen v. Hunter, 108 Cal. XVII, 5 Cal. U. 83, 41 Pac. 14 (1895) .....II: 364, 384
J. M. Howell Co. v. Corning Irr. Co., 177 Cal. 513, 171 Pac. 100 (1918) ..... I: 548, 552; II: 68, 192, 248
Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 Pac.(2d) 706 (1932) ..... II: 49, 85, 88, 139; III: 195, 201
Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 276 Pac. 1017 (1929) .....I: 262, 396, 449, 489, 498, 506, 509, 510, 649; II: 30, 49, 118, 125, 133, 134, 208, 334; III: 195
Johnson Rancho County Water Dist. v. State Water Rights Bd., 235 Cal. App.(2d) 863, 45 Cal. Rptr. 589 (1965) ..... I: 425

Johnstone v. Gloster, 49 Cal. App. 750, 194 Pac. 504 (1920) .....II: 358
Jones v. Harmon, 175 Cal. App.(2d) 869, 1 Cal. Rptr. 192 (1959) .....II: 352, 355
Joslin v. Marin Municipal Water Dist., 67 Cal.(2d) 132, 429 Pac.(2d) 889, 60 Cal. Rptr. 377 (1967) .....I: 11, 210, 501, 545; II: 24, 46, 124, 243, 244, 289; III: 205, 206
Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, (1902), 74 Pac. 766 (1903) .....I: 238; II: 249, 441, 442, 634-636, 638, 639, 654, 669-674, 679, 680, 682-684, 687, 691; III: 209, 211, 400
Kelly v. Natoma Water Co., 6 Cal. 105 (1856) .....I: 187, 383, 385; II: 2, 119, 570; III: 194
Ketchum v. Modesto Irr. Dist., 135 Cal. App. 180, 26 Pac.(2d) 876 (1933) .....II: 351
Keys v. Romley, 64 Cal.(2d) 396, 412 Pac.(2d) 529, 50 Cal. Rptr. 273 (1966) .....II: 543, 553, 554
Kidd v. Laird, 15 Cal. 161 (1860) .....I: 138, 142, 187, 629; II: 2; III: 194
Kimball v. Gearhart, 12 Cal. 27 (1859) .....I: 287, 368, 375, 376, 384, 385, 443; II: 193; III: 183
Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124 (1892) .....II: 268, 277
Kraemer v. Kraemer, 167 Cal. App.(2d) 291, 334 Pac.(2d) 675 (1959) .....II: 351, 358, 360, 376, 390
Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76 (1889) .....I: 445, 574; II: 395, 396
Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625 (1887) .....I: 49, 65
Land v. Johnston, 156 Cal. 253, 104 Pac. 449 (1909) .....II: 264, 271; III: 192
Larsen v. Apollonio, 5 Cal.(2d) 440, 55 Pac.(2d) 196 (1936) .....I: 60, 398, 491, 496; II: 252, 400, 667; III: 209
Last Chance Water-Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523 (1890) .....II: 362
Learned v. Tangeman, 65 Cal. 334, 4 Pac. 191 (1884) .....II: 86
Lee v. Pacific Gas & Elec. Co., 7 Cal.(2d) 114, 59 Pac.(2d) 1005 (1936) .....II: 366
Leigh Co. v. Independent Ditch Co., 8 Cal. 323 (1857) .....II: 119; III: 199
Lema v. Ferrari, 27 Cal. App.(2d) 65, 80 Pac.(2d) 157 (1938) .....II: 269, 303, 426
Lewis v. Scazighini, 130 Cal. App. 722, 20 Pac.(2d) 359 (1933) .....I: 150
Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 Pac. 994 (1918) .....I: 34, 52, 53, 145, 349; II: 75, 262, 264, 316, 317, 426, 558; III: 192
L. Mini Estate Co. v. Walsh, 4 Cal.(2d) 249, 48 Pac.(2d) 666 (1935) ...II: 77, 204, 599
Locke v. Yorba Irr. Co., 35 Cal.(2d) 205, 217 Pac.(2d) 425 (1950) .....I: 473, 476, 565; III: 191
Lodi v. East Bay Municipal Util. Dist., 7 Cal.(2d) 316, 60 Pac.(2d) 439 (1936) .....I: 350, 501; II: 245, 251, 515, 516, 680, 686, 696; III: 205
Logan v. Guichard, 159 Cal. 592, 114 Pac. 989 (1911) .....II: 423
Los Angeles v. Aitken, 10 Cal. App.(2d) 460, 52 Pac.(2d) 585 (1935) .....I: 127, 131, 359; II: 43, 73, 79, 121; III: 196
Los Angeles v. Baldwin, 53 Cal. 469 (1879) .....II: 91; III: 196
Los Angeles v. Glendale, 23 Cal.(2d) 68, 142 Pac.(2d) 289 (1943) .....I: 604, 615; II: 149-154, 246, 290, 360, 428, 505, 514, 586; III: 192, 205
Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755 (1909) .....II: 149, 153, 634, 694
Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899) .....I: 60, 61; II: 148-151, 153-154, 157, 665-667, 669, 690, 716, 719; III: 208, 209
Los Angeles v. Los Angeles Farming & Mill. Co., 152 Cal. 645, 93 Pac. 869 (1908) .....II: 47, 149-151, 153, 154
Los Angeles v. San Fernando, 28 Cal. App.(3d) 905, 105 Cal. Rptr. 77 (1972) .....II: 678
Los Angeles County v. Reyes, 3 Cal. U. 775, 32 Pac. 233 (1893) .....I: 279
Louden v. Frey, 67 Cal. 474, 8 Pac. 31 (1885) .....I: 527
Lowe v. Yolo County Consol. Water Co., 157 Cal. 503, 108 Pac. 297 (1910) .....II: 219, 221, 223
Lower Kings River Water Ditch Co. v. Kings River & Fresno Canal Co., 60 Cal. 408 (1882) .....I: 446

Lower Tule River Ditch Co. v. Angiola Water Co., 149 Cal. 496, 86 Pac. 1081 (1906) ..... I: 290, 602; III: 184
Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886) ..... I: 33, 38, 44, 142, 155, 181, 187, 208, 209, 259; II: 2, 7, 16, 18-20, 23, 25, 27, 42, 43, 52-55, 59, 67, 70, 75, 104-106, 108, 111, 112, 119, 120, 132, 147, 148, 151, 155, 156, 331, 431, 558; III: 180, 194, 199, 202-204
Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426 (1884) ..... II: 225
Madera Irr. Dist. v. All Persons, 47 Cal.(2d) 681, 306 Pac.(2d) 886 (1957) ..... II: 215
Maeris v. Bicknell, 7 Cal. 261 (1857) ..... I: 383, 527 545, 634, 638
Marius v. Bicknell, 10 Cal. 217 (1858) ..... I: 545; II: 225
Martin v. Western States Gas & Elec. Co., 8 Cal. App.(2d) 226, 47 Pac.(2d) 522 (1935) ..... II: 27, 248
Mathews v. Ferrea, 45 Cal. 51 (1872) ..... II: 384
McArthur v. Mt. Shasta Power Corp., 3 Cal.(2d) 704, 45 Pac.(2d) 807 (1935) ..... II: 33, 73, 76
McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849 (1903) ..... II: 691
McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795 (1890) ..... II: 542
McDonald v. Askew, 29 Cal. 200 (1865) ..... I: 446
McDonald v. Bear River & Auburn Water & Min. Co., 13 Cal. 220 (1859) ..... I: 152, 441, 454, 468, 469, 638; II: 216, 274
McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060 (1895) ..... II: 259, 270
McKinley Bros. v. McCauley, 215 Cal. 229, 9 Pac.(2d) 298 (1932) ..... II: 15, 21; III: 194, 202
McKinney v. Smith, 21 Cal. 374 (1863) ..... III: 182
McKissick Cattle Co. v. Alsage, 41 Cal. App. 380, 182 Pac. 793 (1919) ..... I: 93; II: 41; III: 197
McKissick Cattle Co. v. Anderson, 62 Cal. App. 558, 217 Pac. 779 (1923) ..... I: 244; III: 204
McLeran v. Benton, 43 Cal. 467 (1872) ..... I: 485; II: 274, 275
McManus v. Otis, 61 Cal. App.(2d) 432, 143 Pac.(2d) 380 (1943) .... I: 34, 84; II: 540
Mentone Irr. Co. v. Redlands Elec. Light & Power Co., 155 Cal. 323, 100 Pac. 1082 (1909) ..... I: 539; II: 30, 104, 116, 117, 124, 125, 139; III: 199
Meridian v. San Francisco, 13 Cal.(2d) 424, 90 Pac.(2d) 537 (1939) ..... I: 12, 209, 258, 316, 317, 349, 350, 496; II: 24, 32, 68, 95 206, 208, 209, 233, 234, 242, 468, 517; III: 185, 198, 206
Merritt v. Los Angeles, 162 Cal. 47, 120 Pac. 1064 (1912) ..... I: 585; II: 215
Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115 (1910) ..... I: 518; II: 135, 154, 249, 251, 252, 653, 665, 673, 683, 695
Miller & Lux v. Enterprise Canal & Land Co., 142 Cal. 208, 75 Pac. 770 (1904) ..... I: 103, 125
Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 147 Pac. 567 (1915) ..... I: 48; II: 32, 77, 125, 126, 248, 398; III: 195
Miller & Lux v. J. G. James Co., 179 Cal. 689, 178 Pac. 716 (1919) ..... II: 35, 40, 50
Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 Pac. 502 (1907) ..... I: 11, 77, 81, 90, 209, 409; II: 7, 28, 68, 95, 127, 502; III: 204
Miller & Lux v. San Joaquin Light & Power Corp., 120 Cal. App. 589, 8 Pac.(2d) 560 (1932) ..... I: 127; II: 79, 116
Miller & Lux v. San Joaquin Light & Power Crop., 8 Cal.(2d) 427, 65 Pac.(2d) 1289 (1937) ..... II: 346
Mitchell v. Amador Canal & Min. Co., 75 Cal. 464, 17 Pac. 246 (1888) ..... I: 376, 584
Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431 (1894) ..... I: 90; II: 55, 120
Mogle v. Moore, 16 Cal.(2d) 1, 104 Pac.(2d) 785 (1940) ..... I: 56, 66, 67, 76, 84, 86; II: 537, 539, 541
Mojave River Irr. Dist. v. Superior Ct., 202 Cal. 717, 262 Pac. 724 (1927) ..... I: 315, 320, 321
Mokelumne Hill Canal & Min. Co. v. Woodbury, 10 Cal. 185 (1858) .... I: 449; II: 207
Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113 (1904) ..... I: 62; II: 342, 373, 388, 390, 415, 515, 669, 685, 694

Moore v. California Oregon Power Co., 22 Cal.(2d) 725, 140 Pac.(2d) 798 (1943) ..... II: 116, 117, 129, 135, 335, 417, 418, 422; III: 199-201
Moore v. The Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816 (1885) ..... II: 193
Moreno Mut. Irr. Co. v. Beaumont Irr. Dist., 94 Cal. App.(2d) 766, 211 Pac.(2d) 928 (1949) ..... II: 681
Morgan v. Walker, 217 Cal. 607, 20 Pac.(2d) 660 (1933) ..... II: 133, 355, 357, 371, 396, 404
Mott v. Ewing, 90 Cal. 231, 27 Pac. 194 (1891) ..... II: 384
Mt. Shasta Power Corp. v. McArthur, 109 Cal. App. 171, 292 Pac. 549 (1930) ..... I: 645; II: 24, 39, 298, 417; III: 196, 200
Natoma Water & Min. Co. v. Hancock, 101 Cal. 42, 31 Pac. 112 (1892), 34 Pac. 334 (1894) ..... I: 499, 500, 576, 645; II: 210; III: 191
Natoma Water & Min. Co. v. McCoy, 23 Cal. 490 (1863) ..... II: 218
Natural Soda Products Co. v. Los Angeles, 23 Cal.(2d) 193, 143 Pac.(2d) 12 (1943) ..... I: 98; III: 205
Nelson v. Anderson-Cottonwood Irr. Dist., 51 Cal. App. 92, 196 Pac. 292 (1921) ..... I: 497, 529
Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282 (1869) ..... I: 287, 368, 373, 384, 574, 584, 600; II: 193, 214
Nevada Water Co. v. Powell, 34 Cal. 109 (1867) ..... I: 578
Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372 (1906) ..... II: 248, 249
Northern Cal. Power Co., Consol. v. Flood, 186 Cal. 301, 199 Pac. 315 (1921) ..... I: 150, 504; II: 332, 356, 364, 368, 373, 423, 424, 426, 437
North Fork Water Co. v. Edwards, 121 Cal. 662, 54 Pac. 69 (1898) ..... II: 419
Ogburn v. Connor, 46 Cal. 346 (1873) ..... II: 542
O'Leary v. Herbert, 5 Cal.(2d) 416, 55 Pac.(2d) 834 (1936) ..... II: 671
Oliver v. Robnett, 190 Cal. 51, 210 Pac. 408 (1922) ..... II: 363, 386
Omnes v. Crawford, 202 Cal. 766, 262 Pac. 722 (1927) ..... II: 49, 87
Orchard v. Cecil F. White Ranches, Inc., 97 Cal. App.(2d) 35, 217 Pac.(2d) 143 (1950) ..... II: 361, 673, 681
Ortman v. Dixon, 13 Cal. 33 (1859) ..... I: 569, 573, 594; II: 364, 437
Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571 (1880) ..... I: 208; III: 203
Pabst v. Finmand, 190 Cal. 124, 211 Pac. 11 (1922) ..... I: 11, 208, 209; II: 21, 82, 84, 95, 135, 197, 198, 234, 355, 359, 362, 384-386, 396, 424; III: 201, 203, 204
Pagliotti v. Acquistapace, 64 Cal.(2d) 873, 412 Pac.(2d) 538, 50 Cal. Rptr. 282 (1966) ..... II: 553
Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. 1102 (1889) ..... I: 604
Palmer v. Railroad Comm'n, 167 Cal. 163, 138 Pac. 997 (1914) ..... I: 138, 155, 167, 254, 259, 260, 293; II: 26, 59, 417; III: 195
Parke v. Kilham, 8 Cal. 77 (1857) ..... III: 183
Parker v. Swett, 188 Cal. 474, 205 Pac. 1065 (1922) ..... II: 24, 82, 86, 134, 139; III: 200
Parks Canal & Min. Co. v. Hoyt, 57 Cal. 44 (1880) ..... I: 144, 145
Pasadena v. Alhambra, 180 Pac.(2d) 699 (Cal. App. 1947) ..... II: 632, 633, 636, 638
Pasadena v. Alhambra, 33 Cal.(2d) 908, 207 Pac.(2d) 17 (1949) ..... I: 209, 238, 501, 569; II: 194, 246, 249, 291, 332, 353, 361, 362, 366, 395, 416, 417, 426, 468, 505, 510, 632, 633, 636-638, 669-671, 673-676, 678, 680-682; III: 192-193, 205, 210, 211, 213
Peabody v. Vallejo, 2 Cal.(2d) 351, 40 Pac.(2d) 486 (1935) ..... I: 11, 12, 15 61, 77, 90, 209, 210, 501, 578; II: 7, 24, 42, 48, 68, 71, 89, 96, 100, 127, 192, 197, 198, 233, 234, 242, 244, 246, 248, 249, 251, 385, 505, 514, 516, 667, 668, 674, 675, 681, 683, 686, 695; III: 196, 198, 206, 207, 209, 210
Peake v. Harris, 48 Cal. App. 363, 192 Pac. 310 (1920) ... I: 618; II: 34, 132, 396, 397
Peck v. Howard, 73 Cal. App.(2d) 308, 167 Pac.(2d) 753 (1946) ..... II: 350, 355, 360, 363, 403; III: 193
People v. Banning Co., 167 Cal. 643, 140 Pac. 587 (1914) ..... II: 342
People ex rel. Heyneman v. Blake, 19 Cal. 579 (1862) ..... I: 150
People v. Glenn Colusa Irr. Dist., 127 Cal. App. 30, 15 Pac.(2d) 549 (1932) ..... I: 410

People v. Los Angeles, 34 Cal.(2d) 695, 214 Pac.(2d) 1 (1950) ..... I: 98
People's Ditch Co. v. Foothill Irr. Dist., 112 Cal. App. 273, 297 Pac. 71 (1931) ..... I: 630
Perry v. Calkins, 159 Cal. 175, 113 Pac. 136 (1911) ..... I: 62, 629; II: 398, 667
Phillips v. Burke, 133 Cal. App.(2d) 700, 284 Pac.(2d) 809 (1955) ..... II: 570
Phoenix Water Co. v. Fletcher, 23 Cal. 481 (1863) ..... I: 449, 450; II: 205, 208, 209, 218, 237
Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161 (1858) ..... I: 449; II: 207, 209
Pemona Land & Water Co. v. San Antonio Water Co., 152 Cal. 618, 93 Pac. 881 (1908) ..... II: 566
Pope v. Kinman, 54 Cal. 3 (1879) ..... II: 197
Powers v. Perry, 12 Cal. App. 77, 106 Pac. 595 (1909) ..... II: 352
Prather v. Hoberg, 24 Cal.(2d) 549, 150 Pac.(2d) 405 (1944) ..... II: 49, 72, 84, 89, 107, 109, 121, 666; III: 195, 196, 198, 199, 208
Provident Irr. Dist. v. Cecil, 126 Cal. App.(2d) 13, 271 Pac.(2d) 157 (1954) ..... II: 248, 570
Pyramid Land & Stock Co. v. Scott, 51 Cal. App. 634, 197 Pac. 398 (1921) ..... II: 363, 397
Quist v. Empire Water Co., 204 Cal. 646, 269 Pac. 533 (1928) ..... II: 141
Rancho Santa Margarita v. Vail, 11 Cal.(2d) 501, 81 Pac.(2d) 533 (1938) .... I: 61, 138, 304; II: 16, 24, 35, 40, 47, 49, 53, 55, 58, 70, 71, 76, 82, 83, 85, 86, 110, 196, 246, 517, 585, 590, 667, 668, 683; III: 180, 197, 198, 200, 209
Relovich v. Stuart, 211 Cal. 422, 295 Pac. 819 (1931) ..... I: 150
Revis v. I.S. Chapman & Co., 130 Cal. App. 109, 19 Pac.(2d) 511 (1933) ..... II: 672
Rich v. McClure, 78 Cal. App. 209, 248 Pac. 275 (1926) ..... I: 416
Rice v. Meiners, 136 Cal. 292, 68 Pac. 817 (1902) ..... II: 372
Richardson v. McNulty, 24 Cal. 339 (1864) ..... II: 274
Rilovich v. Raymond, 20 Cal. App.(2d) 630, 67 Pac.(2d) 1062 (1937) ..... II: 223
Rindge v. Crags Land Co., 56 Cal. App. 247, 205 Pac. 36 (1922) ..... I: 243, 244; II: 15, 195; III: 204
Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889 (1891) ..... I: 144
Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. 1107 (1906) ..... II: 397
Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905 (1904) ..... II: 35, 120, 132
Rupley v. Welch, 23 Cal. 452 (1863) ..... I: 168, 348, 452, 528; II: 225; III: 182
San Bernardino v. Riverside, 186 Cal. 7, 198 Pac. 784 (1921) ..... I: 60, 61, 155, 257; II: 25, 416, 417, 423, 667, 672, 673, 675, 679-682, 686, 687; III: 191, 208, 210
San Diego v. Cuyamaca Water Co., 209 Cal. 105, 287 Pac. 475 (1930) ..... I: 271; II: 150, 151, 153, 154, 157, 158, 360-363, 391, 427, 428, 431, 432, 435; III: 193
San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 Pac. 496 (1930)... II: 149, 151, 154
San Diego v. Sloane, 272 Cal. App.(2d) 663, 77 Cal. Rptr. 620 (1969) ..... II: 151, 152, 154
San Francisco v. Alameda County, 5 Cal.(2d) 243, 54 Pac.(2d) 462 (1936) ..... II: 22, 23, 26, 34, 37, 47; III: 195
San Francisco Bank v. Langer, 43 Cal. App.(2d) 263, 110 Pac.(2d) 687 (1941) ..... II: 77, 204, 366, 599, 601; III: 198
San Gabriel Valley Country Club v. Los Angeles, 182 Cal. 392, 188 Pac. 554 (1920) ..... I: 34, 38, 39, 96; II: 538, 540, 541
San Pedro, L.A. & S.L.R.R. v. Simons Brick Co., 45 Cal. App. 57, 187 Pac. 62 (1919) ..... I: 63
Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98 (1902) ..... I: 41, 64, 65, 67
San Joaquin & Kings River Canal & Irr. Co. v. Fresno Flume & Irr. Co., 158 Cal. 626, 112 Pac. 182 (1910) ..... I: 518; II: 99, 198, 384; III: 199
San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevenson, 164 Cal. 211, 128 Pac. 924 (1912) ..... III: 191
San Joaquin & Kings River Canal & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922) ..... I: 174, 208, 256; II: 18, 27, 33, 34, 120, 124, 128, 391, 435; III: 202
Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197 (1892) ..... I: 257
Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168 (1896) ..... I: 262, 504

Schimmel v. Martin, 190 Cal. 429, 213 Pac. 33 (1923) ..... I: 150
Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 Pac. 1095 (1927) .....I: 518; II: 45, 77, 195, 204, 289, 355, 422, 584, 585, 594, 599
Scott v. Henry, 196 Cal. 666, 239 Pac. 314 (1925) .....II: 370
Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 Pac. 93 (1930) .....II: 87, 97, 116, 128, 334, 335, 418; III: 195, 199, 200
Senior v. Anderson, 130 Cal. 298, 62 Pac. 563 (1900) ..... I: 244, 378, 499, 569; II: 133
Senior v. Anderson, 138 Cal. 716, 72 Pac. 349 (1903) ..... I: 455
Sheffet v. Los Angeles, 3 Cal. App.(3d) 720, 84 Cal. Rptr. 11 (1970) .....II: 555
Shenandoah Min. & Mill. Co. v. Morgan, 106 Cal. 409, 39 Pac. 802 (1895) .....I: 208; III: 202
Sherwood v. Wood, 38 Cal. App. 745, 177 Pac. 491 (1918) ..... I: 258
Shurtleff v. Bracken, 163 Cal. 24, 124 Pac. 724 (1912) ..... I: 139, 143; II: 234, 384
Sierra County v. Nevada County, 155 Cal. 1, 99 Pac. 371 (1908) ..... I: 31, 68, 75
Sierra Land & Water Co. v. Cain Irr. Co., 219 Cal. 82, 25 Pac.(2d) 223 (1933) ..... I: 377
Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952 (1909) .....II: 357, 366, 377
Silver Lake Power & Irr. Co. v. Los Angeles, 176 Cal. 96, 167 Pac. 697 (1917) ..... I: 258, 584; II: 214
Simons v. Inyo Cerro Gordo Min. & Power Co., 48 Cal. App. 524, 192 Pac. 144 (1920) ..... I: 366, 368, 370, 591; II: 598, 600, 601
Skelley v. Cowell, 37 Cal. App. 215, 173 Pac. 609 (1918) .....II: 403
Smith v. Corbit, 116 Cal. 587, 48 Pac. 725 (1897) .....II: 106, 109, 110, 126, 132, 133; III: 198
Smith v. Gaylord, 179 Cal. 106, 175 Pac. 449 (1918) .....II: 399, 400
Smith v. Green, 109 Cal. 228, 41 Pac. 1022 (1895) .....II: 278, 279, 356, 436; III: 192
Smith v. Hallwood Irr. Co., 67 Cal. App. 777, 228 Pac. 373 (1924) ..... I: 457; II: 363, 367
Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224 (1906) .....II: 366
Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453 (1895) .....II: 277, 291, 393; III: 192
Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139 (1898) ..... I: 492; II: 316, 317, 347
Smith v. O'Hara, 43 Cal. 371 (1872) .....I: 255, 485, 503, 504, 573; II: 195, 275, 276
Smith v. Wheeler, 107 Cal. App.(2d) 451, 237 Pac.(2d) 325 (1951) .....II: 58, 233, 252, 505
South Santa Clara Valley Water Cons. Dist. v. Johnson, 231 Cal. App.(2d) 388, 41 Cal. Rptr. 846 (1964) ..... I: 29; II: 558
Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767 (1904) .....I: 518; II: 27, 49, 89, 384, 422, 584; III: 195
Southern Pac. R.R. v. Dufour, 95 Cal. 615, 30 Pac. 783 (1892) .....II: 670
Southside Improvement Co. v. Burson, 147 Cal. 401, 81 Pac. 1107 (1905) .....II: 422
Spargur v. Heard, 90 Cal. 221, 27 Pac. 198 (1891) .....II: 194, 373, 399
Spring Valley Water Co. v. Alameda County, 88 Cal. App. 157, 263 Pac. 318 (1927) .....II: 37, 438; III: 196
Stanford v. Felt, 71 Cal. 249, 16 Pac. 900 (1886) .....II: 91, 139, 196, 384
Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858 (1908) .....I: 143, 149-151, 475, 483; II: 669
Stark v. Barnes, 4 Cal. 412 (1853) ..... I: 383
Staub v. Muller, 7 Cal.(2d) 221, 60 Pac.(2d) 283 (1936) .....II: 221
Stein Canal Co. v. Kern Island Irrigating Canal Co., 53 Cal. 563 (1879) .....II: 225
Stepp v. Williams, 52 Cal. App. 237, 198 Pac. 661 (1921) .....I: 483, 486; II: 361, 426, 437, 598; III: 193
Stephens v. Mansfield, 11 Cal. 363 (1858) ..... I: 469; II: 274

Stevens v. Oakdale Irr. Dist., 13 Cal.(2d) 343, 90 Pac.(2d) 58 (1939) ..... II: 261, 360, 570, 586, 587
Stevinson Water Dist. v. Roduner, 36 Cal.(2d) 264, 223 Pac.(2d) 209 (1950) ..... II: 589
St. Helena Water Co. v. Forbes, 62 Cal. 182 (1882) ..... I: 156; II: 26, 27, 43
Stiles v. Laird, 5 Cal. 120 (1855) ..... I: 168, 234, 396; III: 181
Strong v. Baldwin, 154 Cal. 150, 97 Pac. 178 (1908) ..... II: 35, 40, 87, 332, 368, 414, 510
Suisun v. DeFreitas, 142 Cal. 350, 75 Pac. 1092 (1904) ..... I: 504; II: 204, 594, 599
Sutter-Butte Canal Co. v. Great Western Power Co. of Cal., 65 Cal. App. 597, 224 Pac. 768 (1924) ..... II: 502
Tartar v. Spring Creek Water & Min. Co., 5 Cal. 395 (1855) ..... I: 151, 168, 453, 523, 526, 540, 594; II: 192, 218, 237; III: 182
Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408 (1894) ..... I: 256
Thayer v. California Dev. Co., 164 Cal. 117, 128 Pac. 21 (1912) ..... I: 151, 468, 498, 499, 512, 647
Thomas v. England, 71 Cal. 456, 12 Pac. 491 (1886) ..... II: 342
Thompson v. Lee, 8 Cal. 275 (1857) ..... I: 287
Thorne v. McKinley Bros., 5 Cal.(2d) 704, 56 Pac.(2d) 204 (1936) ..... I: 494, 504; III: 202
Title Ins. & Trust Co. v. Miller & Lux, 183 Cal. 71, 190 Pac. 433 (1920) ..... II: 27, 49, 52
Temescal Water Co. v. Department of Pub. Works, 44 Cal.(2d) 90, 280 Pac.(2d) 1 (1955) ..... I: 312, 315, 320, 322, 331, 405, 411, 586; III: 185, 186, 188
Trimble v. Hellar, 23 Cal. App. 436, 138 Pac. 376 (1913) ..... I: 490, 492; II: 513
Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.(2d) 489, 45 Pac.(2d) 972 (1935) ..... I: 18, 205, 209, 304, 446, 492, 494, 496, 498, 501, 506, 512, 545, 582, 645, 648, 649; II: 46, 96, 100, 233, 242, 246, 252, 253, 289, 385, 468 514, 516, 668, 672, 674; III: 206, 207, 209, 211
Tulare Water Co. v. State Water Comm'n, 187 Cal. 533, 202 Pac. 874 (1921) ..... I: 331, 405, 411, 586; III: 188
Tuolumne Water Co. v. Chapman, 8 Cal. 392 (1857) ..... II: 225
Turner v. Bush, 43 Cal. App. 309, 185 Pac. 190 (1919) ..... II: 377
Turner v. Eastside Canal & Irr. Co., 168 Cal. 103, 142 Pac. 69 (1914) ..... II: 125, 359, 374, 384, 417, 423; III: 201
Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520 (1909) ..... I: 48, 75; II: 66, 73, 77, 81, 82, 85, 125-127; III: 197, 198
Turner v. Lowell Avenue Mut. Water Co., 104 Cal. App. (2d) 204, 231 Pac.(2d) 115 (1951) ..... I: 565
Union Water Co. v. Crary, 25 Cal. 504 (1864) ..... I: 255, 469; II: 330, 340, 367, 378
Utt v. Frey, 106 Cal. 392, 39 Pac. 807 (1895) ..... I: 269, 287, 488; II: 258, 264-266; III: 192
Van Bibler v. Hilton, 84 Cal. 585, 24 Pac. 308 (1890) ..... II: 104
Ventura Land & Power Co. v. Meiners, 136 Cal. 284, 68 Pac. 818 (1902) ..... I: 41-43; II: 50
Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021 (1908) ..... I: 60, 62; II: 35, 70, 89, 430, 431, 435, 667; III: 208
Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762 (1895) ..... II: 91, 139, 146, 148-151, 153, 156, 565
Vestal v. Young, 147 Cal. 715, 82 Pac. 381 (1905) ..... II: 419
Vineland Irr. Dist. v. Azusa Irrigating Co., 126 Cal. 486, 58 Pac. 1057 (1899) ..... I: 633, II: 665, 667-670, 686, 690, 694; III: 209
Walker v. Lillingston, 137 Cal. 401, 70 Pac. 282 (1902) ..... II: 36, 44, 257; III: 196
Wanders v. Nelson, 98 Cal. App. (2d) 267, 219 Pac.(2d) 852 (1950) ..... II: 419
Ward v. Monrovia, 16 Cal.(2d) 815, 108 Pac.(2d) 425 (1940) ..... II: 269, 273, 420

Warren v. Crafton Water Co., 139 Cal. App.(2d) 314, 293 Pac.(2d) 506 (1956) ..... II: 368, 373, 374
Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal. App. 213, 194 Pac. 757 (1920) ..... I: 5, 125, 578; II: 193
Watson v. Lawson, 166 Cal. 235, 135 Pac. 961 (1913) ..... II: 513
Weaver v. Eureka Lake Co., 15 Cal. 271 (1860) ..... I: 11, 374, 378, 447, 545; II: 202
Weck v. Los Angeles County Flood Control Dist., 80 Cal. App.(2d) 182, 181 Pac.(2d) 935 (1947) ..... I: 66; II: 537, 538, 540, 542
Weck v. Los Angeles County Flood Control Dist., 104 Cal. App.(2d) 599, 232 Pac.(2d) 293 (1951) ..... I: 70
Weinberg Co. v. Bixby, 185 Cal. 87, 196 Pac. 25 (1921) ..... I: 86; II: 542
Wells v. Mantes, 99 Cal. 583, 34 Pac. 324 (1893) ..... III: 184
Western Salt Co. v. Newport Beach, 271 Cal. App.(2d) 397, 76 Cal. Rptr. 372 (1969) ..... II: 555
White v. Todd's Valley Water Co., 8 Cal. 443 (1857) ..... I: 492
Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 Pac. 160 (1896) ..... II: 89, 108, 132; III: 195
Wilkins v. McCue, 46 Cal. 656 (1873) ..... II: 601
Williams v. Harter, 121 Cal. 47, 53 Pac. 405 (1898) ..... I: 258; II: 602
Williams v. Rankin, 245 Cal. App.(2d) 803, 54 Cal. Rptr. 184 (1966) ..... II: 505, 516
Williams v. San Francisco, 24 Cal. App.(2d) 630, 76 Pac.(2d) 182 (1938) ..... II: 18, 61
Williams v. San Francisco, 56 Cal. App.(2d) 374, 133 Pac.(2d) 70 (1942) ..... II: 18, 61; III: 202
Williams v. Sutton, 43 Cal. 65 (1872) ..... II: 342
Willits Water & Power Co. v. Landrum, 38 Cal. App. 164, 175 Pac. 697 (1918) ..... II: 421
Witherill v. Brehm, 74 Cal. App. 286, 240 Pac. 529 (1925) ..... I: 208; II: 424; III: 191, 202
Wixon v. Bear River & Auburn Water & Min. Co., 24 Cal. 367 (1864) ..... II: 218, 237
Woo v. Martz, 110 Cal. App.(2d) 559, 243 Pac.(2d) 131 (1952) ..... II: 336
Wood v. Davidson, 62 Cal. App.(2d) 885, 145 Pac.(2d) 659 (1944) ..... II: 352, 354, 356
Wood v. Etiwanda Water Co., 122 Cal. 152, 54 Pac. 726 (1898) ..... I: 208; III: 202
Wood v. Etiwanda Water Co., 147 Cal. 228, 81 Pac. 512 (1905) ..... II: 259, 262, 265; III: 192
Wood v. Pendola, 1 Cal.(2d) 435, 35 Pac.(2d) 526 (1934) ..... III: 213
Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co., 47 Cal. App. 72, 190 Pac. 213 (1920) ..... I: 482; II: 141
Wright v. Best, 19 Cal.(2d) 368, 121 Pac.(2d) 702 (1942) ..... I: 152, 449, 452, 457; II: 27, 32, 38, 208; III: 191, 196
Wutchumna Water Co. v. Ragle, 148 Cal. 759, 84 Pac. 162 (1906) ..... II: 414
Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107 (1894) ..... II: 37
Yorba v. Anaheim Union Water Co., 41 Cal.(2d) 265, 259 Pac.(2d) 2 (1953) ..... II: 387
Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 279 Pac. 128 (1929) ..... I: 332, 411; II: 215; III: 188

Colorado

Affolter v. Rough & Ready Irr. Ditch Co., 60 Colo. 519, 154 Pac. 738 (1916) ..... II: 279, 281
Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112 (1908) ..... I: 582
Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 396 Pac.(2d) 599 (1964) ..... III: 230
Allen v. Swadley, 46 Colo. 544, 105 Pac. 1097 (1909) ..... II: 370, 426
Antero & Lost Park Res. Co. v. Ohler, 65 Colo. 161, 176 Pac. 286 (1918) ..... I: 375, 377
Archuleta v. Boulder & Weld County Ditch Co., 118 Colo. 43, 192 Pac.(2d) 891 (1948) ..... I: 177, 299, 344, 369; II: 471, 472

Arnett v. Linhart, 21 Colo. 188, 40 Pac. 355 (1895) ..... I: 468
Beaver Brook Res. & Canal Co. v. St. Vrain Res. & Fish Co., 6 Colo. App. 130, 40 Pac. 1066 (1895) ..... I: 258; II: 262
Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 Pac. 1053 (1904) ..... II: 218
Bieser v. Stoddard, 73 Colo. 554, 216 Pac. 707 (1923) ..... I: 588; II: 281, 418, 565
Big Five Mining Co. v. Left Hand Ditch Co., 73 Colo. 545, 216 Pac. 719 (1923) ..... II: 224
Black v. Taylor, 128 Colo. 449, 264 Pac.(2d) 502 (1953) ..... I: 238, 289, 299, 344, 387, 429; II: 471, 639; III: 228
Bond v. Twin Lakes Res. & Canal Co., 178 Colo. 160, 496 Pac.(2d) 311 (1972) ..... III: 239
Blanchard v. Holland, 106 Colo. 147, 103 Pac.(2d) 18 (1940) ..... II: 218, 226
Boulder v. Boulder & White Rock Ditch & Res. Co., 73 Colo. 426, 216 Pac. 553 (1923) ..... II: 548, 552
Boulder & Larimer County Co. v. Culver, 63 Colo. 32, 164 Pac. 510 (1917) ..... II: 259
Bowen v. Shearer, 100 Colo. 134, 66 Pac.(2d) 534 (1937) ..... II: 364, 374
Bowers v. McFadzean, 82 Colo. 138, 257 Pac. 361 (1927) ..... I: 258; II: 278
Bowman v. Virdin, 40 Colo. 247, 90 Pac. 506 (1907) ..... I: 610; II: 253; III: 225
Brighton Ditch Co. v. Englewood, 124 Colo. 366, 237 Pac.(2d) 116 (1951) ..... I: 467, 599, 601, 618, 633; II: 280; III: 225
Broad Run Co. v. Deuel & Snyder Improvement Co., 47 Colo. 573, 108 Pac. 755 (1910) ..... I: 595; III: 220
Broadmoor Dairy & Livestock Co. v. Brookside Water & Improvement Co., 24 Colo. 541, 52 Pac. 792 (1898) ..... I: 192; II: 7; III: 228
Bruening v. Door, 23 Colo. 195, 47 Pac. 290 (1896) ..... II: 204, 604
Buckers Irr., Mill. & Improvement Co. v. Farmers' Independent Ditch Co., 31 Colo. 62, 72 Pac. 49 (1903) ..... I: 62; II: 696; III: 230
Buckers Irr., Mill. & Improvement Co. v. Platte Valley Irr. Co., 28 Colo. 187, 63 Pac. 305 (1900) ..... II: 203
Burkart v. Meiberg, 37 Colo. 187, 86 Pac. 98 (1906) ..... I: 499
Burke v. South Boulder Canyon Ditch Co., 76 Colo. 354, 231 Pac. 674 (1925) ..... II: 476
Cache la Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 Pac. 318 (1898) ..... II: 280
Cache la Poudre Res. Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 Pac. 331 (1898) ..... I: 503, 504, 640; III: 220
Caldwell v. States, 89 Colo. 529, 6 Pac.(2d) 1 (1931) ..... II: 477
Canon City & Cripple Creek R.R. v. Oxtoby, 45 Colo. 214, 100 Pac. 1127 (1909) ..... II: 552
Central Trust Co. v. Culver, 23 Colo. App. 317, 129 Pac. 253 (1912), aff'd, 58 Colo. 334, 145 Pac. 684 (1915) ..... II: 477
C.F. & I. Steel Corp. v. Purgatorie River Water Conservancy Dist., 183 Colo. 135, 515 Pac.(2d) 456 (1973) ..... III: 226
Clay Springs Cattle Co. v. Bassett, 76 Colo. 510, 233 Pac. 156 (1925) ..... I: 574
Clark v. Ashley, 34 Colo. 285, 82 Pac. 588 (1905) ..... II: 331, 401, 581, 604
Cline v. McDowell, 132 Colo. 37, 284 Pac.(2d) 1056 (1955) ..... II: 207, 269
Cline v. Whitten, 144 Colo. 126, 355 Pac.(2d) 306 (1960) ..... II: 477, 605
Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882) ..... I: 10, 14, 258, 518; II: 7, 696; III: 216, 228
Colorado River Water Conservation Dist. v. Rocky Mt. Power Co., 158 Colo. 331, 406 Pac.(2d) 798 (1965) ..... I: 544, 597; II: 8; III: 218, 230
Colorado River Water Conservation Dist. v. Twin Lakes Res. & Canal Co., 181 Colo. 53, 506 Pac.(2d) 1226 (1973) ..... III: 240
Colorado Springs v. Bender, 148 Colo. 458, 366 Pac.(2d) 552 (1961) ..... II: 755
Colorado Springs v. Yust, 126 Colo. 289, 249 Pac.(2d) 151 (1952) ..... II: 207, 280
Colorado & Utah Coal Co. v. Walter, 75 Colo. 489, 226 Pac. 864 (1924) ..... II: 604

Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966 (1892) ..... I: 241, 458, 480, 496-498, 558, 649; III: 220
Combs v. Farmers' High Line Canal & Res. Co., 38 Colo. 420, 88 Pac. 396 (1907) ..... I: 558, 561
Compton v. Knuth, 117 Colo. 523, 190 Pac.(2d) 117 (1948) ..... I: 601
Comstock v. Larimer & Weld Res. Co., 58 Colo. 186, 145 Pac. 700 (1914). . . I: 502, 649
Comstock v. Olney Springs Drainage Dist., 97 Colo. 416, 50 Pac.(2d) 531 (1935) ..... I: 152
Comstock v. Ramsey, 55 Colo. 244, 133 Pac. 1107 (1913) ..... II: 581, 698
Conley v. Dyer, 43 Colo. 22, 95 Pac. 305 (1908) ..... I: 588; II: 281, 472
Crawford Clipper Ditch Co. v. Needle Rock Ditch Co., 50 Colo. 176, 114 Pac. 655 (1911) ..... I: 384, 588; II: 281
Cresson Consol. Gold Min. & Mill. Co., v. Whitten, 139 Colo. 273, 338 Pac.(2d) 278 (1959) ..... II: 477
Crisman v. Heiderer, 5 Colo. 589 (1881) ..... I: 95
Crippen v. White, 28 Colo. 298, 64 Pac. 184 (1901) ..... III: 216
Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 Pac. 344 (1893) ..... I: 450
Davis v. Connour, 178 Colo. 376, 497 Pac.(2d) 1015 (1972) ..... III: 232
Davis v. Randall, 44 Colo. 488, 99 Pac. 322 (1908) ..... III: 222
DeHass v. Benesch, 116 Colo. 344, 181 Pac.(2d) 453 (1947) ..... I: 177, 232, 299, 344, 583; II: 252, 571
Del Norte Irr. Dist. v. Santa Maria Res. Co., 108 Colo. 1, 113 Pac. (2d) 676 (1941) ..... I: 577; II 227
Denver v. Brown, 56 Colo. 216, 138 Pac. 44 (1914) ..... I: 562
Denver v. Colorado Land & Live Stock Co., 86 Colo. 191, 279 Pac. 46 (1929) ..... III: 220
Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 Pac.(2d) 144 (1972) ..... III: 224
Denver v. Miller, 149 Colo. 96, 368 Pac.(2d) 982 (1962) ..... I: 562
Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 276 Pac.(2d) 992 (1954) ..... I: 344, 354, 369, 374, 387, 587; II: 473; III: 218, 219
Denver v. Sheriff, 105 Colo. 193, 96 Pac.(2d) 836 (1939) ..... I: 151, 248, 344, 589; III: 219, 220, 222
Denver, T. & F.W. R.R. v. Dotson, 20 Colo. 304, 38 Pac. 322 (1894) .... I: 31; II: 540
Derry v. Ross, 5 Colo. 295 (1880) ..... II: 277, 278
Downing v. Copeland, 126 Colo. 373, 249 Pac.(2d) 539 (1952) ..... I: 647; III: 223
Downing v. More, 12 Colo. 316, 20 Pac. 766 (1889) ..... III: 227
Drach v. Isola, 48 Colo. 134, 109 Pac. 748 (1910) ..... II: 472
Edwards v. Roberts, 26 Colo. App. 538, 144 Pac. 856 (1914) ..... I: 258
Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 Pac.(2d) 1211 (1971) ..... III: 218, 219
Faden v. Hubbell, 93 Colo. 358, 28 Pac.(2d) 247 (1933) ..... I: 18, 577; II: 571; III: 220
Farmers' Highline Canal & Res. Co. v. Golden, 129 Colo. 575, 272 Pac.(2d) 629 (1954) ..... I: 506, 509, 577, 601, 629, 640; II: 192
Farmers Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444 (1896) ..... II: 202
Farmers Res. & Irr. Co. v. Cooper, 54 Colo. 402, 130 Pac. 1004 (1913) ..... II: 224
Farmers Res. & Irr. Co. v. Fulton Irrigating Ditch Co., 108 Colo. 482, 120 Pac.(2d) 196 (1941) ..... II: 265, 430, 431
Farmers Res. & Irr. Co. v. Lafayette, 93 Colo. 173, 24 Pac.(2d) 756 (1933) ..... I: 572
Feit v. Zoller, 155 Colo. 64, 392 Pac.(2d) 593 (1964) ..... II: 337
Fellhauer v. People, 167 Colo. 320, 447 Pac.(2d) 986 (1968) ..... II: 699, 703, 706; III: 234, 237
Flasche v. West Colo. Co., 112 Colo. 387, 149 Pac.(2d) 817 (1944) ..... I: 647; III: 223
Fort Collins Mill. & Elevator Co. v. Larimer & Weld Irr. Co., 61 Colo. 45, 156 Pac. 140 (1916) ..... I: 498
Fort Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irr. Land Co., 39 Colo. 332, 90 Pac. 1023 (1907) ..... II: 477

Fort Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irr. Land Co., 76 Colo. 278, 230 Pac. 615 (1924) ..... II: 476, 478
Fort Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. 37 (1905) ..... I: 498, 499 576, 609; II: 253; III: 224
Fort Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032 (1892) ..... I: 492
Fort Morgan Res. & Irr. Co. v. McCune, 71 Colo. 256, 206 Pac. 393 (1922) ..... II: 581, 585
Four Counties Water Users Assn. v. Colorado River Water Cons. Dist., 159 Colo. 499, 414 Pac.(2d) 469 (1966) ..... I: 374, 387, 589; III: 219
Four Counties Water Users Assn. v. Colorado River Water Cons. Dist., 161 Colo. 416, 425 Pac(2d) 259 (1967) ..... I: 253, 589
Four Counties Water Users Assn. v. Colorado River Water Cons. Dist., 161 Colo. 424, 425 Pac.(2d) 266 (1967) ..... I: 589
Four Counties Water Users Assn. v. Middle Park Water Cons. Dist., 161 Colo. 429, 425 Pac.(2d) 262 (1967) ..... I: 254, 589
Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 19 Pac. 836 (1888) ..... I: 635; III: 220
Fundingsland v. Colorado Ground Water Comm'n, 171 Colo. 487, 468 Pac.(2d) 835 (1970) ..... II: 706, 708; III: 235
Game & Fish Comm'n v. Farmers Irr. Co., 162 Colo. 301, 426 Pac.(2d) 562 (1967) ..... I: 450, 452; II: 221, 222, 224, 249
Genoa v. Westfall, 141 Colo. 533, 349 Pac.(2d) 370 (1960) ..... I: 238, 441, 592, 593, 598; II: 464, 477; III: 218
German Ditch & Res. Co. v. Platte Valley Irr. Co., 67 Colo. 390, 178 Pac. 896 (1919) ..... II: 418
Granby Ditch & Res. Co. v. Hallenbeck, 127 Colo. 236, 255 Pac.(2d) 965 (1953) ..... II: 281, 418
Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 Pac. 44 (1901) ..... II: 217
Great Western Res. & Canal Co. v. Farmers Res. & Irr. Co., 109 Colo. 218, 124 Pac.(2d) 753 (1942) ..... II: 441; III: 227
Graeser v. Haigler, 117 Colo. 197, 185 Pac.(2d) 781 (1947) ..... II: 260
Greeley & Loveland Irr. Co. v. Farmers Pawnee Ditch Co., 58 Colo. 462, 146 Pac. 247 (1915) ..... III: 217
Greeley & Loveland Irr. Co. v. McCloughan, 140 Colo. 173, 342 Pac.(2d) 1045 (1959) ..... II: 357; III: 227
Green Valley Ditch Co. v. Frantz, 54 Colo. 226, 129 Pac. 1006 (1913) ..... II: 265
Green Valley Ditch Co. v. Schneider, 50 Colo. 606, 115 Pac. 705 (1911) ..... II: 571
Greer v. Heiser, 16 Colo. 306, 26 Pac. 770 (1891) ..... II: 259
Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. 1050 (1904) ..... II: 218
Haines v. Marshall, 67 Colo. 28, 185 Pac. 651 (1919) ..... II: 338, 356, 426
Hall v. Brannan Sand & Gravel Co., 158, Colo. 201, 405 Pac.(2d) 749 (1965) ... III: 230
Hall v. Kuiper, 181 Colo. 130, 510 Pac.(2d) 329 (1973) ..... III: 234, 236, 237
Hallenbeck v. Granby Ditch & Res. Co., 160 Colo. 555, 420 Pac.(2d) 419 (1966) ..... II: 478
Hallett v. Carpenter, 37 Colo. 30, 86 Pac. 317 (1906) ..... I: 601
Handy Ditch Co. v. Greeley & Loveland Irr. Co., 86 Colo. 197, 280 Pac. 481 (1929) ..... I: 354, 362; III: 221
Handy Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 515, 62 Pac. 847 (1900) ..... II: 206, 207
Hankins v. Borland, 163 Colo. 575, 431 Pac.(2d) 1007 (1967) ..... II: 552
Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1905) ..... I: 121, 193, 544
Hassler v. Fountain Mut. Irr. Co., 93 Colo. 246, 26 Pac.(2d) 102 (1933) ..... I: 633; III: 225
Hastings & Heyden Realty Co. v. Gest, 70 Colo. 278, 201 Pac. 854 (1892) ..... I: 458; III: 222
Haver v. Matonock, 79 Colo. 194, 224 Pac. 914 (1926) ..... II: 605

Hehl Engineering Co. v. Hubbell, 132 Colo. 96, 285 Pac.(2d) 593 (1955) ..... II: 604; III: 220
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 101 Colo. 73, 70 Pac.(2d) 849 (1937) ..... I: 623
Holbrook Irr. Dist. v. Fort Lyon Canal Co., 84 Colo. 174, 269 Pac. 574 (1928) ..... I: 354, 362, 363, 385; III: 218, 221
Huerfano Valley Ditch & Res. Co. v. Hinderlider, 81 Colo. 468, 256 Pac. 305 (1927) ..... II: 475, 476, 478
Huerfano Valley Ditch & Res. Co. v. Huerfano Valley Inv. Co., 73 Colo. 300, 215 Pac. 132 (1923) ..... I: 62
Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 Pac. 1093 (1909) ..... I: 595; II: 209; III: 220
In re German Ditch & Res. Co., 56 Colo. 252, 139 Pac. 2 (1913) ..... I: 26, 28, 33, 49, 53, 57-59
In re Water Rights in Water Dist. No. 17, 85 Colo 555, 277 Pac. 763 (1929) ..... II: 476
Ireland v. Henrylyn Irr. Dist., 113 Colo. 555, 160 Pac.(2d) 364 (1945) ..... I: 577
Ironstone Ditch Co. v. Ashenfelter, 57 Colo. 31, 140 Pac. 177 (1914) ..... I: 581, 601, 632
Jefferson County v. Rocky Mt. Water Co., 102 Colo. 351, 79 Pac.(2d) 373 (1938) ..... I: 369, 480, 557, 561, 567
Johnson v. Johnson, 89 Colo. 273, 1 Pac.(2d) 581 (1931) ..... II: 538
Joseph W. Bowles Res. Co. v. Bennett, 92 Colo. 16, 18 Pac.(2d) 313 (1932) ..... I: 445; II: 212
Junction Creek & North Durango Domestic & Irrigating Ditch Co. v. Durango, 21 Colo. 194, 40 Pac. 356 (1895) ..... III: 227
Kaess v. Wilson, 132 Colo. 443, 289 Pac.(2d) 636 (1955) ..... II: 278
King v. Ackroyd, 28 Colo. 488, 66 Pac. 906 (1901) ..... I: 475, 607; III: 223
King v. Henrylyn Irr. Dist., 88 Colo. 8, 291 Pac. 820 (1930) ..... II: 279
Klug v. Ireland, 99 Colo. 542, 64 Pac.(2d) 131 (1936) ..... I: 374, 385; III: 219
Knapp v. Colorado River Water Cons. Dist., 131 Colo. 42, 279 Pac.(2d) 420 (1955) ..... I: 153; II: 258, 264-266; III: 222
Kountz v. Olson, 94 Colo. 186, 29 Pac.(2d) 627 (1934) ..... I: 262; II: 376
Kuiper v. Lundvall, ___ Colo. ___, 529 Pac.(2d) 1328 (1974) ..... III: 232, 233, 236
Kuiper v. Well Owners Cons. Assn., 176 Colo. 119, 490 Pac.(2d) 268 (1971) ..... II: 703
La Jara Creamery & Live Stock Assn. v. Hansen, 35 Colo. 105, 83 Pac. 644 (1905) ..... I: 232; II: 604
Lamar Canal Co. v. Amity Land & Irr. Co., 26 Colo. 370, 58 Pac. 600 (1899) ..... I: 292; II: 471
Lamont v. Riverside Irr. Dist., 179 Colo. 134, 498 Pac.(2d) 1150 (1972) ..... III: 218
Lamson v. Vailles, 27 Colo. 201, 61 Pac. 231 (1900) ..... I: 391
LaPlata River & Cherry Creek Ditch Co. v. Hinderlider, 93 Colo. 128, 25 Pac.(2d) 187 (1933) ..... I: 622; III: 85
Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. 528 (1897) ..... I: 601
Larimer County Res. Co. v. People ex rel. Luthe, 8 Colo. 614, 9 Pac. 794 (1886) ..... I: 366, 374, 441, 615; II: 205
Larrick v. North Kiowa Bijou Mgt. Dist., 181 Colo. 395, 510 Pac.(2d) 323 (1973) ..... III: 234, 236
Las Animas Consol. Canal Co. v. Hinderlider, 100 Colo. 508, 68 Pac.(2d) 564 (1937) ..... II: 580, 581
Leadville Mine Dev. Co. v. Anderson, 91 Colo. 536, 17 Pac.(2d) 303 (1932) ..... II: 567
Leonard v. Buerger, 130 Colo. 497, 276 Pac.(2d) 986 (1954) ..... III: 227
Lengel v. Davis, 141 Colo. 94, 347 Pac.(2d) 142 (1959) ..... II: 260, 273, 274
Lomas v. Webster, 109 Colo. 107, 122 Pac.(2d) 248 (1942) ..... II: 571, 697; III: 227
Loshbaugh v. Benzel, 133 Colo. 49, 291 Pac.(2d) 1064 (1956) ..... I: 600; II: 402
Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 267, 60 Pac. 629 (1900) ..... II: 270, 441; III: 227
Luis Coppa & Son v. Kuiper, 171 Colo. 315, 467 Pac.(2d) 273 (1970) ..... II: 475
Manney v. McClure, 76 Colo. 539, 233 Pac. 158 (1925) ..... II: 226
Mason v. Hills Land & Cattle Co., 119 Colo. 404, 204 Pac.(2d) 153 (1949) ..... II: 258

McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280 (1893) ..... I: 238
McKelvey v. North Sterling Irr. Dist., 66 Colo. 11, 179 Pac. 872 (1919) ..... II: 581
Means v. Pratt, 138 Colo. 214, 331 Pac.(2d) 805 (1958) ..... II: 273
Means v. Stow, 31 Colo. 282, 73 Pac. 48 (1903) ..... I: 595
Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. 431 (1902) ..... II: 696; III: 230
Mendenhall v. Lake Meredith Res. Co., 127 Colo. 444, 257 Pac.(2d) 414 (1953) ..... I: 571, 577
Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers Res. & Irr. Co., 179 Colo. 36, 499 Pac.(2d) 1190 (1972) ..... III: 226
Metropolitan Suburban Water Users Assn. v. Colorado River Water Cons. Dist., 148 Colo. 173, 365 Pac.(2d) 273 (1961) ..... II: 473
Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532 (1896) ..... I: 192, 429 534; II: 7; III: 221, 228
Mountain Meadow Ditch & Irr. Co. v. Park Ditch & Res. Co., 130 Colo. 537, 277 Pac.(2d) 527 (1954) ..... I: 503; II: 392
Munson v. Schade, 79 Colo. 597, 247 Pac. 454 (1926) ..... II: 260
Nepesta Ditch & Res. Co. v. Espinosa, 73 Colo. 302, 215 Pac. 141 (1923) ..... I: 363; III: 221
Nevius v. Smith, 86 Colo. 178, 279 Pac. 44 (1928) ..... I: 232, 238; II: 571, 593, 604, 605, 639, 697
New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989 (1895) ..... II: 446
New Mercer Ditch Co. v. New Cache la Poudre Irrigating Ditch Co., 70 Colo. 351, 201 Pac. 557 (1921) ..... II: 267, 430
New Multa Trina Ditch Co. v. Patch, 123 Colo. 444, 230 Pac.(2d) 597 (1951) ... I: 590
Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278 (1893) ..... I: 397, 398, 444; II: 259; III: 222
Nicoloff v. Bloom Land & Cattle Co., 100 Colo. 137, 66 Pac.(2d) 333 (1937) .... II: 477
Nielson v. Newmyer, 123 Colo. 189, 228 Pac.(2d) 456 (1951) ..... I: 468, 475, 476; III: 223
Northern Colo. Irr. Co. v. Board of Comm'rs of Arapahoe County, 95 Colo. 555, 38 Pac.(2d) 889 (1934) ..... I: 146
North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 313, 505 Pac.(2d) 377 (1973) ..... III: 236
North Sterling Irr. Dist. v. Dickman, 59 Colo. 169, 149 Pac. 97 (1915) ..... II: 219, 220
North Sterling Irr. Dist. v. Riverside Res. & Land Co., 119 Colo. 50, 200 Pac.(2d) 933 (1948) ..... I: 363
Oak Creek Power Co. v. Colorado River Water Cons. Dist., 182 Colo. 389, 514 Pac.(2d) 323 (1973) ..... III: 218, 219
Olney Springs Drainage Dist. v. Auckland, 83 Colo. 510, 267 Pac. 605 (1928) .... II: 225
O'Neill v. Northern Colo. Irr. Co., 56 Colo. 545, 139 Pac. 536 (1914) ..... II: 476, 478
Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854 (1892) ..... I: 458, 480, 518; III: 222
Orchard City Irr. Dist. v. Whitten, 146 Colo. 127, 361 Pac.(2d) 130 (1961) ..... II: 429
Orchard Mesa Irr. Dist. v. Denver, 182 Colo. 59, 511 Pac.(2d) 25 (1973) ..... III: 240
People ex rel. Park Res. Co. v. Hinderlider, 98 Colo. 505, 57 Pac.(2d) 894 (1936) ..... I: 355; III: 222
People ex rel. Standart v. Farmers High Line Canal & Res. Co., 25 Colo. 202, 54 Pac. 626 (1898) ..... II: 333
Perdue v. Fort Lyon Canal Co., 184 Colo. 219, 519 Pac.(2d) 954 (1974) ..... III: 218, 239
Peterson v. Colorado River Water Cons. Dist., 127 Colo. 16, 254 Pac.(2d) 422 (1953) ..... II: 279, 280
Peterson v. Payne, 43 Colo. 184, 95 Pac. 301 (1908) ..... I: 582; II: 252
Pikes Peak Golf Club, Inc. v. Kuiper, 169 Colo. 309, 455 Pac.(2d) 882 (1969) ..... I: 229; II: 567, 605
Platte Valley Irr. Co. v. Buckers Irr., Mill & Improvement Co., 25 Colo. 77, 53 Pac. 334 (1898) ..... I: 62, 447; II: 697; III: 230

Pleasant Valley & Lake Canal Co. v. Maxwell, 93 Colo. 73, 23 Pac.(2d) 948 (1933) ..... II: 351, 370; III: 227
Pouchoulou v. Heath, 137 Colo. 462, 326 Pac.(2d) 657 (1958) ..... II: 269
Pulaski Irr. Ditch Co. v. Trinidad, 70 Colo. 565, 203 Pac. 681 (1922) ..... I: 137; II: 581
Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. 1056 (1896) ..... I: 600
Quirico v. Hickory Jackson Ditch Co., 126 Colo. 464, 251 Pac.(2d) 937 (1952) ..... II: 478
Ranson v. Boulder, 161 Colo. 478, 424 Pac.(2d) 122 (1967) ..... II: 604
Reagle v. Square S. Land & Cattle Co., 133 Colo. 392, 296 Pac.(2d) 235 (1956) ..... I: 488; II: 477; III: 218
Rio Grande Res. & Ditch Co. v. Wagon Wheel Gap Improvement Co., 68 Colo. 437, 191 Pac. 129 (1920) ..... II: 271
Robinson v. Alfalfa Ditch Co., 89 Colo. 567, 5 Pac.(2d) 1115 (1931) ..... II: 476
Rocky Mt. Power Co. v. White River Elec. Ass'n, 151 Colo. 45, 376 Pac.(2d) 158 (1962) ..... I: 369; II: 473
Rogers v. Nevada Canal Co., 60 Colo. 59, 151 Pac. 923 (1915) ..... II: 217, 228, 478
Rollins v. Fearnley, 45 Colo. 319, 101 Pac. 345 (1909) ..... II: 477
Safranek v. Town of Limon, 123 Colo. 330, 228 Pac.(2d) 975 (1951) ..... II: 633, 639, 697, 704; III: 218, 231, 233
San Luis Valley Irr. Dist. v. Alamosa, 55 Colo. 386, 135 Pac. 769 (1913) ..... II: 268
San Luis Valley Irr. Dist. v. Prairie Ditch Co. & Rio Grande Drainage Dist., 84 Colo. 99, 268 Pac. 533 (1928) ..... II: 581, 588
San Luis Valley Land & Cattle Co. v. Hazard, 114 Colo. 233, 157 Pac.(2d) 144 (1945) ..... I: 595; III: 220
Saunders v. Spina, 140 Colo. 317, 344 Pac.(2d) 469 (1959) ..... I: 600; II: 476
Schilling v. Rominger, 4 Colo. 100 (1878) ..... III: 216, 227
Schluter v. Burlington Ditch, Res. & Land Co., 117 Colo. 284, 188 Pac.(2d) 253 (1947) ..... II: 363
Sieber v. Frink, 7 Colo. 148, 2 Pac. 901 (1884) ..... I: 383, 631; II: 263, 265 317
Snyder v. Colorado Gold Dredging Co., 58 Colo. 516, 147 Pac. 330 (1915) ..... II: 476
Sorenson v. Norell, 24 Colo. App. 470, 135 Pac. 119 (1913) ..... I: 603; III: 223
Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., ___Colo.___, 529 Pac.(2d) 1321 (1975) ..... III: 232
Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908) ..... I: 19, 344, 429, 534, 647; II: 217, 221, 228
Sternberger v. Seaton Min. Co., 45 Colo. 401, 102 Pac. 168 (1909) ..... I: 192; II: 8; III: 229, 230
Stockman v. Leddy, 55 Colo. 24, 129 Pac. 220 (1912) ..... I: 141
Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. 313 (1891) ..... I: 397, 429, 447, 458; II: 202; III: 220-222
Suffolk Min. & Mill Co. v. San Miguel Consol. Min. & Mill Co., 9 Colo. App. 407, 48 Pac. 828 (1897) ..... I: 450
Surface Creek Ditch & Res. Co. v. Grand Mesa Resort Co., 114 Colo. 543, 168 Pac.(2d) 906 (1946) ..... II: 366
Taussig v. Moffat Tunnel Water & Dev. Co., 106 Colo. 384, 106 Pac.(2d) 363 (1940) ..... II: 472
Telluride v. Blair, 33 Colo. 353, 80 Pac. 1053 (1905) ..... I: 505
Telluride v. Davis, 33 Colo. 355, 80 Pac. 1051 (1905) ..... I: 600, 601
Thomas v. Guirard, 6 Colo. 530 (1883) ..... I: 10, 592, 594
Thompson v. Clarks, Inc., 162 Colo. 506, 427 Pac.(2d) 314 (1967) ..... III: 230
Tongue Creek Orchard Co. v. Town of Orchard City, 131 Colo. 177, 280 Pac.(2d) 426 (1955) ..... II: 571
Tripp v. Overocker, 7 Colo. 72, 1 Pac. 695 (1883) ..... III: 227
Trowel Land & Irr. Co. v. Bijou Irr. Dist., 65 Colo. 202, 176 Pac. 292 (1918) ..... II: 581
Vogel v. Minnesota Canal & Res. Co., 47 Colo. 534, 107 Pac. 1108 (1910) ..... I: 570, 571, 575, 629, 632; II: 207, 581

Wanamaker Ditch Co. v. Crane, 132 Colo. 366, 288 Pac.(2d) 399 (1955) ..... III: 223
Water Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. 496 (1897) ..... I: 375, 447
Water Supply & Storage Co. v. Larimer & Weld Res. Co., 65 Colo. 504, 179 Pac. 870 (1908) ..... I: 609; II: 581
Webster v. Lomas, 112 Colo. 74, 145 Pac.(2d) 978 (1944) ..... II: 369, 571
Weiland v. Reorganized Catlin Consol. Canal Co., 61 Colo. 125, 156 Pac. 596 (1916) ..... II: 506
West End Irr. Co. v. Garvey, 117 Colo. 109, 184 Pac.(2d) 476 (1947) ..... I: 390, 391
Westminster v. Church, 167 Colo. 1, 445 Pac.(2d) 52 (1968) ..... I: 629, 639, 640; III: 225
Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487 (1888) ..... I: 241, 275, 550, 561; III: 223
Wheldon Valley Ditch Co. v. Farmers Pawnee Canal Co., 51 Colo. 545, 119 Pac. 1056 (1911) ..... I: 493
Whitten v. Coit, 153 Colo. 157, 385 Pac.(2d) 131 (1963) ..... II: 632, 639, 697, 698, 704; III: 233
Windsor Res. & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 Pac. 729 (1908) ..... I: 354, 363, 371, 607, 609; III: 221, 224
Woods v. Sargent, 43 Colo. 268, 95 Pac. 932 (1908) ..... I: 492
Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. 603 (1900) ..... I: 146
Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. 144 (1893) ..... I: 445, 561
Wyman v. Jones, 123 Colo. 234, 228 Pac.(2d) 158 (1951) ..... I: 95
Yunker v. Nichols, 1 Colo. 551 (1872) ..... I: 170, 278; III: 216, 227

Hawaii

Appeal of A.S. Cleghorn, 3 Haw. 216 (1870) ..... II: 181, 510
Bishop v. Kala, 7 Haw. 590 (1889) ..... II: 365
Bishop v. Mahiko, 35 Haw. 608 (1940) ..... II: 174
Branca v. Makua Kane, 13 Haw. 499 (1901) ..... II: 185
Brown v. Koloa Sugar Co., 12 Haw. 409 (1900) ..... II: 186; III: 250
Carter v. Territory of Hawaii, 24 Haw. 47 (1917) ..... I: 17, 171, 199, 203, 226; II: 4, 8, 48, 52, 69, 82, 105, 174, 175, 177-184, 186-188, 265, 266, 269, 272, 278; III: 246-250, 252, 253, 260, 261
Cha Fook v. Lau Piu, 10 Haw. 308 (1896) ..... II: 186, 337; III: 250
Chun Lai v. Mang Young, 10 Haw. 133 (1895) ..... III: 261
City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929) ..... II: 715, 722-724; III: 256
Cross v. Hawaiian Sugar Co., 12 Haw.415 (1900) ..... II: 182
Davis v. Afong, 5 Haw. 216 (1884) ..... II: 181, 352, 414, 606, 717, 720; III: 255, 261
Foster v. Waiahole Water Co., 25 Haw. 726 (1921) ..... II: 177, 183, 187; III: 246, 248
Galt v. Waianuhea, 16 Haw. 652 (1905) ..... II: 342
Haiku Sugar Co. v. Birch, Tax Collector, 4 Haw. 275 (1880) ..... II: 186; III: 250
Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904). ... II: 176, 177, 181, 183, 184, 186, 260-262, 264, 278, 340, 423, 426, 715, 716, 719-721; III: 246-250, 255
Heeia Agric. Co. v. Henry, 8 Haw. 447 (1892) ..... II: 184, 342, 343, 390; III: 249
Horner v. Kumuliilii, 10 Haw. 174 (1895) ..... II: 185; III: 248
Ing Choi v. Ung Sing & Co., 8 Haw. 498 (1892) ..... II: 178; III: 247
In re Boundaries of Pulehunui, 4 Haw. 239 (1879) ..... II: 174, 180; III: 245
In re Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864) ..... II: 173; III: 245
In re Taxes, Waiahole Water Co., 21 Haw. 679 (1913) ..... II: 177, 181; III: 246
In re Title of Kioloku, 25 Haw. 357 (1920) ..... II: 393
Jones v. Meek, 2 Haw. 9 (1857) ..... II: 174

Kaaihue v. Crabbe, 3 Haw. 768 (1877) ..... II: 351
Kaalaea Mill Co. v. Steward, 4 Haw. 415 (1881) ..... II: 182
Kahookiekie v. Keanini, 8 Haw. 310 (1891) ..... II: 179, 606
Kaneohe Ranch Co. v. Ah On, 11 Haw. 275 (1898) ..... II: 181
Kaneohe Ranch Co. v. Kaneohe Rice Mill Co., 20 Haw. 658 (1911) .... II: 185; III: 249
Kahala Sugar Co. v. Wight, 11 Haw. 644 (1899) ..... II: 178, 180, 185, 371, 390 606, 607; III: 247, 249
Lalakea v. Hawaiian Irr. Co., 36 Haw. 692 (1944) ..... II: 404
Leialoha v. Wolter, 21 Haw. 624 (1913) ..... II: 183, 403
Liliuokalani v. Pang Sam, 5 Haw. 13 (1883) ..... II: 183, 606; III: 248, 260
Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895) ..... II: 180, 183, 360, 390, 425; III: 248, 260
Loo Chit Sam v. Wong Kim, 5 Haw. 130 (1884) ..... II: 178, 179; III: 247, 260
Maikai v. A. Hastings & Co., 5 Haw. 133 (1884) ..... II: 174; III: 245
McBryde Sugar Co. v. Koloa Sugar Co., 19 Haw. 106 (1908) ..... II: 189, 503
McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 504 Pac.(2d) 1330 (1973) ..... III: 245, 247, 249-254
McBryde Sugar Co., Ltd. v. Robinson, 55 Haw. 260, 517 Pac.(2d) 26 (1973) ..... III: 245, 250, 253-255
Mele v. Ahuna, 6 Haw. 346 (1882) ..... II: 189, 606
Nahaolelua v. Kaaahu, 10 Haw. 18 (1895) ..... II: 184, 431; III: 248
Oni v. Meek, 2 Haw. 87 (1858) ..... II: 178; III: 249
Palama v. Sheehan, 50 Haw. 298, 440 Pac.(2d) 95 (1968) ..... II: 174; III: 245
Palolo Land & Improvement Co. v. Territory of Hawaii, 18 Haw. 30 (1906) .... II: 718, 720, 721; III: 255
Palolo Land & Improvement Co. v. Wong Quai, 15 Haw. 554 (1904) ..... II: 178, 180, 510; III: 247
Peabody v. Damon, 16 Haw. 447 (1905) ..... II: 184; III: 248
Peck v. Bailey, 8 Haw. 658 (1867) ..... II: 8, 174, 175, 177, 178, 180, 181, 183, 184, 186, 334; III: 247, 248-250, 261
Richards v. Ontai, 19 Haw. 451 (1909) ..... II: 184, 722; III: 248
Rodrigues v. State, 52 Haw. 156, 472 Pac.(2d) 509 (1970) ..... II: 557
Scharsch v. Kilauea Sugar Co., 13 Haw. 232 (1901) ..... II: 186, 414; III: 250
Territory of Hawaii v. Gay, 31 Haw. 376 (1930) ..... I: 17, 199, 203; II: 4, 8, 48, 52, 69, 172, 176, 177, 180, 181, 183-188, 340, 351; III: 244, 246, 248-251, 254
Territory of Hawaii v. Gay, 32 Haw. 404 (1932) ..... II: 189, 503; III: 260
Territory of Hawaii v. Liliuokalani, 14 Haw. 88 (1902) ..... II: 179; III: 247
Tsunodo v. Young Sun Kow, 23 Haw. 660 (1917) ..... II: 722
Waianae Co. v. Kaiwilei, 24 Haw. 1 (1917) ..... II: 183, 414
Wailuku Sugar Co. v. Cornell, 10 Haw. 476 (1896) ..... II: 189, 460, 464, 503; III: 260
Wailuku Sugar Co. v. Hale, 11 Haw. 475 (1898) ..... II: 178, 180; III: 247, 260
Wailuku Sugar Co. v. Widemann, 6 Haw. 185 (1876) ..... II: 186; III: 250
Wilfong v. Bailey, 3 Haw. 479 (1873) ..... II: 181, 425
Wong Leong v. Irwin, 10 Haw. 265 (1896) ..... II: 105, 179, 180, 183, 185, 186, 717, 720; III: 248-250, 255
Yick Wai Co. v. Ah Soong, 13 Haw. 378 (1901) ..... II: 180; III: 260, 261

Idaho

Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. 990 (1898) ..... II: 302
Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 Pac. 418 (1924) ..... I: 137, 441; II: 299, 303, 319
Almo Water Co. v. Darrington, 95 Idaho 16, 501 Pac.(2d) 700 (1972) ..... III: 275, 277, 278
Anderson v. Cummings, 81 Idaho 327, 340 Pac.(2d) 1111 (1959) ..... I: 457; III: 272

Application of Boyer, 73 Idaho 152, 248 Pac.(2d) 540 (1952) .....I: 632, 636; II: 302, 310, 583; III: 266, 274, 276
Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 283 Pac. 522 (1929) .....II: 225
Atchison, T. & S.F.R.R. v. Long, 46 Idaho 701, 27 Pac. 182 (1891) .....II: 610
Bachman v. Reynolds Irr. Dist., 56 Idaho 507, 55 Pac.(2d) 1314 (1936) .....I: 48, 59, 75, 318, 347; II: 343, 364, 607; III: 265, 277
Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 Pac.(2d) 627 (1973) .....III: 280, 281
Bailey v. Idaho Irr. Co., 39 Idaho 354, 227 Pac. 1055 (1924) .....II: 194, 206, 218; III: 272
Basinger v. Taylor, 30 Idaho 289, 164 Pac. 522 (1917) .....I: 19, 332, 368, 369, 372, 429, 512, 587, 608, 647; III: 268, 272
Basinger v. Taylor, 36 Idaho 591, 211 Pac. 1085 (1922) .....I: 13, 342, 369, 513, 559, 608, 645; II: 567; III: 276, 277
Bassett v. Swenson, 51 Idaho 256, 5 Pac.(2d) 722 (1931) .....I: 267, 281; III: 271, 278
Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. 614 (1904) .....III: 282
Beasley v. Engstrom, 31 Idaho 14, 168 Pac. 1145 (1917) .....I: 501
Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 154 Pac.(2d) 507 (1944) .....I: 399, 570, 579, 622, 632; II: 194; III: 273, 275
Bennett v. Nourse, 22 Idaho 249, 125 Pac. 1038 (1912) .... I: 378, 451, 512, 602, 629
Berg v. Twin Falls Canal Co., 36 Idaho 62, 213 Pac. 694 (1922) .....I: 281, 607, 610; III: 275
Beus v. Soda Springs, 62 Idaho 1, 107 Pac.(2d) 151 (1940) .....I: 248; III: 266
Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45 (1927) .....I: 314, 348, 485, 585, 586; II: 364; III: 267, 284, 285
Blaine County Inv. Co. v. Gallet, 35 Idaho 102, 204 Pac. 1066 (1922).....III: 283
Blaine County Inv. Co. v. Mays, 49 Idaho 766, 291 Pac. 1055 (1930) .....I: 18, 546, 602, 605
Board v. Enking, 56 Idaho 722, 58 Pac.(2d) 779 (1936) .....III: 270
Board of Directors of Wilder Irr. Dist. v. Jorgensen, 64 Idaho 538, 136 Pac.(2d) 461 (1943) .....I: 607, 610; III: 275
Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25 (1904) .....III: 283
Boise Dev. Co. v. Idaho Trust & Savings Bank, 24 Idaho 36, 133 Pac. 916 (1913) .....I: 86
Bower v. Moorman, 27 Idaho 162, 147 Pac. 496 (1915) .....I: 396; II: 731, 732
Bradshaw v. Milner Low Lift Irr. Dist., 85 Idaho 528, 381 Pac.(2d) 440 (1963) .....III: 273
Breyer v. Baker, 31 Idaho 387, 171 Pac. 1135 (1918) .....II: 588
Brossard v. Morgan, 7 Idaho 215, 61 Pac. 1031 (1900) .....II: 331, 365
Brown v. Newell, 12 Idaho 166, 85 Pac. 385 (1906) .....I: 469
Callahan v. Price, 26 Idaho 745, 146 Pac. 732 (1915) .....I: 129, 134
Campbell v. Weisbroad, 73 Idaho 82, 245 Pac.(2d) 1052 (1952) .....I: 90
Cantlin v. Carter, 88 Idaho 179, 397 Pac.(2d) 761, (1964) .....I: 404; III: 266
Capital Water Co. v. Public Util. Comm'n, 44 Idaho 1, 262 Pac. 863 (1926) .....I: 557; III: 273
Carrington v. Crandall, 65 Idaho 525, 147 Pac.(2d) 1009 (1944) .....II: 262, 293, 310, 317, 319, 327, 362, 376; III: 277
Cartier v. Buck, 9 Idaho 571, 75 Pac. 612 (1904) .....II: 225
Chandler v. Drainage Dist. No. 2, 68 Idaho 42, 187 Pac.(2d) 971 (1947) .....I: 94
Chill v. Jarvis, 50 Idaho 531, 298 Pac. 373 (1931) .....II: 268, 277, 299, 319, 402
Clark v. Hansen, 35 Idaho 449, 206 Pac. 808 (1922) .....I: 512, 647; III: 274
Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 Pac.(2d) 1005 (1945) .....I: 632, 636; II: 572, 582; III: 274, 276
Conant v. Jones, 3 Idaho 606, 32 Pac. 250 (1893) .....I: 374
Cottonwood Water & Light Co. v. St. Michael's Monastery, 29 Idaho 761, 162 Pac. 242 (1916) .....III: 266
Coulson v. Aberdeen-Springfield Canal Co., 39 Idaho 320, 227 Pac. 29 (1924) .....I: 6, 499

Crane Falls Power & Irr. Co. v. Snake River Irr. Co., 24 Idaho 63, 133 Pac. 655 (1913) ..... I: 348; III: 267
Crawford v. Inglin, 44 Idaho 663, 258 Pac. 541 (1927) ..... II: 572
Crockett v. Jones, 42 Idaho 652, 249 Pac. 483 (1926) ..... III: 274
Crockett v. Jones, 47 Idaho 497, 277 Pac. 550 (1929) ..... I: 577, 629; III: 274
Cronwall v. Talboy, 45 Idaho 459, 262 Pac. 871 (1928) ..... I: 600
Daniels v. Adair, 38 Idaho 130, 220 Pac. 107 (1923) ..... I: 607, 610; III: 275
DeRousse v. Higginson, 95 Idaho 173, 505 Pac.(2d) 321 (1973) ..... III: 285
Drake v. Earhart, 2 Idaho 750, 23 Pac. 541 (1890) ..... I: 491; II: 8; III: 263, 278
Driesbach v. Lynch, 71 Idaho 501, 234 Pac.(2d) 446 (1951) ..... I: 134
Dunn v. Boyd, 46 Idaho 717, 271 Pac. 2 (1928) ..... I: 504; III: 274
Fairview v. Franklin Maple Creek Pioneer Irr. Co., 59 Idaho 7, 79 Pac.(2d) 531 (1938) ..... II: 352, 356, 374, 403, 608
Farmers' Coop Irr. Co. v. Alsager, 47 Idaho 555, 277 Pac. 430 (1929) ..... II: 364
Farmers' Coop Ditch Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. 761 (1908) ..... I: 558, 559, 567; II: 498, 510; III: 273
First Security Bank of Blackfoot v. State, 49 Idaho 740, 291 Pac. 1064 (1930) ..... I: 260, 263, 635; II: 260; III: 272, 276
Fischer v. Davis, 19 Idaho 493, 116 Pac. 412 (1911) ..... I: 86
Fischer v. Davis, 24 Idaho 216, 133 Pac. 910 (1913) ..... I: 86
Follet v. Taylor Bros., 77 Idaho 416, 294 Pac.(2d) 1088 (1956) ..... III: 272
Franklin Cub River Pumping Co. v. LeFevre, 79 Idaho 107, 311 Pac.(2d) 763 (1957) ..... II: 559
Francis v. Green, 7 Idaho 668, 65 Pac. 362 (1901) ..... III: 273
Frost v. Idaho Irr. Co., 19 Idaho 372, 114 Pac. 38 (1911) ..... II: 498, 510
Furey v. Taylor, 22 Idaho 605, 127 Pac. 676 (1912) ..... I: 457
Gard v. Thompson, 21 Idaho 485, 123 Pac. 497 (1912) ..... I: 483, 485, 585
Gasman v. Wilcox, 54 Idaho 700, 35 Pac.(2d) 265 (1934) ..... I: 134
Geertson v. Barrack, 3 Idaho 344, 29 Pac. 42 (1892) ..... II: 512; III: 263
Gile v. Laidlaw, 52 Idaho 665, 20 Pac.(2d) 215 (1933) ..... II: 498
Glavin v. Salmon River Canal Co., 44 Idaho 583, 258 Pac. 532 (1927) ..... I: 145
Glenn Dale Ranchers, Inc. v. Shaub, 94 Idaho 585, 494 Pac.(2d) 1029 (19272) ..... III: 274
Graham v. Leek, 65 Idaho 279, 144 Pac.(2d) 475 (1943) ..... I: 630; II: 302, 310, 319, 511
Hale v. McCammon Ditch Co., 72 Idaho 478, 244 Pac.(2d) 151 (1951) ..... I: 483; III: 272, 273
Hall v. Blackman, 8 Idaho 272, 68 Pac. 19 (1902) ..... II: 266, 351, 363; III: 277
Hall v. Blackman, 22 Idaho 556, 126 Pac. 1047 (1912) ..... I: 636; II: 582; III: 276
Hall v. Taylor, 57 Idaho 662, 67 Pac.(2d) 901 (1937) ..... II: 422, 608
Hard v. Boise City Irr. & Land Co., 9 Idaho 589, 76 Pac. 331 (1904) ..... III: 273
Harris v. Chapman, 51 Idaho 283, 5 Pac.(2d) 733 (1931) ..... I: 153, 473, 475 476, 483, 628; II: 260, 608; III: 276, 277
Harsin v. Pioneer Irr. Dist., 45 Idaho 369, 363 Pac. 988 (1927) ..... III: 273
Hart v. Stewart, 95 Idaho 781, 519 Pac.(2d) 1171 (1974) ..... III: 284
Harvey v. Deseret Sheep Co., 40 Idaho 450, 234 Pac. 146 (1925) ..... I: 473
Head v. Merrick, 69 Idaho 106, 203 Pac.(2d) 608 (1949) .... II: 358, 365, 511; III: 272
Helphery v. Perrault, 12 Idaho 451, 86 Pac. 417 (1906) ..... I: 618; III: 275
Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. 907 (1906) ..... I: 451, 454
Hill & Gauchay v. Green, 47 Idaho 157, 274 Pac. 110 (1928) ..... II: 567
Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist., 57 Idaho 403, 66 Pac.(2d) 115 (1937) ..... I: 632; II: 434, 442; III: 278
Hillman v. Hardwick, 3 Idaho 255, 28 Pac. 438 (1891) ..... I: 169, 492; II: 512; III: 263
Hinton v. Little, 50 Idaho 371, 296 Pac. 582 (1931) ..... I: 237; II: 641, 732; III: 280
Hobbs v. Twin Falls Canal Co., 24 Idaho 380, 133 Pac. 899 (1913) ..... I: 482
Hodges v. Trail Creek Irr. Co., 78 Idaho 10, 297 Pac.(2d) 524 (1956) ..... III: 277
Hunt v. Bremer, 47 Idaho 490, 276 Pac. 964 (1929) ..... I: 473

Hurst v. Idaho Iowa Lateral & Res. Co., 42 Idaho 436, 246 Pac. 23 (1926) .....II: 302
Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. 1059 (1909) ....I: 14, 30-32, 38, 39, 48, 64, 68, 75, 192; II: 8; III: 278
Idaho Power Co. v. Buhl, 62 Idaho 351, 111 Pac.(2d) 1088 (1941) .....I: 266, 267; III: 271
In re Johnson, Appeal from Dept. of Reclamation, 50 Idaho 573, 300 Pac. 492 (1931) ..... I: 629, 635; II: 259, 260, 310
In re Robinson, 61 Idaho 462, 103 Pac.(2d) 693 (1940).....I: 152, 476, 528; III: 266, 272
Jackson v. Cowan, 33 Idaho 525, 196 Pac. 216 (1921) ..... I: 62, 583
Jensen v. Boise-Kuna Irr. Dist., 75 Idaho 133, 269 Pac.(2d) 755 (1954) .....II: 428; III: 278
Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499 (1908) ..... I: 133
Johnson v. Strong Arm Res. Irr. Dist., 82 Idaho 478, 356 Pac.(2d) 67 (1960) ....II: 357
Jones v. Big Lost River Irr. Dist., 93 Idaho 227, 459 Pac.(2d) 1009 (1969) .....I: 636; II: 443; III: 274, 276
Jones v. McIntire, 60 Idaho 338, 91 Pac.(2d) 373 (1939) .....II: 9, 607, 608; III: 279
Jones v. Vanausdeln, 28 Idaho 743, 156 Pac. 615 (1916) .....II: 731
Josslyn v. Daly, 15 Idaho 137, 96 Pac. 568 (1908) ..... I: 447; II: 202, 252, 608
Joyce v. Murphy Land & Irr. Co., 35 Idaho 549, 208 Pac. 241 (1922) ..... II: 260, 262 263, 265, 268, 273; III: 277
Joyce v. Rubin, 23 Idaho 296, 130 Pac. 793 (1913) .....III: 265
Keiler v. McDonald, 37 Idaho 573, 218 Pac. 365 (1923) .....II: 608
Keller v. Magic Water Co., 92 Idaho 276, 441 Pac.(2d) 725 (1968) .....I: 381, 399, 491, 496, 516, 610, 629; III: 273, 276
King v. Chamberlin, 20 Idaho 504, 118 Pac. 1099 (1911) .....II: 559
Kirk v. Bartholomew, 3 Idaho 367, 29 Pac. 40 (1892) .....I: 508; II: 512; III: 263
Knutson v. Huggins, 62 Idaho 662, 115 Pac.(2d) 421 (1941) ..... I: 350 574; II: 268; III: 270
Lambrix v. Frazier, 31 Idaho 382, 171 Pac. 1134 (1918) .....II: 215, 510
Lattig v. Scott, 17 Idaho 506, 107 Pac. 47 (1910) ..... I: 133
Lee v. Hanford, 21 Idaho 327, 121 Pac. 558 (1912) ..... I: 493; II: 511
Lemmon v. Hardy, 95 Idaho 778, 519 Pac.(2d) 1168 (1974) ..... III: 271
LeQuime v. Chambers, 15 Idaho 405, 98 Pac. 415 (1908) .....II: 595, 608, 609, 731
Linford v. Hall & Son, 78 Idaho 49, 297 Pac.(2d) 893 (1956) ..... II: 351, 363, 374, 401; III: 277
Lockwood v. Freeman, 15 Idaho 395, 98 Pac. 295 (1908) ..... I: 496
Loosli v. Heseman, 66 Idaho 469, 162 Pac.(2d) 393 (1945) .....I: 63; II: 403, 422, 424, 543;
MacKinnon v. Black Pine Min. Co., 32 Idaho 228, 179 Pac. 951 (1919) ..... I: 603; II: 225
Maher v. Gentry, 67 Idaho 559, 186 Pac.(2d) 870 (1947) .....II: 607, 608; III: 279
Mahoney v. Neiswanger, 6 Idaho 750, 59 Pac. 561 (1899) .....II: 608
Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 18 Pac. 52 (1888) .....I: 169, 447; II: 202, 204, 607; III: 263
Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 Pac. 208 (1912) ....I: 267, 268, 283, 586; II: 607; III: 271, 278
Martiny v. Wells, 91 Idaho 215, 419 Pac.(2d) 470 (1966) .....II: 252, 434, 443, 607
Mays v. District Ct., 34 Idaho 200, 200 Pac. 115 (1921) .....II: 510; III: 284
McGinness v. Stanfield, 6 Idaho 372, 55 Pac. 1020 (1898) ..... I: 504
McGlochlin v. Coffin, 61 Idaho 440, 103 Pac.(2d) 703 (1940) .....II:: 368
Moe v. Harger, 10 Idaho 302, 77 Pac. 645 (1904) ..... I: 446
Montpelier Mill Co. v. Montpelier, 19 Idaho 212, 113 Pac. 741 (1911) .....I: 19, 429; III: 272
Mountain Home Irr. Dist. v. Duffy, 79 Idaho 435, 319 Pac.(2d) 965 (1957) .... II: 359, 361, 362, 397; III: 278
Muir v. Allison, 33 Idaho 146, 191 Pac. 206 (1920) .....I: 528, 622; III: 275
Murray v. Public Util. Comm'n, 27 Idaho 603, 150 Pac. 47 (1915) .....I: 557; III: 273

Nampa & Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 47 Pac.(2d) 916 (1935) ..... I: 558, 559; III: 273
Nampa & Meridian Irr. Dist. v. Petrie, 37 Idaho 45, 223 Pac. 531 (1923) ..... II: 732
Nampa & Meridian Irr. Dist. v. Welsh, 52 Idaho 279, 15 Pac.(2d) 617 (1932) ..... I: 153; II: 505, 567
Neil v. Hyde, 32 Idaho 576, 186 Pac. 710 (1919) ..... I: 583; II: 252
Newport Water Co. v. Kellogg, 31 Idaho 574, 174 Pac. 602 (1918) .... II: 433; III: 265
Nielson v. Parker, 19 Idaho 727, 115 Pac. 488 (1911) ..... I: 178, 289, 318, 347; III: 264, 265, 268
Noh v. Stoner, 53 Idaho 651, 26 Pac.(2d) 1112 (1933) ..... I: 446; II: 732
Nordick v. Sorensen, 81 Idaho 117, 338 Pac.(2d) 766 (1959) ..... II: 607
Paddock v. Clark, 22 Idaho 498, 126 Pac. 1053 (1912) ..... I: 475; III: 272
Payette Lakes Protective Ass'n v. Lake Res. Co., 68 Idaho 111, 189 Pac.(2d) 1009 (1948) ..... I: 151; III: 270
Perry v. Reynolds, 63 Idaho 457, 122 Pac.(2d) 508 (1942) ..... II: 266, 302
Pflueger v. Hopple, 66 Idaho 152, 156 Pac.(2d) 316 (1945) ..... II: 356, 359; III: 277
Pioneer Irr. Dist. v. American Ditch Ass'n, 50 Idaho 732, 1 Pac.(2d) 196 (1931) ..... I: 317, 346
Pioneer Irr. Dist. v. Smith, 48 Idaho 734, 285 Pac. 474 (1930) ..... II: 414
Public Util. Comm'n v. Natatorium Co., 36 Idaho 287, 211 Pac. 533 (1922) .... II: 608, 640, 731, 732; III: 279
Pyke v. Burnside, 8 Idaho 487, 69 Pac. 477 (1902) ..... I: 387
Rabido v. Furey, 33 Idaho 56, 190 Pac. 73 (1920) ..... II: 608; III: 268
Ramseyer v. Jamerson, 78 Idaho 504, 305 Pac.(2d) 1088 (1957) ..... I: 619, 649; II: 337, 359, 375; III: 275
Ravndal v. Northfork Placers, 60 Idaho 305, 91 Pac.(2d) 368 (1939) ..... I: 429, 451, 454; II: 205, 209; III: 272
Reno v. Richards, 32 Idaho 1, 178 Pac. 81 (1918) ..... I: 152, 348, 372, 578, 610; II: 213, 567; III: 275
Reynolds Irr. Dist. v. Sproat, 70 Idaho 217, 214 Pac.(2d) 880 (1950) ..... I: 486; II: 572; III: 273
Rudge v. Simmons, 39 Idaho 22, 226 Pac. 170 (1924) ..... I: 530; III: 266
Russell v. Irish, 20 Idaho 194, 118 Pac. 501 (1911) ..... I: 471, 472, 475; III: 272
Sanderson v. Salmon River Canal Co., 34 Idaho 145, 199 Pac. 999 (1921) ..... I: 263
Sand Point Water & Light Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. 347 (1905) ..... I: 318, 346, 347, 386; III: 264
Sarret v. Hunter, 32 Idaho 536, 185 Pac. 1072 (1919) ..... I: 263
Saunders v. Robison, 14 Idaho 770, 95 Pac. 1057 (1908) ..... I: 518, 636; II: 439
Scott v. Watkins, 63 Idaho 506, 122 Pac.(2d) 220 (1942) ..... I: 29, 32, 38, 49, 68, 94; II: 537
Sebern v. Moore, 44 Idaho 410, 258 Pac. 176 (1927) ..... II: 571, 572
Short v. Praisewater, 35 Idaho 691, 208 Pac. 844 (1922) ..... II: 608, 609
Silkey v. Tiegs, 51 Idaho 344, 5 Pac.(2d) 1049 (1931) ..... I: 237; II: 252, 519, 641; III: 280
Simonson v. Moon, 72 Idaho 39, 237 Pac.(2d) 93 (1951) ..... I: 599, 619; III: 275
Smith v. Big Lost River Irr. Dist., 83 Idaho 374, 364 Pac.(2d) 146 (1961) ..... II: 223
Smith v. Long, 76 Idaho 265, 281 Pac.(2d) 483 (1955) ..... I: 134
Speer v. Stephenson, 16 Idaho 707, 102 Pac. 365 (1909) ..... I: 332, 485, 585, 586
State v. Hall, 90 Idaho 478, 413 Pac.(2d) 685 (1966) ..... III: 285
State v. Twin Falls Canal Co., 21 Idaho 410, 121 Pac. 1039 (1911) ..... I: 618; III: 275
State Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 Pac.(2d) 924 (1974) ..... III: 265, 269, 270, 279
State ex rel. Tappan v. Smith, 92 Idaho 451, 444 Pac.(2d) 412 (1968) ..... II: 734; III: 280, 281
Stevenson v. Steele, 93 Idaho 4, 453 Pac.(2d) 819 (1969) ..... I: 538; II: 735; III: 281, 284
Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. 189 (1900) ..... I: 377, 603
St. John Irr. Co. v. Danforth, 50 Idaho 513, 298 Pac. 365 (1931) ..... II: 280, 595, 608

Stowell v. Tucker, 7 Idaho 312, 62 Pac. 1033 (1900) ..... III: 273
Taylor v. Hulett, 15 Idaho 265, 97 Pac. 37 (1908) ..... II: 503, 508
Thompson v. Bingham, 78 Idaho 305, 302 Pac.(2d) 948 (1956) ..... II: 334
Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 271 Pac. 578 (1928) ..... II: 260, 279
Uhrig v. Coffin, 72 Idaho 271, 240 Pac.(2d) 480 (1952) ..... I: 502, 508; III: 274
Union Cent. Life Ins. Co. v. Albrethsen, 50 Idaho 196, 294 Pac. 842 (1930) ..... II: 732; III: 279
Union Grain & Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 240 Pac. 443 (1925) ..... I: 398, 574; II: 262; III: 266, 274
Van Camp v. Emery, 13 Idaho 202, 89 Pac. 752 (1907) ..... I: 573; III: 273
Village of Peck v. Denison, 92 Idaho 747, 450 Pac.(2d) 310 (1969) ..... I: 318, 496; II: 219, 512, 607; III: 273
Wagoner v. Jefferey, 66 Idaho 455, 162 Pac.(2d) 400 (1945) ..... II: 310, 319
Walbridge v. Robinson, 22 Idaho 236, 125 Pac. 812 (1912) ..... I: 6, 390
Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 43 Pac.(2d) 943 (1935) ..... I: 63, 145; II: 280, 536, 538, 539, 559
Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073 (1915) ..... I: 502, 586, 628, 641; III: 275, 277
Weeks v. McKay, 85 Idaho 617, 382 Pac.(2d) 788 (1963) ..... I: 192; II: 9; III: 272, 279
Welch v. Garrett, 5 Idaho 639, 51 Pac. 405 (1897) ..... II: 270
Young v. Extension Ditch Co., 13 Idaho 174, 89 Pac. 296 (1907) ..... II: 223
Youngs v. Regan, 20 Idaho 275, 118 Pac. 499 (1911) ..... I: 258; II: 608, 731
Zezi v. Lightfoot, 57 Idaho 707, 68 Pac.(2d) 50 (1937) ..... I: 637; II: 310, 319; III: 266, 277

Kansas

Artesian Valley Water Cons. Assn. v. Division of Water Resources, 174 Kans. 212, 255 Pac.(2d) 1015 (1953) ..... III: 304-306
Atchison, T & S.F. Ry. v. Shriver, 101 Kans. 257, 166 Pac. 519 (1917) ..... II: 81, 109, 120; III: 295, 296
Atkinson v. Herington Cattle Co., 200 Kans. 298, 436 Pac.(2d) 816 (1968) ..... II: 209, 219
Augustine v. Hinnen, 201 Kans. 710, 443 Pac.(2d) 354 (1968) ..... II: 219
Broadway Mfg. Co. v. Leavenworth Terminal Ry. & Bridge Co., 81 Kans. 616, 106 Pac. 1034 (1910) ..... I: 81, 83, 86
Brown v. Schneider, 81 Kans. 486, 106 Pac. 41 (1910) ..... I: 67
Campbell v. Grimes, 62 Kans. 503, 64 Pac. 62 (1901) ..... II: 81, 109, 206; III: 294-296
Clark v. Allaman, 71 Kans. 206, 80 Pac. 571 (1905) ..... I: 169, 210, 289; II: 9, 48, 51, 53, 55, 67, 81, 105, 109, 110, 362, 396, 405; III: 287, 292, 294-298
Clement v. Phoenix Util. Co., 119 Kans. 190, 237 Pac. 1062 (1925) ..... I: 86
Dougan v. Board of County Comm'rs, 141 Kans. 554, 43 Pac.(2d) 223 (1935) ..... I: 73, 138, 139; II: 77, 81; III: 294, 295
Dreyer v. Siler, 180 Kans. 765, 308 Pac.(2d) 127 (1957) ..... I: 131
Durkee v. Board of County Comm'rs, 142 Kans. 690, 51 Pac.(2d) 984 (1935) ... II: 28, 81, 218; III: 295
Dyer v. Stahlhut, 147 Kans. 767, 78 Pac.(2d) 900 (1938) ..... I: 63, 86; II: 536, 545
Emporia v. Soden, 25 Kans. 588 (1881) ..... I: 62, 155; II: 25, 81, 109, 110; III: 294-296, 301
Finn v. Alexander, 102 Kans. 607, 171 Pac. 602 (1918) ..... II: 376
Frizell v. Bindley, 144 Kans. 84, 58 Pac.(2d) 95 (1936) ..... I: 155, 210; II: 81, 109, 405; III: 292, 295-297
Gibbs v. Williams, 25 Kans. 214 (1881) ..... I: 35, 41, 46; II: 536, 538, 539, 559
Goering v. Schrag, 167 Kans. 499, 207 Pac.(2d) 391 (1949) ..... II: 545
Heise v. Schulz, 167 Kans. 34, 204 Pac.(2d) 706 (1949) ..... II: 81, 82, 109, 405; III: 295, 296

Hesston & Sedgwick v. Smrha, 192 Kans. 647, 391 Pac.(2d) 93 (1964) .....I: 196, 211; II: 5, 101, 114, 610; III: 300
Hornor v. Baxter Srings, 116 Kans. 288, 226 Pac. 779 (1924) ..... I: 33, 96, 99; II: 66
Horn v. Seeger, 167 Kans. 532, 207, Pac.(2d) 953 (1949) .....II: 545
Jobling v. Tuttle , 75 Kans. 351, 89 Pac. 699 (1907) .....II: 351, 364, 609; III: 292
Johnston v. Bowersock, 62 Kans. 148, 61 Pac. 740 (1900) ..... I: 131, 147, 483
Kansas City & E. R.R. v. Riley, 33 Kans. 374, 6 Pac. 581 (1885) .....II: 560
Kansas City v. King, 65 Kans. 64, 68 Pac. 1093 (1902) ..... I: 78
Lake Koen Navigation, Res. & Irr. Co. v. Klein, 63 Kans. 484, 65 Pac. 684 (1901) ..... I: 274, 275
Martin v. Lown, 111 Kans. 752, 208 Pac. 565 (1922) .....II: 545
Missouri P. R.R. v. Keys, 55 Kans. 205, 40 Pac. 275 (1895) ..... I: 81, 86, 96
Palmer v. Waddell, 22 Kans. 352 (1879) ..... I: 38, 68
Rait v. Furrow, 75 Kans. 101, 85 Pac. 934 (1906) .....I: 28, 31, 32, 35, 50, 56, 58, 65, 67-69; II: 537, 610
Schamleffer v. Council Grove Peerless Mill Co., 18 Kans. 24 (1877) .....II: 9, 28, 81; III: 294, 295
Singleton v. Atchison, T. & S.F.R.R., 67 Kans. 284, 72 Pac. 786 (1903) .....II: 545
Skinner v. Wolf, 126 Kans. 158, 266 Pac. 926 (1928) .....II: 545
Smith v. Miller, 147 Kans. 40, 75 Pac.(2d) 273 (1938) .....I: 156; II: 26, 81; III: 295
State v. Kansas Bd. of Agric., 158 Kans. 603, 149 Pac.(2d) 604 (1944) .....II: 642
State ex rel. Emery v. Knapp, 167 Kans. 546, 207 Pac.(2d) 440 (1949) .....I: 16, 196, 211, 315; II: 5, 28, 96, 101, 114, 610, 642, 643; III: 300, 304, 305
State ex rel. Peterson v. State Bd. of Agric., 158 Kans. 603, 149 Pac.(2d) 604 (1944) .....I: 196, 210; III: 294, 298
Union Trust Co. v. Cuppy, 26 Kans. 754 (1882) ..... I: 79
Wallace v. Winfield, 96 Kans. 35, 149 Pac. 693 (1915) ..... III: 292, 294-296
Wallace v. Winfield, 98 Kans. 651, 159 Pac. 11 (1916) .....I: 137, 144; II: 81, 109, 422; III: 295, 296, 300
Weaver v. Beech Aircraft Corp., 180 Kans. 224, 303 Pac.(2d) 159 (1956) ..... II: 81, 109, 610; III: 295, 296
Whitehair v. Brown, 80 Kans. 297, 102 Pac. 783 (1909) .....II: 420; III: 292
Williams v. Wichita, 190 Kans. 317, 374 Pac.(2d) 578 (1962) .....I: 16, 196, 211, 315; II: 5, 101, 114, 609, 610; III: 113, 300, 304
Wood v. Fowler, 26 Kans. 682 (1882) ..... I: 131, 147

Montana

Allen v. Petrick, 69 Mont. 373, 222 Pac. 451 (1924) .....I: 10, 13, 370, 494, 502, 508, 514
Allen v. Wampler, 143 Mont. 486, 392 Pac.(2d) 82 (1964) .....III: 332
Allendale Irr. Co. v. State Water Cons. Bd., 113 Mont. 436, 127 Pac.(2d) 227 (1942) ..... I: 251, 519
Anaconda Nat'l Bank v. Johnson, 75 Mont. 401, 244 Pac. 141 (1926) .....I: 178, 370; III: 311, 312
Anderson v. Cook, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113 (1901) .....I: 619; III: 321
Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 79 Pac.(2d) 667 (1938) ..... I: 369, 448; II: 202
Arnold v. Passavant, 19 Mont. 575, 49 Pac. 400 (1897) ..... I: 375
Atchison v. Peterson, 1 Mont. 561 (1872) .....I: 170, 258; II: 205, 237, 262, 274; III: 310
Babcock v. Gregg, 55 Mont. 317, 178 Pac. 284 (1918) .....II: 419
Bailey v. Tintinger, 45 Mont. 154, 122 Pac. 575 (1912) .....I: 169, 345, 367, 369, 375, 492, 495, 558, 559; III: 308, 311, 315
Barkley v. Tielake, 2 Mont. 59 (1874) ..... I: 485; II: 275, 276, 278
Beaverhead Canal Co. v. Dillon Elec. Light & Power Co., 34 Mont. 135, 85 Pac. 880 (1906) ..... I: 447; II: 204, 594, 610

Boehler v. Boyer, 72 Mont. 472, 234 Pac. 1086 (1925) ..... II: 362
Brady Irr. Co. v. Teton County, 107 Mont. 330, 85 Pac.(2d) 350 (1938) ..... I: 154
Brennan v. Jones, 101 Mont. 550, 55 Pac.(2d) 697 (1936) ..... I: 142, 441
Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. 334 (1905) ..... I: 458, 472; II: 361, 362
Campbell v. Flannery, 29 Mont. 246, 74 Pac. 450 (1903) ..... II: 543
Caruthers v. Pemberton, 1 Mont. 111 (1869) ..... I: 492, 512; III: 309
Chessman v. Hale, 31 Mont. 577, 79 Pac. 254 (1905) ..... II: 422
Clausen v. Armington, 123 Mont. 1, 212 Pac.(2d) 440 (1949) ..... I: 345, 370, 498, 499, 574, 575; III: 311
Cocanougher v. Zeigler, 112 Mont. 76, 112 Pac.(2d) 1058 (1941) ..... I: 280
Colorchik v. Watkins, 144 Mont. 17, 393 Pac.(2d) 786 (1964) ..... II: 363, 401
Columbia Min. Co. v. Holter, 1 Mont. 296 (1871) ..... I: 631
Connolly v. Harrel, 102 Mont. 295, 57 Pac.(2d) 781 (1936) ..... I: 444, 599; III: 320
Conrow v. Huffine, 48 Mont. 437, 138 Pac. 1094 (1914) ..... I: 493, 496, 508
Cook v. Hudson, 110 Mont. 263, 103 Pac.(2d) 137 (1940) ..... I: 499, 574, 575; II: 343, 353, 374
Custer v. Missoula Pub. Serv. Co., 91 Mont. 136, 6 Pac.(2d) 131 (1931) ..... I: 137, 498, 573
Doney v. Beatty, 124 Mont. 41, 220 Pac.(2d) 77 (1950) ... I: 29-31, 38, 39, 64, 65, 68; II: 536, 538, 539, 541, 560
Donich v. Johnson, 77 Mont. 229, 250 Pac. 963 (1926) ..... I: 178, 348, 350, 360; III: 312
Drew v. Burgraff, 141 Mont. 405, 378 Pac.(2d) 232 (1963) ..... II: 365, 401, 403
Fabian v. Collins, 3 Mont. 215 (1878) ..... II: 433
Farmers Union Oil Co. v. Anderson, 129 Mont. 580, 291 Pac.(2d) 604 (1955) ..... III: 316
Featherman v. Hennessy, 42 Mont. 535, 113 Pac. 751 (1911) ..... I: 485, 579, 639, 640; II: 264, 276
Federal Land Bank v. Morris, 112 Mont. 445, 116 Pac.(2d) 1007 (1941) ..... I: 356, 363, 509; II: 270; III: 316, 321, 323
Firestone v. Bradshaw, 157 Mont. 181, 483 Pac.(2d) 716 (1971) ..... III: 324
Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416 (1897) ..... II: 9; III: 310, 325
Ford v. Gregson, 7 Mont. 89, 14 Pac. 659 (1887) ..... I: 468
Fordham v. Northern P. R.R., 30 Mont. 421, 76 Pac. 1040 (1904) ..... I: 83
Forrester v. Rock Island Oil & Refining Co., 133 Mont. 333, 323 Pac.(2d) 597 (1958) ..... II: 402
Gallagher v. Basey, 1 Mont. 457 (1872) ..... I: 170, 258; III: 310
Galliger v. McNulty, 80 Mont. 339, 260 Pac. 401 (1927) ..... I: 503, 519; II: 383, 573, 588
Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959 (1896) ..... I: 636; II: 266, 584
Geary v. Harper, 92 Mont. 242, 12 Pac.(2d) 276 (1932) ..... I: 266; II: 337; III: 320
Glantz v. Gabel, 66 Mont. 134, 212 Pac. 858 (1923) ..... II: 352, 368
Glass v. Basin Min. & Concentrating Co., 22 Mont. 151, 55 Pac. 1047 (1899) .... I: 280
Goon v. Proctor, 27 Mont. 526, 71 Pac. 1003 (1903) ..... II: 268, 611
Gwynn v. Philipsburg, 156 Mont. 194, 478 Pac.(2d) 855 (1970) ..... I: 355, 363; III: 320, 321
Haggin v. Saile, 23 Mont. 373, 59 Pac. 154 (1899) ..... II: 9, 266, 268; III: 325
Hale v. County of Jefferson, 39 Mont. 137, 101 Pac. 973 (1909) ..... I: 154
Hanson v. Larsen, 44 Mont. 350, 120 Pac. 229 (1911) ..... I: 635, 641
Harrer v. North P. Ry., 147 Mont. 130, 410 Pac.(2d) 713 (1966) ..... III: 320
Havre Irr. Co. v. Majerus, 132 Mont. 410, 318 Pac.(2d) 1076 (1957) ..... II: 351, 358, 360, 361, 373, 401; III: 324
Hays v. Buzard, 31 Mont. 74, 77 Pac. 423 (1904) ..... I: 459; II: 260, 272
Hays v. DeAtley, 65 Mont. 558, 212 Pac. 296 (1923) ..... II: 367, 373
Head v. Hale, 38 Mont. 302, 100 Pac. 222 (1909) ..... I: 488, 640
Helena v. Rogan, 26 Mont. 452, 68 Pac. 798 (1902) ..... I: 445, 447, 450; II: 202, 203, 205
Helena Water Works Co. v. Settles, 37 Mont. 237, 95 Pac. 838 (1908) ..... I: 154

Helland v. Custer County, 127 Mont. 23, 256 Pac.(2d) 1085 (1953) ..... II: 377
Herrin v. Sutherland, 74 Mont. 587, 241 Pac. 328 (1925) ..... I: 193; III: 325
Hilger v. Sieben, 38 Mont. 93, 98 Pac. 881 (1909) ..... III: 326
Hogan v. Thrasher, 72 Mont. 318, 233 Pac. 607 (1925) ..... I: 471, 472
Huffine v. Miller, 74 Mont. 50, 237 Pac. 1103 (1925) ..... I: 496
Hustad v. Reed, 133 Mont. 211, 321 Pac.(2d) 1083 (1958) ..... III: 324
Irion v. Hyde, 107 Mont. 84, 81 Pac.(2d) 353 (1938) ..... II: 271, 355, 363, 364
Irion v. Hyde, 110 Mont. 570, 105 Pac.(2d) 666 (1940) ..... I: 583; III: 320
Johnson v. Bielenberg, 14 Mont. 506, 37 Pac. 12 (1894) ..... II: 348
Jones v. Hanson, 133 Mont. 115, 320 Pac.(2d) 1007 (1958) ..... II: 366, 402
Kelley v. Grainey, 113 Mont. 520, 129 Pac.(2d) 619 (1942) ..... II: 365
Kelly v. Granite Bi-Metallic Consol. Min. Co., 41 Mont. 1, 108 Pac. 785 (1910) ..... I: 350, 360, 579
Kenck v. Deegan, 45 Mont. 245, 122 Pac. 746 (1912) ..... I: 488, 549
King v. Schultz, 141 Mont. 94, 375 Pac.(2d) 108 (1962) ..... II: 362; III: 324
Kleinschmidt v. Greiser, 14 Mont. 484, 37 Pac. 5 (1894) ..... I: 379, 508, 512; II: 259
Kramer v. Deer Lodge Farms Co., 116 Mont. 152, 151 Pac.(2d) 483 (1944) ..... II: 431; III: 324
Kofoed v. Bray, 69 Mont. 78, 28 Pac. 532 (1923) ..... I: 467, 472, 476
Lamping v. Diehl, 126 Mont. 193, 246 Pac.(2d) 230 (1952) ..... II: 401
Leggat v. Carroll, 30 Mont. 384, 76 Pac. 805 (1904) ..... I: 458; III: 319
Le Munyon v. Gallatin Valley R.R., 60 Mont. 517, 199 Pac. 915 (1921) ..... I: 32, 51, 56; II: 547, 560
Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 Pac. 999 (1923) ..... I: 472; III: 319
Leonard v. Shatzer, 11 Mont. 422, 28 Pac. 457 (1892) ..... I: 448; II: 202, 610
Lokowich v. Helena, 46 Mont. 575, 126 Pac. 1063 (1913) ..... I: 632
Loyning v. Rankin, 118 Mont. 235, 165 Pac.(2d) 1006 (1946) ..... I: 448, 583, 629; II: 203; III: 321
Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 Pac.(2d) 286 (1931) ..... I: 458; III: 319
Mannix & Wilson v. Thrasher, 95 Mont. 267, 26 Pac.(2d) 373 (1933) ..... I: 518, 636; II: 587
Maynard v. Watkins, 55 Mont. 54, 173 Pac. 551 (1918) ..... I: 169, 287; III: 308, 310
McCafferty v. Young, 144 Mont. 385, 397 Pac.(2d) 96 (1964) ..... III: 325
McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648 (1897) ..... I: 485; II: 276
McDonnell v. Huffine, 44 Mont. 411, 120 Pac. 792 (1912) ..... I: 444, 599; II: 259, 337
McIntosh v. Graveley, 159 Mont. 72, 495 Pac.(2d) 186 (1972) ..... III: 320, 322
Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451 (1891) ..... I: 638; II: 279
Meine v. Ferris, 126 Mont. 210, 247 Pac.(2d) 195 (1952) ..... I: 31, 604; III: 320, 322
Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702 (1921) ..... I: 5, 6, 14, 138, 139, 202, 396, 496, 518, 570, 633; II: 9; III: 309, 310, 317, 325
Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054 (1895) ..... I: 153, 485, 606, 610; II: 274, 276; III: 322
Midkiff v. Kincheloe, 127 Mont. 324, 263 Pac.(2d) 976 (1953) ..... III: 310, 311
Missoula Pub. Serv. Co. v. Bitter Root Irr. Dist., 80 Mont. 64, 257 Pac. 1038 (1927) ..... I: 604; III: 322
Moore v. Sherman, 52 Mont. 542, 159 Pac. 966 (1916) ..... II: 264, 431, 432, 434
Murray v. Tingley, 20 Mont. 260, 50 Pac. 723 (1897) ..... I: 370, 371, 384, 386-388; III: 310, 311
Musselshell Valley Farming & Livestock Co. v. Cooley, 86 Mont. 276, 283 Pac. 213 (1929) ..... I: 345, 370; III: 311
Nelson v. C & C Plywood Corp., 154 Mont. 414, 465 Pac.(2d) 314 (1970) ..... III: 326
Newton v. Weiler, 87 Mont. 164, 286 Pac. 133 (1930) ..... II: 572
Nixon v. Huttinga, 163 Mont. 499, 518 Pac.(2d) 263 (1974) ..... III: 320

Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059 (1905) ..... II: 274
O'Shea v. Doty, 68 Mont. 316, 218 Pac. 658 (1923) ..... II: 278
Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 Pac.(2d) 206 (1936) ..... I: 18, 151, 267, 469, 488, 543, 549; II: 261, 270; III: 315
Paradise Rainbows v. Fish & Game Comm'n, 148 Mont. 412, 421 Pac.(2d) 717 (1966) ..... I: 410, 543; III: 315
Perkins v. Kramer, 121 Mont. 595, 198 Pac.(2d) 475 (1948) ..... I: 360, 615; II: 567; III: 322
Perkins v. Kramer, 148 Mont. 355, 423 Pac.(2d) 587 (1966) ..... III: 326
Pew v. Johnson, 35 Mont. 173, 88 Pac. 770 (1907) ..... I: 459
Popham v. Holloron, 85 Mont. 442, 275 Pac. 1099 (1929) ..... I: 32, 33, 38, 54, 59, 66, 68, 71; II: 541, 573, 580
Power v. Switzer, 21 Mont. 523, 55 Pac. 32 (1898) ..... I: 495
Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081 (1909) ..... I: 274, 276, 280; III: 324
Price v. Western Life Ins. Co., 115 Mont. 509, 146 Pac.(2d) 165 (1944) ..... II: 365
Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741 (1892) ..... I: 239
Quigley v. McIntosh, 88 Mont. 103, 290 Pac. 266 (1930) ..... I: 346, 574; II: 526; III: 312
Quigley v. McIntosh, 110 Mont. 495, 103 Pac.(2d) 1067 (1940) ..... III: 332
Quinlan v. Calvert, 31 Mont. 115, 77 Pac. 428 (1904) ..... II: 610
Raymond v. Wimsette, 12 Mont. 551, 31 Pac. 537 (1892) ..... I: 580; II: 239
Rhodes v. Weigand, 145 Mont. 542, 402 Pac.(2d) 588 (1965) ..... II: 441
Richland County v. Anderson, 129 Mont. 559, 291 Pac.(2d) 267 (1955) ..... III: 316
Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 Pac.(2d) 1074 (1933) ..... I: 59; II: 573, 588, 596, 611; III: 322
Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512 (1912) ..... I: 258, 583; III: 321, 326
St. Onge v. Blakely, 76 Mont. 1, 245 Pac. 532 (1926) ..... I: 263, 264, 378; II: 261, 269-272
Sayre v. Johnson, 33 Mont. 15, 81 Pac. 389 (1905) ..... I: 260, 530
Scott v. Jardine Gold Min. & Mill Co., 79 Mont. 485, 257 Pac. 406 (1927) ..... II: 431
Shammel v. Vogl, 144 Mont. 354, 396 Pac.(2d) 103 (1964) ..... III: 311, 320, 323
Sherlock v. Greaves, 106 Mont. 206, 76 Pac.(2d) 87 (1938) ..... I: 371, 550; II: 348, 353, 375, 431, 432
Smith v. Denniff, 24 Mont. 20, 60 Pac. 398 (1900) ..... I: 6, 260, 264, 458, 459; II: 9; III: 325
Smith v. Duff, 39 Mont. 382, 102 Pac. 984 (1909) ..... I: 62, 378, 492, 577; II: 330, 340, 352, 374, 567; III: 320, 326
Smith v. Hope Mine Co., 18 Mont. 432, 45 Pac. 632 (1896) ..... II: 271
Smith v. Krutar, 153 Mont. 325, 457 Pac.(2d) 459 (1969) ..... III: 320, 324
Spaeth v. Emmett, 142 Mont. 231, 383 Pac.(2d) 811 (1963) ..... III: 319
Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 Pac. 727, 97 Pac. 838 (1908) ..... I: 519, 638, 639
Stalcup v. Cameron Ditch Co., 130 Mont. 294, 300 Pac.(2d) 511 (1956) ..... II: 419
State v. Quantic, 37 Mont. 32, 94 Pac. 491 (1908) ..... II: 331, 341
State ex rel. Crowley v. District Ct., 108 Mont. 89, 88 Pac.(2d) 23 (1939) ..... I: 445, 645; II: 211; III: 320
State ex rel. Reeder v. District Ct., 100 Mont. 376, 47 Pac.(2d) 653 (1935) ..... I: 153; II: 505, 526; III: 332
State ex rel. Schoonover v. Stewart, 89 Mont. 257, 297 Pac. 476 (1931) ..... I: 154
State ex rel. Silve v. District Ct., 105 Mont. 106, 69 Pac.(2d) 972 (1937) ..... III: 315
State ex rel. Swanson v. District Ct., 107 Mont. 203, 82 Pac.(2d) 779 (1938) ..... III: 328
State ex rel. Zosel v. District Ct., 56 Mont. 578, 185 Pac. 1112 (1919) ..... I: 153; II: 504, 567, 591
State Highway Comm'n v. Brastoch Meats, Inc., 145 Mont. 261, 400 Pac.(2d) 274 (1965) ..... II: 548
Stearns v. Benedick, 126 Mont. 272, 247 Pac.(2d) 656 (1952) ..... I: 169, 508; II: 365; III: 308
Talbott v. Butte City Water Co., 29 Mont. 17, 73 Pac. 1111 (1903) ..... II: 358, 359

Te Selle v. Storey, 133 Mont. 1, 319 Pac.(2d) 218 (1957) ..... II: 337, 364, 368, 375, 404, 414
Thomas v. Ball, 66 Mont. 161, 213 Pac. 597 (1923) ..... I: 263; II: 262, 263, 265, 269, 271, 274, 284; III: 323
Thompson v. Harvey, 164 Mont. 133, 519 Pac.(2d) 963 (1974) ..... III: 322
Thorp v. Woolman, 1 Mont. 168 (1870) ..... I: 170; II: 9; III: 309, 325
Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 Pac.(2d) 370 (1933) ..... I: 518, 572, 632
Tillinger v. Frisbie, 138 Mont. 60, 353 Pac.(2d) 645 (1960) ..... II: 547
Tobacco River Power Co. v. Public Serv. Comm'n, 109 Mont. 521, 98 Pac.(2d) 886 (1940) ..... I: 152
Toohey v. Campbell, 24 Mont. 13, 60 Pac. 396 (1900) ..... I: 380, 496
Tucker v. Jones, 8 Mont. 225, 19 Pac. 571 (1888) ..... I: 263, 474
Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 Pac. 11 (1926) ..... I: 498; II: 217
Vennes v. Nollmeyer, 144 Mont. 43, 394 Pac.(2d) 178 (1964) ..... II: 402
Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 Pac. 68 (1924) ..... I: 153, 154; II: 346, 377; III: 324
Vidal v. Kensler, 100 Mont. 592, 51 Pac.(2d) 235 (1935) ..... I: 345, 370; III: 311
Warren v. Senecal, 71 Mont. 210, 228 Pac. 71 (1924) ..... III: 315
Wallace v. Goldberg, 72 Mont. 234, 231 Pac. 56 (1925) ..... II: 9; III: 326
West Side Ditch Co. v. Bennett, 106 Mont. 422, 78 Pac.(2d) 78 (1938) ..... II: 610
Wheat v. Cameron, 64 Mont. 494, 210 Pac. 761 (1922) ..... I: 512
Whitcomb v. Helena Water Works Co., 151 Mont. 443, 444 Pac.(2d) 301 (1968) ..... I: 355, 363; III: 320, 321
Whitcomb v. Murphy, 94 Mont. 562, 23 Pac.(2d) 980 (1933) ..... I: 153, 467; III: 328
Wine v. Northern P. R.R., 48 Mont. 200, 136 Pac. 387 (1913) ..... I: 81
Wood v. Lowney, 20 Mont. 273, 50 Pac. 794 (1897) ..... I: 485; II: 276
Woodward v. Perkins, 116 Mont. 46, 147 Pac.(2d) 1016 (1944) ..... II: 567, 573
Woolman v. Gerringer, 1 Mont. 535 (1872) ..... I: 383, 386; II: 573, 580, 584
Worden v. Alexander, 108 Mont. 208, 90 Pac.(2d) 160 (1939) ..... I: 5, 498, 502, 509, 510, 645, 649; III: 320
Yellowstone Valley Co. v. Associated Mtg. Inv., Inc., 88 Mont. 73, 290 Pac. 255 (1930) ..... I: 459, 472, 476, 483; III: 319

Nebraska

Ainsworth Irr. Dist. v. Bejot, 170 Nebr. 257, 102 N.W.(2d) 416 (1960) ..... I: 522; III: 340
Bahm v. Raikes, 160 Nebr. 503, 70 N.W.(2d) 507 (1955) ..... I: 42, 76, 81, 87, 94
Ballmer v. Smith, 158 Nebr. 495, 63 N.W.(2d) 862 (1954) ..... I: 93
Block v. Franzen, 163 Nebr. 270, 79 N.W.(2d) (1956) ..... I: 99, 100, 101; II: 538
Brinegar v. Copass, 77 Nebr. 241, 109 N.W. 173 (1906) ..... I: 83, 84
Brummund v. Vogel, 184 Nebr. 415, 168 N.W.(2d) 24 (1969) ..... I: 212; II: 10, 93, 104, 241, 611; III: 355-357
Buchanan v. Seim, 104 Nebr. 444, 177 N.W. 751 (1920) ..... I: 81
Burger v. City of Beatrice, 181 Nebr. 213, 147 N.W.(2d) 784 (1967) ..... III: 345
Clark v. Cambridge & Arapahoe Irr. & Improvement Co., 45 Nebr. 798, 64 N.W. 239 (1895) ..... I: 114; II: 10, 79, 80, 239, 441; III: 333, 345, 346, 349, 350, 352
Clark v. Cedar County, 118 Nebr. 465, 225 N.W. 235 (1929) ..... I: 78
Cline v. Stock, 71 Nebr. 70, 98 N.W. 454 (1904), 102 N.W. 265 (1905) ..... I: 16, 197, 212; II: 5, 10, 103, 116, 240; III: 357
Cooper v. Sanitary Dist. No. 1 of Lancaster County, 146 Nebr. 412, 19 N.W.(2d) 619 (1945) ..... I: 31, 51
County of Scotts Bluff v. Hartwig, 160 Nebr. 823, 71 N.W.(2d) 507 (1955) ..... II: 362, 538, 541
Courter v. Mololey, 152 Nebr. 476, 41 N.W.(2d) 732 (1950) ..... I: 76; II: 336, 540

Court House Rock Irr. Co. v. Willard, 75 Nebr. 408, 106 N.W. 463 (1906) ..... I: 649
Crawford Co. v. Hathaway, 60 Nebr. 754, 84 N.W. 271 (1900) ..... III: 333, 352
Crawford Co. v. Hathaway, 61 Nebr. 317, 85 N.W. 303 (1901) ..... III: 352
Crawford Co. v. Hathaway, 67 Nebr. 325, 93 N.W. 781 (1903) ..... I: 138, 142, 151, 154-156, 211, 212, 319, 320, 430; II: 10, 22, 23, 25, 26, 28, 37, 42, 51, 53, 68, 80, 82, 95, 105, 116, 134, 216, 395, 396, 437, 449; III: 296, 333, 334, 338, 346-353, 357, 362-364
Cross v. Jones, 85 Nebr. 77, 122 N.W. 681 (1909) ..... II: 265
Cummings v. Hvatt, 54 Nebr. 35, 74 N.W. 411 (1898) ..... III: 333
Dawson County Irr. Co. v. McMullen, 120 Nebr. 245, 231 N.W. 840 (1930) ..... II: 294; III: 344
Drainage Dist. No. 1 of Lincoln County v. Suburban Irr. Dist., 139 Nebr. 460, 298 N.W. 131 (1941) ..... I: 229; III: 332, 336
Dunn v. Thomas, 69 Nebr. 683, 96 N.W. 143 (1903) ..... II: 367, 396, 419
Eidemiller Ice Co. v. Guthrie, 42 Nebr. 238, 60 N.W. 717 (1894) ..... II: 104, 124; III: 346, 351, 352
Elasser v. Szymanski, 163 Nebr. 65, 77 N.W.(2d) 815 (1956) ..... II: 336, 374
Enterprise Irr. Dist. v. Tri-State Land Co., 92 Nebr. 121, 138 N.W. 171 (1912) ..... I: 317, 325; II: 271; III: 335, 345, 364
Enterprise Irr. Dist. v. Willis, 135 Nebr. 827, 284 N.W. 326 (1939) ..... II: 193; III: 363
Fairbury v. Fairbury Mill & Elevator Co., 123 Nebr. 588, 243 N.W. 774 (1932) ..... I: 143, 573; II: 116, 118, 120; III: 339, 352
Farmers' Irr. Dist. v. Frank, 72 Nebr. 136, 100 N.W. 286 (1904) ..... I: 314, 325, 463, 465, 471; II: 262, 265, 266, 277, 294; III: 332, 335, 341, 343, 344, 363, 364
Farmers' & Merchants' Irr. Co. v. Cozad Irr. Co., 65 Nebr. 3, 90 N.W. 951 (1902) ..... III: 333
Farmers' & Merchants' Irr. Co. v. Gothenburg Water Power & Irr. Co., 73 Nebr. 223, 102 N.W. 487 (1905) ..... I: 464, 465, 637; III: 341, 343
Gering Irr. Dist. v. Mitchell Irr. Dist., 141 Nebr. 344, 3 N.W.(2d) 556 (1942) ..... II: 229
Gillespie v. Hynes, 168 Nebr. 49, 95 N.W.(2d) 457 (1959) ..... II: 238
Hagadone v. Dawson County Irr. Co., 136 Nebr. 258, 285 N.W. 600 (1939) ..... I: 602 605; III: 339
Hengelfelt v. Ehrmann, 141 Nebr. 322, 3 N.W.(2d) 576 (1942) ..... I: 83, 85, 87; II: 540
Hickman v. Loup River Pub. Power Dist., 173 Nebr. 428, 113 N.W.(2d) 617 (1962) ..... III: 338
Hickman v. Loup River Pub. Power Dist., 176 Nebr. 416, 126 N.W.(2d) 404 (1964) ..... II: 293; III: 344
Hofeldt v. Elkhorn Valley Drainage Dist., 115 Nebr. 539, 213 N.W. 832 (1927) ..... I: 44, 87
Horbach v. Miller, 4 Nebr. 31 (1875) ..... II: 376
In re Metropolitan Util. Dist. of Omaha, 179 Nebr. 783, 140 N.W.(2d) 626 (1966) ..... II: 57, 134, 644, 737; III:, 349, 359
Jack v. Teegarden, 151 Nebr. 309, 37 N.W.(2d) 387 (1949) ..... I: 29, 56, 70, 96, 98; II: 66, 536
Johnk v. Union P. R.R., 99 Nebr. 763, 157 N.W. 918 (1916) ..... I: 97, 98
Jones v. Schmidt, 170 Nebr. 351, 102 N.W.(2d) 640 (1950) ..... II: 364, 374
Kearney Water & Elec. Powers Co. v. Alfalfa Irr. Dist., 97 Nebr. 139, 149 N.W. 363 (1914) ..... I: 20, 289, 325, 430, 570; II: 268; III: 334, 335, 338, 345, 364
Keim v. Downing, 157 Nebr. 481, 59 N.W.(2d) 602 (1953) ..... I: 486
Kersenbrack v. Boyes, 95 Nebr. 407, 145 N.W. 837 (1914) ..... II: 294; III: 335, 344
Kilpatrick Bros. Co. v. Frenchman Valley Irr. Dist., 101 Nebr. 155, 162 N.W. 422 (1917) ..... II: 401; III: 344
Kinkead v. Turgeon, 74 Nebr. 573, 104 N.W. 1061 (1905), 109 N.W. 744 (1906) ..... I: 133; III: 351

Kirk v. State Bd. of Irr., 90 Nebr. 627, 134 N.W. 167 (1912) ..... I: 142, 416, 418; III: 339
Kiwanis Club Foundation, Inc. of Lincoln v. Yost, 179 Nebr. 598, 139 N.W.(2d) 359 (1966) ..... III: 348
Krueger v. Crystal Lake Co., 111 Nebr. 724, 197 N.W. 675 (1924) ..... I: 94
Krumwiede v. Rose, 177 Nebr. 570, 129 N.W.(2d) 491 (1964) ..... II: 352, 358, 401; III: 351
Kuhlmann v. Platte Valley Irr. Dist., 166 Nebr. 493, 89 N.W.(2d) 768 (1858) ... II: 343, 355, 356, 358, 365, 367, 401, 403; III: 344, 345
Kuta v. Flynn, 182 Nebr. 479, 155 N.W.(2d) 795 (1968) ..... II: 549
Lackaff v. Bogue, 158 Nebr. 174, 62 N.W.(2d) 889 (1954) ..... II: 538
Larned v. Jenkins, 102 Nebr. 796, 169 N.W. 723 (1918) ..... II: 229
Linch v. Nichelson, 178 Nebr. 682, 134 N.W.(2d) 793 (1965) ..... II: 549, 560
Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irr. Dist., 142 Nebr. 141, 5 N.W.(2d) 240 (1942) ..... I: 430; II: 225, 250; III: 337, 338
Mader v. Mettenbrink, 159 Nebr. 118, 65 N.W.(2d) 334 (1954) ..... I: 31, 36, 39, 68; II: 540
Maranville Ditch Co. v. Kilpatrick Bros. Co., 100 Nebr. 371, 160 N.W. 81 (1916) ..... II: 401; III: 344
McBride v. Whitaker, 65 Nebr. 137, 90 N.W. 966 (1902) ..... III: 350
McCook Irr. Water Power Co. v. Crews, 70 Nebr. 109, 96 N.W. 996 (1903), 102 N.W. 249 (1905) ..... I: 16, 197, 212; II: 5, 10, 103, 240; III: 345, 351, 357
McGinley v. Platte Valley Pub. Power Irr. Dist., 132 Nebr. 292, 271 N.W. 864 (1937) ..... II: 53; III: 347
Meng v. Coffee, 67 Nebr. 500, 93 N.W. 713 (1903) ..... I: 137, 289; II: 10, 42, 339, 361, 362, 401; III: 332, 345, 346, 348, 351, 352
Mentzer v. Dolen, 178 Nebr. 42, 131 N.W.(2d) 671 (1964) ..... III: 345
Miksch v. Tassler, 108 Nebr. 208, 187 N.W. 796 (1922) ..... I: 32, 64
Morrissey v. Chicago, B & Q R.R., 38 Nebr. 406, 56 N.W. 946 (1893) ..... I: 55, 64
Muhleisen v. Krueger, 120 Nebr. 380, 232 N.W. 735 (1930) ..... I: 39, 63; II: 536
Murphy v. Chicago B & Q R.R., 101 Nebr. 73, 161 N.W. 1048 (1917) ..... I: 84, 85
Nichol v. Yocum, 173 Nebr. 298, 113 N.W.(2d) 195 (1962) ..... II: 548, 560
Nickerson Township, County of Dodge v. Adams, 185 Nebr. 31, 173 N.W.(2d) 387 (1970) ..... II: 549, 560
Norman v. Kusel, 97 Nebr. 400, 150 N.W. 201 (1914) ..... II: 219
North Loup River Pub. Power & Irr. Dist. v. Loup River Pub. Power Dist., 162 Nebr. 22, 74 N.W.(2d) 863 (1956) ..... I: 325; II: 293; III: 335, 343, 344
Ohm v. Clear Creek Drainage Dist., 153 Nebr. 428, 45 N.W.(2d) 117 (1950) ..... II: 403
Oliver v. Thomas, 173 Nebr. 36, 112 N.W.(2d) 525 (1961) ..... II: 351, 403; III: 345
Olson v. City of Wahoo, 124 Nebr. 802, 248 N.W. 304 (1933) ..... II: 644, 737; III: 358, 359
Onstatt v. Airdale Ranch & Cattle Co., 129 Nebr. 54, 260 N.W. 556 (1935) ..... II: 281; III: 345
Osterman v. Central Nebr. Pub. Power & Irr. Dist., 131 Nebr. 356, 268 N.W. 334 (1936) ..... I: 212, 522; II: 55, 56, 67, 80, 134, 737; III: 332, 340, 346, 349, 350, 359
Paloucek v. Adams, 153 Nebr. 744, 45 N.W.(2d) 895 (1951) ..... II: 422; III: 345
Parsons v. Wasserburger, 148 Nebr. 239, 27 N.W.(2d) 190 (1947) ..... II: 449
Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants, Irr. & Land Co., 45 Nebr. 884, 64 N.W. 343 (1895) ..... III: 333
Pint v. Hahn, 152 Nebr. 127, 40 N.W.(2d) 328 (1949) ..... I: 94
Platte Valley Irr. Dist. v. Tilley, 142 Nebr. 122, 5 N.W.(2d) 252 (1942) ..... II: 250; III: 337, 339
Plattsmouth Water Co. v. Smith, 57 Nebr. 579, 78 N.W. 275 (1899) ..... III: 346
Plunkett v. Parsons, 143 Nebr. 535, 10 N.W.(2d) 469 (1943) ..... III: 364
Pyle v. Richards, 17 Nebr. 180, 22 N.W. 370 (1885) ..... I: 38, 57
Reed v. Jacobson, 160 Nebr. 245, 69 N.W.(2d) 881 (1955) ..... I: 32, 94

Robinson v. Central Nebr. Pub. Power & Irr. Dist., 146 Nebr. 534, 20 N.W.(2d) 509 (1945) ..... II: 540
Robinson v. Dawson County Irr. Co., 142 Nebr. 811, 8 N.W.(2d) 179 (1943) ..... I: 581; II: 238; III: 339
Rogers v. Petsch, 174 Nebr. 313, 117 N.W.(2d) 771 (1962) ..... II: 611
Rolfsmeyer v. Seward County, 182 Nebr. 348, 154 N.W.(2d) 752 (1967) ..... II: 549
Slattery v. Dout, 121 Nebr. 418, 237 N.W. 301 (1931) ..... II: 594, 611
Slattery v. Harley, 58 Nebr. 575, 79 N.W. 151 (1899) ..... III: 346, 351, 352
Snyder v. Platte Valley Pub. Power & Irr. Dist., 144 Nebr. 308, 13 N.W.(2d) 160 (1944) ..... I: 32, 51
Southern Nebr. Power Co. v. Taylor, 109 Nebr. 683, 192 N.W. 317 (1923) ..... II: 116; III: 347, 351
State v. Birdwood Irr. Dist., 154 Nebr. 52, 46 N.W.(2d) 884 (1951) ..... I: 8, 10, 464, 465; II: 294, 316; III: 342-344
State v. Board of Supervisors of Clay County, 171 Nebr. 117, 105 N.W.(2d) 721 (1960) ..... II: 250
State v. Ecklund, 147 Nebr. 508, 23 N.W.(2d) 782 (1946) ..... I: 90
State v. Nielsen, 163 Nebr. 372, 79 N.W.(2d) 721 (1956) ..... II: 262, 263, 293, 294, 430, 432; III: 343-345
State v. Oliver Bros., 119 Nebr. 302, 228 N.W. 864 (1930) ..... I: 320; II: 271
State ex rel. Cary v. Cochran, 138 Nebr. 163, 292 N.W. 239 (1940) ..... I: 575, 581; II: 250; III: 339, 364
State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Nebr. 586, 262 N.W. 543 (1935) ..... I: 392, 393
Stolting v. Everett, 155 Nebr. 292, 51 N.W.(2d) 603 (1952) ..... I: 93
Stratbucker v. Junge, 153 Nebr. 885, 46 N.W.(2d) 486 (1951) ..... II: 48; III: 347
Summerville v. Scotts Bluff County, 182 Nebr. 311, 154 N.W.(2d) 517 (1967) ..... III: 351
Thies v. Platte Valley Pub. Power & Irr. Dist., 137 Nebr. 344, 289 N.W. 386 (1939) ..... I: 133; III: 351
Town v. Missouri P. R.R., 50 Nebr. 768, 70 N.W. 402 (1897) ..... I: 33, 55, 64; II: 537
Vetter v. Broadhurst, 100 Nebr. 356, 160 N.W. 109 (1916) ..... I: 281; III: 338, 345
Vonberg v. Farmers Irr. Dist., 132 Nebr. 12, 270 N.W. 835 (1937) ..... I: 397
Walla v. Oak Creek Township in Saunders County, 167 Nebr. 225, 92 N.W.(2d) 542 (1958) ..... II: 541
Wasserburger v. Coffee, 180 Nebr. 147, 141 N.W.(2d) 738, 180 Nebr. 569, 144 N.W.(2d) 209 (1966) ..... I: 17, 138, 142, 151, 154-156, 197, 211-213, 319, 430; II: 5, 10, 22, 25, 37, 51, 53-56, 68, 80, 86, 93, 95, 96, 104, 116, 241; III: 334, 338, 346, 347, 349, 350, 353-358
Wemmer v. Young, 167 Nebr. 495, 93 N.W.(2d) 837 (1958) ..... II: 403
Whipple v. Nelson, 143 Nebr. 286, 9 N.W.(2d) 288 (1943) ..... I: 98
Worm v. Crowell, 165 Nebr. 713, 87 N.W.(2d) 384 (1958) ..... II: 351, 376, 403; III: 345

Nevada

Application of Filippini, 66 Nev. 17, 202 Pac.(2d) 535 (1949) ..... I: 137, 151, 288, 441; II: 192, 347, 360, 405; III: 367, 375
Authors v. Bryant, 22 Nev. 242, 38 Pac. 439 (1894) ..... II: 362, 366, 372, 374, 405; III: 375
Barnes v. Sabron, 10 Nev. 217 (1875) ..... I: 28, 31, 33, 45, 54, 55, 57, 169, 234, 288, 292, 378, 499-501, 503, 573; II: 226, 536, 538, 539; III: 366, 367, 369, 376
Bidleman v. Short, 38 Nev. 467, 150 Pac. 834 (1915) ..... I: 13, 265, 498; II: 226, 573
Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231 (1899) ..... III: 378
Boynton v. Longley, 19 Nev. 69, 6 Pac. 437 (1885) ..... II: 337, 422, 543; III: 376

Brown v. Ashley, 16 Nev. 311 (1881) ..... III: 376
Campbell v. Godfield Consol. Water Co., 36 Nev. 458, 136 Pac. 976 (1913) ..... I: 641; II: 204, 613
Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 Pac. 950 (1901) ..... II: 565, 567
Carson City v. Lompa, 88 Nev. 541, 501 Pac.(2d) 662 (1972) ..... III: 376
Chiatovich v. Davis, 17 Nev. 133, 28 Pac. 239 (1882) ..... I: 488
Cook v. Maremont-Holland Co., 75 Nev. 380, 344 Pac.(2d) 198 (1959) ..... II: 346, 402, 403
Covington v. Becker, 5 Nev. 281 (1869) ..... III: 366, 376
Dalton v. Bowker, 8 Nev. 190 (1873) ..... I: 143; III: 376
Dick v. Bird, 14 Nev. 161 (1879) ..... II: 362; III: 376
Doherty v. Pratt, 34 Nev. 343, 124 Pac. 574 (1912) ..... I: 501, 513, 645, 649; II: 372
Franktown Creek Irr. Co. v. Marlette Lake Co., 77 Nev. 348, 364 Pac.(2d) 1069 (1961) ..... II: 320, 355, 358, 363, 369, 401, 406; III: 374, 375
Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. 8 (1902) ..... I: 492; III: 371
Hobart v. Wicks, 15 Nev. 418 (1880) ..... I: 516
Humboldt Land & Cattle Co. v. District Ct., 47 Nev. 396, 224 Pac. 612 (1924) ..... II: 445; III: 383
In re Barber Creek & Its Tributaries (Scossa v. Church), 46 Nev. 254, 205 Pac. 518, 210 Pac. 563 (1922) ..... I: 152, 153; II: 505
In re Bassett Creek & Its Tributaries, 62 Nev. 461, 155 Pac.(2d) 324 (1945) ..... I: 68; II: 573, 574
In re Calvo, 50 Nev. 125, 253 Pac. 671 (1927) ..... I: 538, 593; III: 368
In re Humboldt River, 49 Nev. 357, 246 Pac. 692 (1926) ..... III: 377
In re Manse Spring & Its Tributaries, 60 Nev. 280, 108 Pac.(2d) 311 (1940) ..... I: 142, 441; II: 262, 264, 270, 278, 294, 317, 319, 320, 323, 612, 644; III: 367, 374, 375, 377
Jerett v. Mahan, 20 Nev. 89, 17 Pac. 12 (1888) ..... I: 570; II: 194; III: 377
Jones v. Adams, 19 Nev. 78, 6 Pac. 442 (1885) ..... I: 14, 203, 204, 258; II: 10 III: 377
Kent v. Smith, 62 Nev. 30, 140 Pac.(2d) 357 (1943) ..... I: 632, 645; III: 372, 374
Lake v. Tolles, 8 Nev. 285 (1873) ..... III: 376
Lobdell v. Hall, 3 Nev. 507 (1868) ..... I: 239, 485
Lobdell v. Simpson, 2 Nev. 274 (1866) ..... I: 169, 170, 234; II: 10; III: 366, 376
McCormick v. Sixth Judicial Dist. Ct., 69 Nev. 214, 246 Pac.(2d) 805 (1952) ..... III: 383, 384
Mosier v. Caldwell, 7 Nev. 363 (1872) ..... II: 613, 644, 740; III: 379
Nenzel v. Rochester Silver Corp., 50 Nev. 352, 259 Pac. 632 (1927) ..... I: 152
Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534 (1869) ..... I: 169, 374, 383, 384, 492, 574; III: 366, 370, 376
Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803 (1914) ..... I: 7, 176, 288, 314, 319; II: 445, 455; III: 367, 383, 384
Pacific Live Stock Co. v. Ellison Ranching Co., 52 Nev. 279, 286 Pac. 120 (1930) ..... II: 512
Pitt v. Scrugham, 44 Nev. 418, 195 Pac. 1101 (1921) ..... II: 445; III: 383
Proctor v. Jennings, 6 Nev. 83 (1870) ..... I: 396, 578, 579; III: 366, 373
Prosole v. Steamboat Canal Co., 37 Nev. 154, 140 Pac. 720, 144 Pac. 744 (1914) ..... I: 242, 459, 460, 558, 560, 566, 568; III: 369, 372, 373
Ramelli v. Sorgi, 38 Nev. 552, 149 Pac. 71 (1915) ..... I: 512
Reno Smelting, Mill & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 (1889) ..... II: 10; III: 377, 378
Robinson v. Bate, 78 Nev. 506, 376 Pac.(2d) 763 (1962) ..... II: 226
Robison v. Mathis, 49 Nev. 35, 234 Pac. 690 (1925) ..... II: 226, 613; III: 376
Roeder v. Stein, 23 Nev. 92, 42 Pac. 867 (1895) ..... I: 501, 513
Ronnow v. Delmue, 23 Nev. 29, 41 Pac. 1074 (1895) ..... II: 230; III: 377

Ruddell v. Sixth Judicial Dist. Ct., 54 Nev. 363, 17 Pac.(2d) 693 (1933) ..... II: 445; III: 383
Ryan v. Gallio, 52 Nev. 330, 286 Pac. 963 (1930) ..... II: 573, 574
Schulz v. Sweeny, 19 Nev. 359, 11 Pac. 253 (1886) ..... I: 604; III: 373, 374
Scossa v. Church (In re Barber Creek & Its Tributaries), 46 Nev. 254, 205 Pac. 518, 210 Pac. 563 (1922) ..... I: 152, 153; II: 505
Smith v. Logan, 18 Nev. 149, 1 Pac. 678 (1883) ..... I: 265, 459, 474; III: 374, 376
State Engineer v. American Nat'l Ins. Co., 88 Nev. 424, 498 Pac.(2d) 1329 (1972) ..... III: 369
State Engineer v. Cowles Bros., 86 Nev. 872, 478 Pac.(2d) 159 (1970) ..... III: 377
State ex rel. Hinckley v. Sixth Judicial Dist. Ct., 53 Nev. 343, 1 Pac.(2d) 105 (1931) ..... II: 445; III: 383
Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 295 Pac. 772 (1931) ..... I: 494, 539, 592; III: 371, 372, 377
Strait v. Brown, 16 Nev. 317 (1881) ..... I: 45, 58, 68, 447; II: 613, 644, 740; III: 379
Tonkin v. Winzell, 27 Nev. 88, 73 Pac. 593 (1903) ..... I: 44, 447, 580; II: 202; III: 372, 373
Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280 (1906), 89 Pac. 289 (1907) ..... I: 258, 502, 629; III: 374, 378
Vansickle v. Haines, 7 Nev. 249 (1872) ..... I: 204; II: 10, 331, 343, 347, 393; III: 376-378
Vineyard Land & Stock Co. v. District Ct., 42 Nev. 1, 171 Pac. 166 (1918) ..... I: 320; II: 445; III: 383
Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914 (1902) ..... I: 366, 531, 594; II: 512; III: 367, 369, 372, 377
Winter v. Winter, 8 Nev. 129 (1872) ..... III: 376
Zolezzi v. Jackson, 72 Nev. 150, 297 Pac.(2d) 1081 (1956) ..... I: 457; III: 372

New Mexico

Acequia del Llano v. Acequia de Las Joyas del Llano Frio, 25 N. Mex. 134, 179 Pac. 235 (1919) ..... III: 387
Albuquerque v. Garcia, 17 N. Mex. 445, 130 Pac. 118 (1913) ..... I: 280; III: 399
Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 61 Pac. 357 (1900) ..... I: 137, 546, 550, 558, 562; II: 295; III: 390, 392, 396, 400
Albuquerque v. Reynolds, 71 N. Mex. 428, 379 Pac.(2d) 73 (1963) ..... II: 169, 171; III: 402
Bolles v. Pecos Irr. Co., 23 N. Mex. 32, 167 Pac. 280 (1917) ..... I: 567; III: 396
Bounds v. Carner, 53 N. Mex. 234, 205 Pac.(2d) 216 (1949) ..... II: 359, 361, 383, 407; III: 398
Burgett v. Calentine, 56 N. Mex. 194, 242 Pac.(2d) 276 (1951) ..... II: 613, 614, 646
Candelaria v. Vallejos, 13 N. Mex. 146, 81 Pac. 589 (1905) ..... III: 387
Carlsbad Irr. Dist. v. Ford, 46 N. Mex. 335, 128 Pac.(2d) 1047 (1942) ..... I: 460; III: 391
Cartwright v. Public Serv. Co. of N. Mex., 66 N. Mex. 64, 343 Pac.(2d) 654 (1959) ..... I: 339; II: 158-160, 162, 163, 167-171; III: 388, 389
Cartwright v. Public Serv. Co. of N. Mex., 68 N. Mex. 418, 362 Pac.(2d) 796 (1961) ..... II: 168, 170; III: 388
Chavez v. Gutierrez, 54 N. Mex. 76, 213 Pac.(2d) 597 (1950) ..... II: 300, 311
De Baca v. Pueblo of Santo Domingo, 10 N. Mex. 38, 60 Pac. 73 (1900) ..... III: 387
Eccles v. Ditto, 23 N. Mex. 235, 167 Pac. 726 (1917) ..... II: 657
El Paso & R.I. Ry. v. District Ct., 36 N. Mex. 94, 8 Pac.(2d) 1064 (1931) ..... II: 461; III: 406
Farmers' Dev. Co. v. Rayado Land & Irr. Co., 18 N. Mex. 1, 133 Pac. 104 (1913) ..... I: 412

Farmers' Dev. Co. v. Rayado Land & Irr. Co., 28 N. Mex. 357, 213 Pac. 202 (1923) ..... I: 538; III: 391, 393
Fellows v. Schultz, 81 N. Mex. 496, 469 Pac.(2d) 141 (1970) ..... III: 394
First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 269 Pac. 56 (1928) ..... I: 444, 460, 469, 485, 538; II: 192; III: 392, 395
Fort Sumner Irr. Dist. v. Carlsbad Irr. Dist., 87 N. Mex. 149, 530 Pac.(2d) 943 (1974) ..... III: 394
Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N. Mex. 649, 187 Pac. 555 (1920) ..... I: 229; II: 574, 580
Hagerman Irr. Co. v. McMurny, 16 N. Mex. 172, 113 Pac. 823 (1911) ..... I: 146, 147, 161; II: 295; III: 390, 396, 400
Halford Ditch Co. v. Independent Ditch Co., 22 N. Mex. 169, 159 Pac. 860 (1916) ..... II: 434; III: 387, 399
Harkey v. Smith, 31 N. Mex. 521, 247 Pac. 550 (1926) ..... I: 7, 317, 370, 495, 505, 530, 570, 621; II: 302, 309; III: 391, 394, 395
Heine v. Reynolds, 69 N. Mex. 398, 367 Pac.(2d) 708 (1962) ..... III: 402-404
Holloway v. Evans, 55 N. Mex. 601, 238 Pac.(2d) 457 (1951) ..... I: 442
Ingram v. Malone Farm, 72 N. Mex. 256, 382 Pac.(2d) 981 (1963) ..... I: 412
Jaquez Ditch Co. v. Garcia, 17 N. Mex. 160, 124 Pac. 891 (1912) ..... I: 28, 32, 33, 37, 38, 46, 54, 56, 68
Kaiser Steel Corp. v. W. S. Ranch Co., 81 N. Mex. 414, 467 Pac.(2d) 986 (1970) ..... I: 280; III: 399
Keeney v. Carillo, 2 N. Mex. 480 (1833) ..... I: 383; II: 613, 614; III: 393, 400
Kelley v. Carlsbad Irr. Co., 71 N. Mex. 464, 379 Pac.(2d) 763 (1963) ..... I: 412
La Luz Community Ditch Co. v. Alamogordo, 34 N. Mex. 127, 279 Pac. 72 (1929) ..... II: 431, 434; III: 387, 399
La Mesa Community Ditch v. Appelzoeller, 19 N. Mex. 75, 140 Pac. 1051 (1914) ..... III: 387
Langenegger v. Carlsbad Irr. Dist., 82 N. Mex. 416, 483 Pac.(2d) 297 (1971) ..... III: 397, 404
Leyba v. Armijo, 11 N. Mex. 437, 68 Pac. 939 (1902) ..... III: 387
Martinez v. Cook, 56 N. Mex. 343, 244 Pac.(2d) 134 (1952) ..... I: 33, 34, 46, 54, 94; II: 430, 544; III: 399
Martinez v. Mundy, 61 N. Mex. 87, 295 Pac.(2d) 209 (1956) ..... II: 351, 363, 366; III: 398
Mathers v. Texaco, Inc., 77 N. Mex. 239, 421 Pac.(2d) 771 (1967) ..... III: 402, 403
May v. Torress, 86 N. Mex. 62, 519 Pac.(2d) 298 (1974) ..... III: 391
Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy Dist., 57 N. Mex. 287, 258 Pac.(2d) 391 (1953) ..... I: 457; III: 395
Miller v. Hagerman Irr. Co., 20 N. Mex. 604, 151 Pac. 763 (1915) ..... I: 611; III: 396
Millheiser v. Long, 10 N. Mex. 99, 61 Pac. 111 (1900) ..... I: 492, 495; III: 392, 394
New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 77 Pac.(2d) 634 (1937) ..... I: 151, 152; II: 158, 162, 300, 311; III: 388
Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N. Mex. 148, 193 Pac.(2d) 418 (1948) ..... I: 153, 582; II: 657; III: 395
Pioneer Irrigating Ditch Co. v. Blashek, 41 N. Mex. 99, 64 Pac.(2d) 388 (1937) ..... II: 407; III: 398
Posey v. Dove, 57 N. Mex. 200, 257 Pac.(2d) 541 (1953) ..... I: 152
Pueblo of Isleta v. Tondre & Pickard, 18 N. Mex. 388, 137 Pac. 86 (1913) ..... III: 387
Raton v. Raton Ice Co., 26 N. Mex. 300, 191 Pac. 516 (1920) ..... I: 280; III: 399
Rio Puerco Irr. Co. v. Jasho, 19 N. Mex. 149, 141 Pac. 874 (1914) ..... I: 376, 384, 404; III: 393
Roswell v. Berry, 80 N. Mex. 110, 452 Pac.(2d) 179 (1969) ..... III: 404
Snow v. Abalos, 18 N. Mex. 681, 140 Pac. 1044 (1914) ..... I: 142, 145, 146, 160, 366, 575; III: 386, 387, 390, 394, 395, 400
State v. Crider, 78 N. Mex. 312, 431 Pac.(2d) 45 (1967) ..... I: 249, 378, III: 393
State v. Davis, 63 N. Mex. 322, 319 Pac.(2d) 207 (1957) ..... II: 301, 430

State v. Mendenhall, 68 N. Mex. 467, 362 Pac.(2d) 998 (1961) ..... II: 646
State v. W. S. Ranch Co., 69 N. Mex. 169, 364 Pac.(2d) 1036 (1961) ..... II: 408; III: 398
State ex rel. Black v. Aztec Ditch Co., 25 N. Mex. 590, 185 Pac. 549 (1919) ..... III: 387
State ex rel. Bliss v. Dority, 55 N. Mex. 12, 225 Pac.(2d) 1007 (1950) ..... I: 258; III: 391, 401
State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 143 Pac. 207 (1914) ..... I: 378, 494, 573; II: 158; III: 387, 388, 392-395
State ex rel. Erickson v. McLean, 62 N. Mex. 264, 308 Pac.(2d) 983 (1957) ..... II: 429, 430, 443; III: 404
State ex rel. Red River Valley Co. v. District Ct., 39 N. Mex. 523, 51 Pac.(2d) 239 (1935) ..... I: 275
State ex rel. Reynolds v. Fanning, 68 N. Mex. 313, 361 Pac.(2d) 721 (1961) ..... II: 430
State ex rel. Reynolds v. Luna Irr. Co., 80 N. Mex. 515, 458 Pac.(2d) 590 (1969) ..... I: 604
State ex rel. Reynolds v. Mears, 86 N. Mex. 510, 525 Pac.(2d) 870 (1974) ..... III: 394, 395, 404
State ex rel. Reynolds v. Miranda, 83 N. Mex. 445, 493 Pac.(2d) 409 (1972) ..... III: 393
State ex rel. Reynolds v. Sharp, 66 N. Mex. 192, 344 Pac.(2d) 943 (1959) ..... III: 406
State ex rel. Reynolds v. South Springs Co., 80 N. Mex. 144, 452 Pac.(2d) 478 ..... II: 294; III: 397, 398
State ex rel. Sanchez v. Casados, 27 N. Mex. 555, 202 Pac. 987 (1921) ..... III: 387
State ex rel. State Game Comm'n. v. Red River Valley Co., 51 N. Mex. 207, 182 Pac.(2d) 421 (1945) ..... I: 121, 146, 148, 161, 170, 171, 193, 258, 284, 351, 371, 543, 544; II: 11; III: 390, 392, 399
Stroup v. Frank A. Hubbell Co., 27 N. Mex. 35, 192 Pac. 519 (1920) ..... I: 649
Templeton v. Pecos Valley Artesian Conservatory Dist., 65 N. Mex. 59, 332 Pac.(2d) 465 (1958) ..... II: 646
Territory v. Baca, 2 N. Mex. 183 (1882) ..... III: 387
Territory v. Tafoya, 2 N. Mex. 191 (1882) ..... III: 387
Trambley v. Luterman, 6 N. Mex. 15, 27 Pac. 312 (1891) ..... I: 14; II: 11, 337, 430; III: 398-400
Turley v. Furman, 16 N. Mex. 253, 114 Pac. 278 (1911) ..... I: 392
United States v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 51 Pac. 674 (1898) ..... I: 161, 284; III: 390
Vanderwork v. Hewes & Dean, 15 N. Mex. 439, 110 Pac. 567 (1910) ..... II: 574, 613, 614, 645; III: 400, 401
Water Supply Co. of Albuquerque v. Albuquerque, 17 N. Mex. 326, 128 Pac. 77 (1912) ..... I: 532; III: 392
Worley v. U.S. Borax & Chemical Corp., 78 N. Mex. 112, 428 Pac.(2d) 651 (1967) ..... I: 575; III: 395, 406
W. S. Ranch Co. v. Kaiser Steel Corp., 79 N. Mex. 65, 439 Pac.(2d) 714 (1968) ..... I: 626, 638; II: 294, 311; III: 397, 398
Yeo v. Tweedy, 34 N. Mex. 611, 286 Pac. 970 (1929) ..... I: 236; III: 390, 400, 401
Young v. Dugger, 23 N. Mex. 613, 170 Pac. 61 (1918) ..... III: 399
Young & Norton v. Hinderlider, 15 N. Mex. 666, 110 Pac. 1045 (1910) ..... I: 412; III: 394

North Dakota

Baeth v. Hoisveen, 157 N.W.(2d) 728 (N. Dak. 1968) ..... I: 16, 198, 211, 213-215, 315, 330; II: 5, 11, 101; III: 412, 416, 418-420

Bigelow v. Draper, 6 N. Dak. 152, 69 N.W. 570 (1896) .....I: 135, 156, 213, 214; II: 26, 42, 82, 615; III: 416
Brignall v. Hannah, 34 N. Dak. 174, 157 N.W. 1042 (1916) ..... I: 213; II: 73, 615
Davenport Township v. Leonard Township, 22 N. Dak. 152, 133 N.W. 56 (1911) ..... II: 538
Fenderer v. Northern P. Ry., 77 N. Dak. 169, 42 N.W.(2d) 216 (1950) ..... I: 79, 95
Froemke v. Parker, 41 N. Dak. 408, 171 N.W. 284 (1919) ...I: 39, 99-101; II: 538, 541
Hogue v. Bourgois, 71 N.W.(2d) 47 (N. Dak. 1955) ..... I: 90, 131, 132
Jacobsen v. Pedersen, 190 N.W.(2d) 1 (N. Dak. 1971) .....II: 556
Johnson v. Armour & Co., 69 N. Dak. 769, 291 N.W. 113 (1940) .....I: 190; II: 4, 11, 23, 26, 32, 37, 437, 615; III: 416, 417
Jones v. Boeing Co., 153 N.W.(2d) 897 (N. Dak. 1967) .....II: 551, 556
Lemer v. Koble, 86 N.W.(2d) 44 (N. Dak. 1957) .....II: 540
McDonough v. Russell-Miller Mill. Co., 38 N. Dak. 465, 165, N.W. 504 (1917)....I: 190; II: 4, 11, 27, 28, 31, 48, 84, 208, 615; III: 416, 417
Ozark-Mahoning Co. v. State, 76 N. Dak. 464, 37 N.W.(2d) 488 (1949) .....I: 111, 130, 135, 213; II: 615; III: 416
Roberts v. Taylor, 47 N. Dak. 146, 181 N.W. 622 (1921) ..... I: 101
Rynestad v. Clemetson, 133 N.W.(2d) 559 (N. Dak. 1965) .....II: 551
State v. Brace, 76 N. Dak. 314, 36 N.W.(2d) 330 (1949) .....I: 29, 37, 38, 72, 129, 131, 134, 135
Sturr v. Beck, 6 Dak. 71, 50 N.W. 486 (1888) .....I: 190, 213, 220, 396; II: 11, 13, 615; III: 408, 416, 418
Volkmann v. Crosby, 120 N.W.(2d) 18 (N. Dak. 1963) ..... II: 646, 647; III: 419-421

Oklahoma

Aladdin Petroleum Corp. v. State ex rel. Comm'rs of Land Office, 200 Okla. 134, 191 Pac.(2d) 224 (1948) ..... I: 112, 132
Anderson v. Francis, 177 Okla. 47, 57 Pac.(2d) 619 (1936) .....II: 376
Atchison, T. & S.F. Ry. v. Hadley, 168 Okla. 588, 35 Pac.(2d) 463 (1934) .....I: 143, 155; II: 25; III: 431
Branch v. Altus, 195 Okla. 625, 159 Pac.(2d) 1021 (1945) ..... I: 97
Broady v. Furray, 163 Okla. 204, 21 Pac.(2d) 770 (1933) .....I: 191, 215; II: 12, 123, 206; III: 430-432
Burkett v. Bayes, 78 Okla. 8, 187 Pac. 214 (1918) .....II: 124, 139; III: 431, 432
Canada v. Shawnee, 179 Okla. 53, 64 Pac.(2d) 694 (1937) .....II: 647; III: 173, 437
Chicago, R.I. & P. Ry. v. Groves, 20 Okla. 101, 93 Pac. 755 (1908) .....I: 54, 55, 68, 97, 192; II: 12, 67, 537; III: 431, 432
Comar Oil Co. v. Blagden, 169 Okla. 78, 35 Pac.(2d) 954 (1934) .....II: 209
Culbertson v. Greene, 206 Okla. 210, 243 Pac.(2d) 648 (1952) .....III: 432
Curry v. Hill, 460 Pac.(2d) 933 (Okla. 1969) ..... I: 121, 122, 125; II: 123
Dowlen v. Crowley, 170 Okla. 59, 37 Pac.(2d) 933 (1934) ..... I: 87
Enid v. Brooks, 132 Okla. 60, 269 Pac. 241 (1928) .....I: 192; II: 209, 222; III: 432
Franks v. Rouse, 192 Okla. 520, 137 Pac.(2d) 899 (1943) ..... I: 81, 85, 88
Garrett v. Haworth, 183 Okla. 569, 83 Pac.(2d) 822 (1938) .....I: 29, 33; II: 126, 220; III: 432
Gates v. Settlers' Mill., Canal & Res. Co., 19 Okla. 83, 91 Pac. 856 (1907) .....I: 11, 242, 366, 374, 379, 441, 573, 574, 591; II: 194; III: 424, 427, 429
Gay v. Hicks, 33 Okla. 675, 124 Pac. 1077 (1912) .....I: 326, 383, 529, 540, 570; II: 229; III: 424-426, 429
George v. Greer, 207 Okla. 494, 250 Pac.(2d) 858 (1952) ..... I: 87; II: 222
Grand-Hydro v. Grand River Dam Authority, 192 Okla. 693, 139 Pac.(2d) 798 (1943) .....I: 191, 215, 326, 529, 540; II: 229; III: 424, 425, 430
Gulf Oil Corp. v. Miller, 198 Okla. 54, 175 Pac.(2d) 335 (1946) .....II: 30, 209, 254; III: 432

Hargraves v. Wilson, 382 Pac.(2d) 736 (Okla. 1963) .....II: 336, 368, 373
Jefferson v. Hicks, 23 Okla. 684, 102 Pac. 79 (1909) .....I: 78, 85, 87, 88; II: 536, 538, 541
Johnston v. Woodard, 376 Pac.(2d) 602 (Okla. 1962) .....II: 441
Kingfisher v. Zalabak, 77 Okla. 108, 186 Pac. 936 (1920) .....I: 192; II: 124, 222; III: 432
Lynch v. Clements, 263 Pac.(2d) 153 (Okla. 1953) .....I: 111, 112, 129, 130
Lynn v. Rainey, 400 Pac.(2d) 805 (Okla. 1965) .....II: 550
Markwardt v. Guthrie, 18 Okla. 32, 90 Pac. 26 (1907) .....I: 192; II: 112, 123, 209, 222; III: 431, 432
Martin v. British Am. Oil Producing Co., 187 Okla. 193, 102 Pac.(2d) 124 (1940) .....I: 155, 192; II: 30, 31, 48, 82, 84, 121, 134, 136, 209, 254; III: 431-433
Miller v. Marriott, 48 Okla. 179, 149 Pac. 1164 (1915) .....I: 39
Notle v. Sturgeon, 376 Pac.(2d) 616 (Okla. 1962) .....II: 351
Nunn v. Osborne, 417 Pac.(2d) 571 (Okla. 1966) .....II: 560, 561
Ogden v. Baker, 205 Okla. 506, 239 Pac.(2d) 393 (1951) .....II: 30, 254; III: 432
Oklahoma City v. Tytenicz, 171 Okla. 519, 43 Pac.(2d) 747 (1935) .....II: 107, 209, 222, 254; III: 432
Oklahoma Water Resources Bd. v. Central Okla. Master Conservancy Dist., 464 Pac.(2d) 748 (Okla. 1968), rehearing, 464 Pac.(2d) 755 (Okla. 1969) .....I: 199, 217-218, 488; II 5, 12, 95, 229; III: 430-432, 435
Owens v. Snider, 52 Okla. 772, 153 Pac. 833 (1915) .....I: 326, 489, 529, 540; II: 229; III: 424, 425, 429
Peppers Refining Co. v. Spivey, 285 Pac.(2d) 228 (Okla. 1955) .....II: 222
Prest-O-Lite Co. v. Howery, 169 Okla. 408, 37 Pac.(2d) 303 (1934) .....II: 30, 209, 254; III: 432
Smith v. Stanolind Oil & Gas Co., 197 Okla. 499, 172 Pac.(2d) 1002 (1946) .....I: 191, 192, 215; II: 24, 39, 84, 87, 91, 104, 107, 110, 120, 136, 196; III: 430-433
Sunray Oil Corp. v. Burge, 269 Pac.(2d) 782 (Okla. 1954) .....II: 30, 209, 254
Zalaback v. Kingfisher, 59 Okla. 222, 158 Pac. 926 (1916) .....I: 192; II: 124, 222; III: 432

Oregon

Abel v. Mack, 131 Oreg. 586, 283 Pac. 8 (1929) .....II: 495
Alexander v. Central Oreg. Irr. Dist., 528 Pac.(2d) 582 (Oreg. App. 1974) .....III: 473, 474
Allen v. Magill, 96 Oreg. 610, 189 Pac. 986, 190 Pac. 726 (1920) .....II: 345, 359; III: 448
Andrews v. Donnelley, 59 Oreg. 138, 116 Pac. 569 (1911) .....II: 226
Appleton v. Oregon Iron & Steel Co., 229 Oreg. 81, 366 Pac.(2d) 174 (1961) .....III: 473
Barker v. Sonner, 135 Oreg. 75, 294 Pac. 1053 (1931) .....I: 148, 602; II: 576
Beers v. Sharp, 44 Oreg. 386, 75 Pac. 717 (1904) .....II: 390, 396
Beisell v. Wood, 182 Oreg. 66, 185 Pac.(2d) 570 (1947) .....I: 474 II: 616, 618; III: 453, 474
Bennett v. Salem, 192 Oreg. 531, 235 Pac.(2d) 772 (1951) .....I: 498, 512; II: 430, 431, 434, 495; III: 459, 476
Blanchard v. Hartley, 111 Oreg. 308, 226 Pac. 436 (1924) .....I: 638; III: 456
Bolter v. Garrett, 44 Oreg. 304, 75 Pac. 142 (1904) .....II: 193, 194, 431; III: 455
Borman v. Blackmon, 60 Oreg. 304, 118 Pac. 848 (1911) .....I: 56, 232; II: 262
Bowen v. Spalding, 63 Oreg. 392, 128 Pac. 37 (1912) .....I: 245; II: 226
Boyce v. Cupper, 37 Oreg. 256, 61 Pac. 642 (1900) .....II: 360, 619
Brattain v. Conn, 50 Oreg. 156, 91 Pac. 458 (1907) .....II: 371
Britt v. Reed, 42 Oreg. 76, 70 Pac. 1029 (1902) .....III: 462

Brosnon v. Boggs, 101 Oreg. 472, 198 Pac. 890 (1921) ..... II: 576, 580
Brosnon v. Harris, 39 Oreg. 148, 65 Pac. 867 (1901) ..... II: 620
Broughton v. Stricklin, 146 Oreg. 259, 28 Pac.(2d) 219 (1933), 30 Pac.(2d) 332 (1934) ..... I: 457, 635, 640; II: 320, 321, 324, 581; III: 453, 457, 561
Broughton's Estate v. Central Oreg. Irr. Dist., 165 Oreg. 435, 101 Pac.(2d) 425, 108 Pac.(2d) 276 (1940) ..... I: 321; III: 473
Brown v. Baker, 39 Oreg. 66, 65 Pac. 799, 66 Pac. 193 (1901) ..... III: 462
Brown v. Gold Coin Min. Co., 48 Oreg. 277, 86 Pac. 361 (1906) ..... II: 431, 432
Bull v. Siegrist, 169 Oreg. 180, 126 Pac.(2d) 832 (1942) ..... II: 617, 648; III: 467, 468
Calderwood v. Young, 212 Oreg. 197, 315 Pac.(2d) 561 (1957) ..... II: 250, 408, 418, 495; III: 458, 476
Campbell v. Walker, 137 Oreg. 375, 2 Pac.(2d) 912 (1931) ..... I: 260, 474, 595
Cantrall v. Sterling Min. Co., 61 Oreg. 516, 122 Pac. 42 (1912) ..... I: 619; III: 455
Carson v. Gentner, 33 Oreg. 512, 52 Pac. 506 (1898) ..... I: 273; III: 442, 462
Carson v. Hayes, 39 Oreg. 97, 65 Pac. 814 (1901) ..... I: 446; II: 432; III: 454
Caviness v. La Grande Irr. Co., 60 Oreg. 410, 119 Pac. 731 (1911) ..... I: 245, 258, 259, 396, 398, 488; II: 87, 97, 107, 108; III: 454, 460, 462
Cleaver v. Judd, 238 Oreg. 266, 393 Pac.(2d) 196 (1964) ..... II: 618
Cookinham v. Lewis, 58 Oreg. 484, 114 Pac. 88, 115 Pac. 342 (1911) ..... I: 414; III: 448
Coffmon v. Robbins, 8 Oreg. 278 (1880) ..... II: 82; III: 460
Cole v. Logan, 24 Oreg. 304, 33 Pac. 568 (1893) ..... I: 235, 376, 379; III: 442, 443
Cottel v. Berry, 42 Oreg. 593, 72 Pac. 584 (1903) ..... I: 99, II: 66
Coventon v. Seufert, 23 Oreg. 548, 32 Pac. 508 (1893) ..... I: 471, 492
Cox v. Bernard, 39 Oreg. 53, 64 Pac. 860 (1901) ..... I: 88
Curtis v. La Grande Water Co., 20 Oreg. 34, 23 Pac. 808, 25 Pac. 378 (1890) ..... II: 437; III: 442
Dalton v. Kelsey, 58 Oreg. 244, 114 Pac. 464 (1911) ..... I: 441, 501; II: 396
David v. Brokaw, 121 Oreg. 591, 256 Pac. 186 (1927) ..... II: 616
Davis v. Chamberlain, 51 Oreg. 304, 98 Pac. 154 (1908) ..... I: 259; II: 269, 275, 331, 396, 408
Day v. Hill, 241 Oreg. 507, 406 Pac.(2d) 148 (1965) ..... II: 321, 395, 396, 409; III: 458
Dill v. Killip, 174 Oreg. 94, 147 Pac.(2d) 896 (1944) ..... I: 472; II: 193, 495; III: 453
Donelly v. Cuhna, 61 Oreg. 72, 119 Pac. 331 (1911) ..... I: 492, 509; III: 447
Dressler v. Isaacs, 217 Oreg. 586, 343 Pac.(2d) 714 (1959) ..... II: 616; III: 453
Dry Gulch Ditch Co. v. Hutton, 170 Oreg. 656, 133 Pac.(2d) 601 (1943) ..... I: 606, 607; II: 202, 352, 355, 362, 374; III: 456
Dunn v. Henderson, 122 Oreg. 133, 258 Pac. 183 (1927) ..... II: 237
Eastern Oreg. Live Stock Co. v. Keller, 108 Oreg. 256, 216 Pac. 556 (1923) ..... I: 63
Ebell v. Baker, 137 Oreg. 427, 299 Pac. 313 (1931) ..... II: 351, 366, 367, 371, 388, 392, 408, 414, 418; III: 458
Eldredge v. Mill Ditch Co., 90 Oreg. 590, 177 Pac. 939 (1919) ..... I: 480, 560, 564
Faull v. Cooke, 19 Oreg. 455, 26 Pac. 662 (1890) ..... II: 402; III: 461
Fitzstephens v. Watson, 218 Oreg. 185, 344 Pac.(2d) 221 (1959) ..... I: 36, 192, 193, 195, 219, 315; II: 12, 19, 37, 38, 97, 98, 134, 137, 437, 438, 616; III: 461, 465, 466
Foster v. Foster, 107 Oreg. 355, 213 Pac. 895 (1923) ..... I: 513
Freytay v. Vitas, 213 Oreg. 462, 326 Pac.(2d) 110 (1958) ..... I: 132
Garbarino v. VanCleave, 214 Oreg. 554, 330 Pac.(2d) 28 (1958) ..... II: 543, 552, 556
Gardner v. Dollina, 206 Oreg. 1, 288 Pac.(2d) 796 (1955) ..... I: 96, 97
Gardner v. Wright, 49 Oreg. 609, 91 Pac. 286 (1907) ..... II: 332, 370, 374, 404, 408
Glaze v. Frost, 44 Oreg. 29, 74 Pac. 336 (1903) ..... I: 492

Green v. Wheeler, 254 Oreg. 424, 458 Pac.(2d) 938 (1969) .....I: 373; III: 445
Haney v. Neace-Stark Co., 109 Oreg. 93, 216 Pac. 757 (1923) .....I: 476; III: 453, 456
Hansen v. Crouch, 98 Oreg. 141, 193 Pac. 454 (1920) ..... I: 33, 38, 39, 59, 68, 71
Harrington v. Demaris, 46 Oreg. 111, 77 Pac. 603, 82 Pac. 14 (1904) .....I: 44, 98; II: 66, 396
Hayes v. Adams, 109 Oreg. 51, 218 Pac. 933 (1923) .....II: 616, 617, 632; III: 467, 468
Hedges v. Riddle, 63 Oreg. 257, 127 Pac. 548 (1912) .....II: 19, 296; III: 457
Hedges v. Riddle, 75 Oreg. 197, 146 Pac. 99 (1915) ..... I: 509
Henrici v. Paulson, 128 Oreg. 514, 274 Pac. 314 (1929) .....II: 618
Henrici v. Paulson, 134 Oreg. 222, 293 Pac. 424 (1930) .....I: 280; II: 618, 620; III: 459
Hildebrandt v. Montgomery, 113 Oreg. 687, 234 Pac. 267 (1925) .....I: 49; II: 593, 619, 620
Hill v. American Land & Livestock Co., 82 Oreg. 202, 161 Pac. 403 (1916) ....II: 577
Hindman v. Rizor, 21 Oreg. 112, 27 Pac. 13 (1891) ..... I: 377, 469, 485; II: 276
Hough v. Porter, 51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909) .....I: 44, 97, 124, 173, 174, 195, 218, 258, 509; II: 18, 19, 61, 92, 97, 107, 113, 114, 270, 404, 576; III: 447, 455, 462, 464, 465, 492
Hutchinson v. Stricklin, 146 Oreg. 285, 28 Pac.(2d) 225 (1933) .....I: 366, 496, 620, 640; II: 320, 321, 581; III: 454, 456
In re Althouse Creek, 85 Oreg. 224, 162 Pac. 1072 (1917) ..... I: 512
In re Deschutes River & Tributaries, 134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930) .....I: 18, 374, 379, 490, 546, 548, 630, 633; II: 87, 97, 98, 201; III: 445, 446, 449, 456, 457, 465
In re Deschutes River & Tributaries, 148 Oreg. 389, 36 Pac.(2d) 585 (1934) ..... III: 476
In re Hood River, 114 Oreg. 112, 227 Pac. 1065 (1924) .....I: 11, 16, 38, 142, 205, 219, 242, 315, 374, 385, 441, 498, 513, 576; II: 3, 12, 23, 97, 98, 100, 114, 201, 494; III: 446, 454, 455, 457, 461, 464, 465, 475
In re North Powder River, 75 Oreg. 83, 144 Pac. 485 (1914), 146 Pac. 475 (1915) .....I: 504, 620; II: 425; III: 454, 455, 457
In re Owyhee River, 124 Oreg. 44, 259 Pac. 292 (1927) .....I: 376; III: 455
In re Rogue River, 102 Oreg. 60, 201 Pac. 724 (1921) .....I: 570; III: 454
In re Rogue River, 117 Oreg. 477, 244 Pac. 662 (1926) .....I: 509; III: 447
In re Schollmeyer, 69 Oreg. 210, 138 Pac. 211 (1914) .....I: 152, 414, 431, 537; III: 447, 448, 450, 452
In re Silvies River, 115 Oreg. 27, 237 Pac. 322 (1925) .....I: 288, 374, 386, 480, 487, 530, 595, 596, 603, 635, 639; II: 91; III: 443, 445, 456, 457
In re Sucker Creek, 83 Oreg. 228, 163 Pac. 430 (1917) .....III: 460
In re Umatilla River, 88 Oreg. 376, 168 Pac. 922 (1917), 172 Pac. 97 (1918) .....I: 635; II: 277; III: 456, 457
In re Walla Walla River, 141 Oreg. 492, 16 Pac.(2d) 939 (1932) .....I: 480, 549, 559, 564, 567; III: 454
In re White River & Its Tributaries, 141 Oreg. 504, 16 Pac.(2d) 1109 (1932) .....I: 376; III: 444
In re Willow Creek, 74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915) .....I: 7, 15, 152, 195, 219, 573, 596, 620, 638; II: 3, 12, 100, 193, 258, 262-265, 450, 494, 495; III: 454, 455, 457, 464, 474, 475
Ison v. Sturgill, 57 Oreg. 109, 109 Pac. 579, 110 Pac. 535 (1910) .....I: 378, 379; II: 358, 359, 361
Jones v. Conn, 39 Oreg. 30, 64 Pac. 855, 65 Pac. 1068 (1901) ..... II: 19, 50, 53, 56, 57, 97, 125, 138; III: 460, 461
Jones v. Warmsprings Irr. Dist., 162 Oreg. 186, 91 Pac.(2d) 542 (1939) .....II: 565, 580, 583
Joseph Mill Co. v. Joseph, 74 Oreg. 296, 144 Pac. 465 (1914) ..... I: 513
Kaler v. Campbell, 13 Oreg. 596, 11 Pac. 301 (1886) .....I: 579; III: 442
Klamath Dev. Co. v. Lewis, 136 Oreg. 445, 299 Pac. 705 (1931) .....II: 616, 618

Krebs v. Perry, 134 Oreg. 290, 292 Pac. 319, 293 Pac. 432 (1930) .....I: 620; III: 455
Laurance v. Brown, 94 Oreg. 387, 195 Pac. 761 (1919) ..... I: 259, 263
Lavery v. Arnold, 36 Oreg. 84, 57 Pac. 906, 58 Pac. 524 (1899) .....II: 737
Lewis v. McClure, 8 Oreg. 273 (1880) .....I: 235; III: 442, 462
Little Walla Walla Irr. Union v. Finis Irr. Co., 62 Oreg. 348, 124 Pac. 666, 125 Pac. 270 (1912) .....I: 509; II: 367, 368; III: 447
Low v. Rizor, 25 Oreg. 551, 37 Pac. 82 (1894) .....I: 469; III: 442, 448
Low v. Schaffer, 24 Oreg. 239, 33 Pac. 678 (1893) .....I: 447; II: 194, 202, 618; III: 442, 447, 460
Luckey v. Deatsman, 217 Oreg. 628, 343 Pac.(2d) 723 (1959) .... I: 486; II: 437, 616
Luscher v. Reynolds, 153 Oreg. 625, 56 Pac.(2d) 1158 (1936) ..... I: 121; II: 123
Mace v. Mace, 40 Oreg. 586, 67 Pac. 660, 68 Pac. 737 (1902) ..... I: 88
Mann v. Parker, 48 Oreg. 321, 86 Pac. 598 (1906) ..... I: 498; II: 237
Marks v. Twohy Bros. Co., 98 Oreg. 514, 194 Pac. 675 (1921) ..... I: 599
Masterson v. Kennard, 140 Oreg. 288, 12 Pac.(2d) 560 (1932) ..... II: 271, 362, 383, 403
Masterson v. Pacific Livestock Co., 144 Oreg. 396, 24 Pac.(2d) 1046 (1933) ..... I: 595
McCall v. Porter, 42 Oreg. 49, 70 Pac. 820 (1902), 71 Pac. 976 (1903) .....I: 399, 595; III: 454
McCoy v. Huntley, 60 Oreg. 372, 119 Pac. 481 (1911) .....I: 619; III: 455
McDougal v. Lame, 39 Oreg. 212, 64 Pac. 864 (1901) .....II: 368
Messinger v. Woodcock, 159 Oreg. 435, 80 Pac.(2d) 895 (1938) .....II: 616, 618
Minton v. Coast Property Corp., 151 Oreg. 208, 46 Pac.(2d) 1029 (1935) ..... I: 266; II: 619
Moore v. United Elkhorn Mines, 64 Oreg. 342, 127 Pac. 969 (1912), 130 Pac. 640 (1913) .....II: 264
Morgan v. Shaw, 47 Oreg. 333, 83 Pac. 534 (1906) .....I: 383; III: 461, 462
Morrison v. Officer, 48 Oreg. 569, 87 Pac. 896 (1906) .....II: 617, 618
Morse v. Gold Beach Water Light & Power Co., 160 Oreg. 301, 84 Pac.(2d) 113 (1938) .....I: 332; III: 444
Nault v. Palmer, 96 Oreg. 538, 190 Pac. 346 (1920) .....III: 454, 455
Nevada Ditch Co. v. Bennett, 30 Oreg. 59, 45 Pac. 472 (1896) .....I: 137, 144, 495, 549; III: 442, 443
Nevada Ditch Co. v. Canyon & Sand Hollow Ditch Co., 58 Oreg. 517, 114 Pac. 86 (1911) .....I: 549; III: 446
North Powder Mill Co. v. Coughanour, 34 Oreg. 9, 54 Pac. 223 (1898) .....III: 462
Norwood v. Eastern Oreg. Land Co., 112 Oreg. 106, 227 Pac. 1111 (1924) .....II: 21, 27, 126, 134, 137, 138; III: 461, 462
Oakes v. Dickson, 225 Oreg. 95, 357 Pac.(2d) 385 (1960) .....II: 432
Oliver v. Skinner & Lodge, 190 Oreg. 423, 226 Pac.(2d) 507 (1951) .....I: 377, 379, 504, 512, 530, 574, 577, 638; II: 229, 575, 576; III: 445, 446, 456
Oregon Land & Constr. Co. v. Allen Ditch Co., 41 Oreg. 209, 69 Pac. 455 (1902) .....II: 357, 372; III: 443
Oregon Lumber Co. v. East Fork Irr. Dist., 80 Oreg. 568, 157 Pac. 963 (1916) .....II: 494; III: 475
Oviatt v. Big Four Min. Co., 39 Oreg. 118, 65 Pac. 811 (1901) .....I: 152, 375, 376; II: 269
Pacific Livestock Co. v. Balcombe, 101 Oreg. 233, 199 Pac. 857 (1921) .....II: 495
Parkersville Drainage Dist. v. Wattier, 48 Oreg. 332, 86 Pac. 775 (1906) .....III: 442
Phillips v. Gardner, 2 Oreg. App. 423, 469 Pac.(2d) 42 (1970) .....I: 426, 431; III: 450, 451
Port of Umatilla v. Richmond, 212 Oreg. 596, 321 Pac.(2d) 338 (1958) .....III: 459
Porter v. Pettengill, 57 Oreg. 247, 110 Pac. 393 (1910) .....I: 499, 508; III: 447
Price v. Oregon R.R., 47 Oreg. 350, 83 Pac. 843 (1906) ..... I: 88; II: 541
Pringle Falls Elec. Power & Water Co. v. Patterson, 65 Oreg. 474, 128 Pac. 820 (1912), 132 Pac. 527 (1913) .....III: 457
Rehfuss v. Weeks, 93 Oreg. 25, 182 Pac. 137 (1919) .....II: 552
Salem Mills Co. v. Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832 (1902) ....II: 354, 422
Schweiger v. Solbeck, 191 Oreg. 454, 230 Pac.(2d) 195 (1951) ..... I: 78, 79, 94

Seaweard v. Pacific Livestock Co., 49 Oreg. 157, 88 Pac. 963 (1907) ..... I: 474
Shepard v. Purvine, 196 Oreg. 348, 248 Pac.(2d) 352 (1952) ..... I: 486; II: 616
Shively v. Hume, 10 Oreg. 76 (1881) ..... I: 31, 33; III: 460
Shook v. Colohan, 12 Oreg. 239, 6 Pac. 503 (1885) ..... II: 105, 107, 110, 126; III: 460, 461
Simmons v. Winters, 21 Oreg. 35, 27 Pac. 7 (1891) ..... I: 28, 39, 257, 475, 499; III: 442, 448
Simpson v. Bankofier, 141 Oreg. 426, 16 Pac.(2d) 632 (1932), 18 Pac.(2d) 814 (1933) ..... I: 398, 444
Skinner v. Silver, 158 Oreg. 81, 75 Pac.(2d) 21 (1938) ..... I: 483; II: 616-618; III: 453
Smith v. Cameron, 123 Oreg. 501, 262 Pac. 946 (1928) ..... III: 459
Smyth v. Jenkins, 148 Oreg. 165, 33 Pac.(2d) 1007 (1934) ..... III: 446
Smyth v. Jenkins, 208 Oreg. 92, 299 Pac.(2d) 819 (1956) ..... I: 320, 414, 504, 595; II: 363
Smyth v. Neal, 31 Oreg. 105, 49 Pac. 850 (1897) ..... II: 430, 432; III: 442
Speake v. Hamilton, 21 Oreg. 3, 26 Pac. 855 (1890) ..... I: 235; III: 442
Squaw Creek Irr. Dist. v. Mamero, 107 Oreg. 291, 214 Pac. 889 (1923) ..... III: 476
State ex rel. Johnson v. Stewart, 163 Oreg. 585, 96 Pac.(2d) 220 (1939) ..... I: 571; II: 206
State ex rel. Pac. Livestock Co. v. Davis, 116 Oreg. 232, 240 Pac. 882 (1925) ..... I: 245; II: 97
State ex rel. Van Winkle v. People's West Coast Hydro-Elec. Corp., 129 Oreg. 475, 278 Pac. 583 (1929) ..... I: 376, 387; II: 272; III: 443
Staub v. Jensen, 180 Oreg. 682, 178 Pac.(2d) 931 (1947) ..... I: 317; II: 267, 408, 430; III: 443, 459, 473-474
Taylor v. Welch, 6 Oreg. 198 (1876) ..... II: 12, 67, 617, 648; III: 460, 467-468
Tolman v. Casey, 15 Oreg. 83, 13 Pac. 669 (1887) ..... II: 339; III: 442
Tomasek v. State, 196 Oreg. 120, 248 Pac.(2d) 703 (1952) ..... I: 91, 95
Tudor v. Jaca, 178 Oreg. 126, 164 Pac.(2d) 680 (1945), 165 Pac.(2d) 770 (1946) ..... I: 398, 500, 574, 645, 649; II: 408, 495; III: 445, 449, 454, 455, 458
Turner v. Cole, 31 Oreg. 154, 49 Pac. 971 (1897) ..... I: 503
Turvey v. Kincaid, 111 Oreg. 235, 226 Pac. 219 (1924) ..... I: 591
Tyler v. Obiaque, 95 Oreg. 57, 186 Pac. 579 (1920) ..... II: 576
Vaughn v. Kolb, 130 Oreg. 506, 280 Pac. 518 (1929) ..... I: 148; II: 261, 271, 575, 577
Volchers v. Seymour, 187 Oreg. 170, 210 Pac.(2d) 484 (1949) ..... II: 376
Warner Valley Stock Co. v. Lynch, 215 Oreg. 523, 336 Pac.(2d) 884 (1959) ..... I: 321, 414, 575, 581, 596; II: 211, 493; III: 453-455, 474
Watts v. Spencer, 51 Oreg. 262, 94 Pac. 39 (1908) ..... II: 275-277, 353
Weiss v. Oregon Iron & Steel Co., 13 Oreg. 496, 11 Pac. 255 (1886) ..... II: 12, 48, 82, 84, 115; III: 460
Wellman v. Kelley, 197 Oreg. 553, 252 Pac.(2d) 816 (1953) ..... I: 78, 81, 83, 88; II: 538
West v. Taylor, 16 Oreg. 165, 13 Pac. 665 (1887) ..... I: 44, 54
Whited v. Cavin, 55 Oreg. 98, 105 Pac. 396 (1909) ..... I: 398, 494
Williams v. Altnow, 51 Oreg. 275, 95 Pac. 200, 97 Pac. 539 (1908) ..... II: 97; III: 461, 463
Wimer v. Simons, 27 Oreg. 1, 39 Pac. 6 (1895) ..... II: 277, 278, 331, 432
Withers v. Reed, 194 Oreg. 541, 243 Pac.(2d) 283 (1952) ..... II: 296; III: 457
Wright v. Phillips, 127 Oreg. 420, 272 Pac. 554 (1928) ..... I: 39, 44, 54, 58
Wyckoff v. Mayfield, 130 Oreg. 687, 280 Pac. 340 (1929) ..... I: 91

South Dakota

Anderson v. Drake, 24 S. Dak. 216, 123 N.W. 673 (1909) ..... II: 538, 541

Anderson v. Ray, 37 S. Dak. 17, 156 N.W. 591 (1916) ..... I: 122
Belle Fourche Irr. Dist. v. Smiley, 84 S. Dak. 701, 176 N.W.(2d) 239 (1970) .....I: 16, 196, 211, 221, 315; II: 4, 13, 45, 99, 101, 115, 288, 620; III: 483, 497-498, 500
Belle Fourche Irr. Dist. v. Smiley, 87 S. Dak. 151, 204 N.W.(2d) 105 (1973) .....III: 497, 500
Benson v. Cook, 47 S. Dak. 611, 201 N.W. 526 (1924) .....I: 26, 29, 31, 32, 34, 35, 37, 47, 48, 52, 55, 63; II: 561, 562; III: 482
Bogue v. Clay County, 75 S. Dak. 140, 60 N.W.(2d) 218 (1953) .....II: 544
Bruha v. Bochek, 76 S. Dak. 131, 74 N.W.(2d) 313 (1955) .....II: 543, 545
Butte County v. Lovinger, 64 S. Dak, 200, 266 N.W. 127 (1936) .....I: 367, 461, 482, 559; III: 481
Cook v. Evans, 45 S. Dak. 31, 185 N.W. 262 (1921) .....I: 174, 288, 620; II: 18, 21-22, 114; III: 479, 484, 486, 489, 492
Cook v. Evans, 45 S. Dak. 43, 186 N.W. 571 (1922) ..... I: 288; II: 21-22; III: 479, 489
Cundy v. Weber, 68 S. Dak. 214, 300 N.W. 17 (1941) ..... I: 441, 620; II: 263-266, 279, 317, 436, 511; III: 484, 486
Deadwood Cent. R.R. v. Barker, 14 S. Dak. 558, 86 N.W. 619 (1901) ..... II: 649; III: 478, 498
Driskill v. Rebbe, 22 S. Dak. 242, 117 N.W. 135 (1908) .....III: 489, 495
Edgemont Improvement Co. v. N.S. Tubbs Sheep Co., 22 S. Dak. 142, 115 N.W. 1130 (1908) .....II: 262, 264, 271, 435; III: 486
Farwell v. Sturgis Water Co., 10 S. Dak. 421, 73 N.W. 916 (1898) .....II: 620
Flisrand v. Madson, 35 S. Dak. 457, 152 N.W. 796 (1915) ..... I: 122
Heezen v. Aurora County, 83 S. Dak. 198, 157 N.W.(2d) 26 (1968) .....II: 544
Henderson v. Goforth, 34 S. Dak. 441, 148 N.W. 1045 (1914) ..... II: 90, 351, 360-362, 373, 403; III: 484, 487, 491, 494, 495
Hildebrand v. Knapp, 65 S. Dak. 414, 274 N.W. 821 (1937) ..... I: 122; II: 80
Homes Dev. Co. v. Simmons, 75 S. Dak. 575, 70 N.W.(2d) 527 (1955) .....III: 487
Jewett v. Redwater Irrigating Ass'n, ___ S. Dak. ___, 220 N.W.(2d) 834 (1974) ..... III: 485, 501
Johnson v. Metropolitan Life Ins. Co., 71 S. Dak. 155, 22 N.W.(2d) 737 (1946) .....I: 29, 33, 36, 38-40, 56; II: 544
Knight v. Grimes, 80 S. Dak. 517, 127 N.W.(2d) 708 (1964) .....I: 196, 221, 315; II: 4, 13, 101, 115, 620, 649; III: 113, 488, 497, 500
Kougl v. Curry, 73 S. Dak. 427, 44 N.W.(2d) 114 (1950) .....II: 336, 364, 375, 404
La Fleur v. Kolda, 71 S. Dak. 162, 22 N.W.(2d) 741 (1946) .....II: 543, 544
Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. Dak. 519, 91 N.W. 352 (1902) .....I: 15, 190, 191, 220; II: 4, 13, 96; III: 478, 489, 491, 493-495
Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. Dak. 307, 128 N.W. 596 (1910) .....II: 90, 98-99, 105, 108, 119, 201; III: 489, 491-495
Lone Tree Ditch Co. v. Rapid City Elec. & Gas Light Co., 16 S. Dak. 451, 93 N.W. 650 (1903) .....I: 504; II: 206; III: 478, 481
Madison v. Rapid City, 61 S. Dak. 83, 246 N.W. 283 (1932) .....II: 620; III: 498
Metcalf v. Nelson, 8 S. Dak. 87, 65 N.W. 911 (1895) .....II: 620, 649; III: 498
Mulder v. Tague, 85 S. Dak. 544, 186 N.W.(2d) 884 (1971) .....II: 544, 557
Parsons v. Sioux Falls, 65 S. Dak. 145, 272 N.W. 288 (1937) .....I: 155; II: 25, 26, 30, 80, 209, 223, 238, 239; III: 490
Platt v. Rapid City, 67 S. Dak. 245, 291 N.W. 600 (1940) .....II: 18, 22, 114; III: 492
Redwater Land & Canal Co. v. Jones, 27 S. Dak. 194, 130 N.W. 85 (1911) .....II: 22, 90, 96, 125, 257, 332, 401; III: 489-491, 493, 495
Redwater Land & Canal Co. v. Reed, 26 S. Dak. 466, 128 N.W. 702 (1910) .....I: 138, 190, 191, 220; II: 4, 13, 23, 24, 37, 42, 44, 83, 126, 257, 332, 437, 438; III: 489-491, 493, 495
Robbins v. Rapid City, 71 S. Dak. 171, 23 N.W.(2d) 144 (1946) ..... I: 148

St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co., 32 S. Dak. 260, 143 N.W. 124 (1913) ..... I: 137, 138, 141, 143, 155, 156, 221; II: 25, 26, 45, 82, 103, 114, 288, 296, 497; III: 490, 491, 493, 494, 496, 497
Sayles v. Mitchell, 60 S. Dak. 592, 245 N.W. 390 (1932) ..... II: 48, 55, 63, 67, 73, 118, 121, 218; III: 490
Scott v. Toomey, 8 S. Dak. 639, 67 N.W. 838 (1896) ..... III: 487
Stenger v. Tharp, 17 S. Dak. 13, 94 N.W. 402 (1903) ..... I: 220; II: 257, 332; III: 478, 484, 489, 490, 493, 495
Sturr v. Beck, 6 S. Dak. 71, 50 N.W. 486 (1888) ..... I: 190, 213, 220, 396; II: 11, 13; III: 408, 416-418, 478, 488, 489
Terry v. Heppner, 59 S. Dak. 317, 239 N.W. 759 (1931) ..... I: 29, 31, 32, 34, 37, 47, 48, 52, 55, 63, 66; II: 75, 538, 541, 561, 562; III: 482
Thompson v. Andrews, 39 S. Dak. 477, 165 N.W. 9 (1917) ..... I: 29, 36, 38-40
Willadsen v. Crawford, 75 S. Dak. 161, 60 N.W.(2d) 692 (1953) ..... II: 206, 432, 434, 436; III: 487
Weidmeier v. Edelman, 75 S. Dak. 29, 58 N.W.(2d) 306 (1953) ..... II: 206

Texas

Adams v. North Leon River Irr. Corp., 475 S.W.(2d) 873 (Tex. Civ. App. 1972) ..... III: 528
Anson v. Arnett, 250 S.W.(2d) 450 (Tex. Civ. App. 1952) ..... I: 539; II: 258, 262, 264-267, 273, 279, 285, 309, 321; III: 514
Austin v. Hall, 93 Tex. 591, 57 S.W. 563 (1900) ..... I: 110, 111; II: 340, 341, 404
Baker v. Brown, 55 Tex. 377 (1881) ..... II: 82, 112, 115, 232, 343, 367, 369, 378, 388, 402, 409; III: 516, 521, 522
Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S.W. 758 (1896) ..... I: 110, 128; II: 80, 199; III: 506, 522, 525
Bass v. Taylor, 126 Tex. 522, 90 S.W.(2d) 811 (1936) ..... I: 42, 81, 89
Benjamin v. Gulf, C. & S.F. Ry., 49 Tex. Civ. App. 473, 108 S.W. 408 (1908) ..... II: 29, 31, 209
Berry v. American Rio Grande Land & Irr. Co., 236 S.W. 550 (Tex. Civ. App. 1921) ..... II: 142
Biggs v. Lee, 147 S.W. 709 (Tex. Civ. App. 1912) ..... I: 223; II: 29, 32, 96, 198, 209, 513; III: 521, 527
Biggs v. Leffingwell, 62 Tex. Civ. App. 665, 132 S.W. 902 (1910) ..... II: 120, 231, 232, 236, 367-388, 402; III: 523
Biggs v. Miller, 147 S.W. 632 (Tex. Civ. App. 1912) ..... I: 222, 396, 492, 550, 558, 559, 573, 574; II: 43, 198, 498, 510; III: 512, 527
Bigham Bros. v. Port Arthur Canal & Dock Co., 91 S.W. 848 (Tex. Civ. App. 1905) ..... II: 25, 34, 209
Bigham Bros. v. Port Arthur Channel & Dock Co., 100 Tex. 192, 97 S.W. 686 (1906) ..... I: 128; II: 25, 80, 209; III: 520
Board of Water Engineers v. Briscoe, 35 S.W.(2d) 804 (Tex. Civ. App. 1930) ..... I: 326, 332; II: 499
Board of Water Engineers v. McKnight, 111 Tex. 82, 229 S.W. 301 (1921) ..... I: 303, 319; II: 115, 199, 450, 451, 455, 531; III: 506, 525, 531-533
Board of Water Engineers v. San Antonio, 273 S.W.(2d) 913 (Tex. Civ. App. 1954) ..... I: 326, 521
Board of Water Engineers v. San Antonio, 155 Tex. 111, 283 S.W.(2d) 722 (1955) ..... I: 326, 521
Borden v. Trespalacios Rice & Irr. Co., 98 Tex. 494, 86 S.W. 11 (1905) ..... III: 506
Boyd v. Schreiner, 116 S.W. 100 (Tex. Civ. App. 1912) ..... II: 29, 30, 209
Brown v. Linkenhoger, 175 S.W.(2d) 975 (Tex. Civ. App. 1943) ..... I: 42
Bunch v. Thomas, 121 Tex. 225, 49 S.W.(2d) 421 (1932) ..... II: 547
Burr's Ferry, B & C R.R. v. Allen, 164 S.W. 878 (Tex. Civ. App. 1914) ..... I: 110
Cantwell v. Zinser, 208 S.W.(2d) 577 (Tex. Civ. App. 1948) ..... II: 622, 650, 743, 744, 745; III: 528

Chicago, R.I. & G. Ry. v. Tarrant County W.C. & I. Dist. No. 1, 123 Tex. 432, 73 S.W.(2d) 55 (1934) ..... II: 129; III: 517, 524
Clark v. Briscoe Irr. Co., 200 S.W.(2d) 674 (Tex. Civ. App. 1947) .....I: 152, 320, 637; III: 510, 514
Cluck v. Houston & T.C. R.R., 34 Tex. Civ. App. 452, 79 S.W. 80 (1904) ....II: 78, 621
Corpus Christi v. McLaughlin, 147 S.W.(2d) 576 (Tex. Civ. App. 1940) .....II: 37, 438; III: 519
Corpus Christi v. Pleasanton, 154 Tex. 289, 276 S.W.(2d) 798 (1955) .....II: 622; 650, 658, 744-747; III: 529, 530
Corzelius v. Harrell, 143 Tex. 509, 186 S.W.(2d) 961 (1945) .....I: 319; II: 451; III: 531
Diversion Lake Co. v. Heath, 126 Tex. 129, 86 S.W.(2d) 441 (1935) .....I: 42, 110, 544; II: 122, 123; III: 523
Duke v. Reily, 431 S.W.(2d) 769 (Tex. Civ. App. 1968) ..... I: 185; II: 17
Evans v. Ropte, 128 Tex. 75, 96 S.W.(2d) 973 (1936) .....II: 621
Fairbanks v. Hidalgo W.I. Dist. No. 2, 261 S.W. 542 (Tex. Civ. App. 1923) ..... I: 375, 485
Fleming v. Davis, 37 Tex. 173 (Semicolon Ct. 1872) .....I: 142, 189; II: 25, 78, 112, 205, 594, 622; III: 503, 505, 520, 522
Fort Quitman Land Co. v. Mier, 211 S.W.(2d) 340 (Tex. Civ. App. 1948) .....II: 33, 38, 395, 396, 439
Fort Worth & D.C. Ry. v. Kiel, 143 Tex. 601, 187 S.W.(2d) 371 (1945) ..... I: 79
Fort Worth Improvement Dist. No. 1 v. Fort Worth, 106 Tex. 148, 158 S.W. 164 (1913) ..... I: 88
Freeland v. Peltier, 44 S.W.(2d) 404 (Tex. Civ. App. 1931) .....I: 205; II: 43, 345, 409, 410
Garrison v. Bexar-Medwa-Atascosa Counties W.I. D. No. 1, 407 S.W.(2d) 771 (Tex. Sup. Ct. 1966) .....III: 507
Gibson v. Carroll, 180 S.W. 630 (Tex. Civ. App. 1915) ..... II: 34, 36, 41, 43, 46, 409; III: 519
Goodwin v. Hidalgo County W.C. & I. Dist. No. 1, 58 S.W.(2d) 1092 (Tex. Civ. App. 1933) ..... I: 152
Gramann v. Eicholtz, 36 Tex. Civ. App. 309, 81 S.W. 756 (1904) .....II: 537
Great Am. Dev. Co. v. Smith, 303 S.W.(2d) 861 (Tex. Civ. App. 1957) ..... II: 78, 122, 232, 622; III: 520, 523
Greenman v. Fort Worth, 308 S.W.(2d) 553 (Tex. Civ. App. 1957) .....I: 155; II: 26, 43
Grogan v. Brownwood, 214 S.W. 532 (Tex. Civ. App. 1919) .....I: 422; II: 62, 63, 118, 120, 199, 232; III: 520, 522, 525
Gulf, C. & S.F. Ry. v. Pomeroy, 67 Tex. 498, 3 S.W. 722 (1887) ..... I: 78
Haas v. Chaussard, 17 Tex. 588 (1856) .....I: 137, 188, 221; II: 13, 34, 91, 139, 333, 341, 343, 367, 378, 398, 409; III: 516, 523
Hall v. Carter, 33 Tex. Civ. App. 230, 77 S.W. 19 (1903) ..... II: 232, 386, 422, 423; III: 522
Hancock v. Moore, 135 Tex. 619, 146 S.W.(2d) 369 (1941) ..... I: 91
Harrell v. Vahlsing, Inc., 248 S.W.(2d) 762 (Tex. Civ. App. 1952) .....II: 66, 567
Heard v. Refugio, 129 Tex. 349, 103 S.W.(2d) 728 (1937) ..... I: 32, 33, 42
Heard v. Texas, 146 Tex. 139, 204 S.W.(2d) 344 (1947) .....I: 128; II: 80, 351, 366, 367, 374, 402, 410
Heidelberg v. Harvey, 366 S.W.(2d) 121 (Tex. Civ. App. 1961) .....II: 430
Hidalgo County W.I. Dist. No. 2 v. Cameron County W.C. & I Dist. No. 5, 250 S.W.(2d) 941 (Tex. Civ. App. 1952) .....II: 88, 235; III: 522
Hidalgo County W.I. Dist. No. 2 v. Cameron County W.C. & I Dist. No. 5, 253 S.W.(2d) 294 (Tex. Civ. App. 1952) .....I: 620; II: 133, 235, 499, 532; III: 513, 522
Higgins v. Spear, 118 Tex. 310, 15 S.W.(2d) 1010 (1929) .....II: 546, 547
Hill Farms, Inc. v. Hill County, 436 S.W.(2d) 320 (Tex. Civ. App. 1969) .....II: 340
Hoefs v. Short, 114 Tex. 501, 273 S.W. 785 (1925) .....I: 29, 31, 40, 44, 50, 52, 54, 64, 68-70, 244; II: 76

Honaker v. Reeves County W.I. Dist. No. 1, 152 S.W.(2d) 454 (Tex. Civ. App. 1941) ..... I: 619; II: 106, 133, 142; III: 513
Houston v. Renault, Inc., 431 S.W.(2d) 322 (Tex. Sup. Ct. 1968) ..... II: 546, 548, 555
Houston & T.C. R.R. v. East, 98 Tex. 146, 81 S.W. 279 (1904) ..... II: 650, 743, 744; III: 528, 529
Houston Transp. Co. v. San Jacinto Rice Co., 163 S.W. 1023 (Tex. Civ. App. 1914) ..... II: 31, 237, 341, 401
Humble Oil & Refining Co. v. State, 162 S.W.(2d) 119 (Tex. Civ. App. 1942) ..... II: 393, 428
Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 225 (1927) ..... I: 33, 70, 95; II: 39, 73, 74, 130, 134, 136, 231-233, 237, 253, 386, 387, 409, 410; III: 520, 523-524
Hunstock v. Limburger, 115 S.W. 327 (Tex. Civ. App. 1909) ..... I: 455, 474
Imperial Irr. Co. v. Jayne, 104 Tex. 395, 138 S.W. 575 (1911) ..... III: 506
International & G.N.R.R. v. Reagan, 121 Tex. 233, 49 S.W.(2d) 414 (1932) ..... I: 39, 56, 66, 68, 71; II: 536, 541
Jackson v. Knight, 268 S.W. 773 (Tex. Civ. App. 1925) ..... I: 88, 89
Jackson v. Nacogdoches, 188 S.W.(2d) 237 (Tex. Civ. App. 1945) ..... II: 392, 393
Jones v. Johnson, 6 Tex. Civ. App. 262, 25 S.W. 650 (1894) ..... I: 115
King v. Schaff, 204 S.W. 1039 (Tex. Civ. App 1918) ..... I: 128; II: 80, 120, 230, 232
Knight v. Durham, 136 S.W. 591, 594 (Tex. Civ. App. 1911) ..... I: 88, 89, 94
Kountz v. Carpenter, 206 S.W. 109 (Tex. Civ. App. 1918) ..... II: 343, 373, 378
Kuehler v. Texas Power Corp., 9 S.W.(2d) 435 (Tex. Civ. App. 1928) ..... II: 116, 126, 235, 238; III: 523
Lakeside Irr. Co. v. Kirby, 166 S.W. 715 (Tex. Civ. App. 1914) ..... II: 73, 121, 136, 232, 402; III: 520, 523, 524
Lakeside Irr. Co. v. Markham Irr. Co., 116 Tex. 65, 285 S.W. 593 (1926) ..... I: 144, 153, 446, 461; II: 218, 503: III: 512
Lower Nueces River Water Supply Dist. v. Cartwright, 274 S.W.(2d) 199, (Tex. Civ. App. 1954) ..... I: 248; II: 283, 285, 321; III: 512, 514
Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 81 S.W.(2d) 653 (1935) ..... II: 23, 26, 124, 134; III: 518, 523
Manry v. Robison, 122 Tex. 213, 56 S.W.(2d) 438 (1932) ..... I: 90
Martin v. Burr, 111 Tex. 57, 228 S.W. 543 (1921) ..... II: 108, 110, 115, 120, 341, 344, 355, 360, 368, 374, 378, 384, 389, 395, 404, 409, 410, 415; III: 506, 519, 522, 523
Matagorda Canal Co. v. Markham Irr. Co., 154 S.W. 1176 (Tex. Civ. App. 1913) ..... I: 222; II: 43, 56, 58, 90, 142, 198, 199, 235, 498; III: 512, 519, 522, 525, 527
Maufrais v. State, 142 Tex. 559, 180 S.W.(2d) 144 (1944) ..... I: 42, 91
McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S.W. 398 (1893) ..... I: 260; II: 28, 199, 232, 252; III: 505-506, 518, 520, 525
McKenzie v. Beason, 140 S.W. 246 (Tex. Civ. App. 1911) ..... II: 66, 141, 232
Miller v. Ballinger, 204 S.W. 1173 (Tex. Civ. App. 1918) ..... II: 191, 226, 233
Miller v. Letzerich, 121 Tex. 248, 49 S.W.(2d) 404 (1932) ..... II: 546-548
Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926) ..... I: 16, 41, 42, 70, 72, 76, 120, 128, 142, 181, 184, 185, 189, 194, 221, 222, 244, 315, 332, 338, 349, 405; II: 2, 13, 17, 20, 21, 38, 55, 68, 69, 71, 80, 83, 85, 92, 95, 115, 198, 199, 345, 352, 364, 401, 409, 439, 589, 744; III: 505, 507, 508, 510. 516-522, 525-528
Mudd Creek Irr. Agric. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S.W. 1078 (1889) ..... I: 189; II: 25, 34, 143, 144, 199, 341, 362, 401, 409; III: 503, 522, 525
Mudge v. Hughes, 212 S.W. 819 (Tex. Civ. App. 1919) ..... I: 151
New Odorless Sewerage Co. v. Wisdom, 30 Tex. Civ. App. 224, 70 S.W. 354 (1902) ..... II: 30, 209
Nueces County W.C. & I. Dist. No. 3 v. Texas Water Rights Comm'n, 481 S.W.(2d) 930 (Tex. Civ. App. 1972) ..... III: 514
Parker v. El Paso County W.I. Dist. No. 1, 116 Tex. 631, 297 S.W. 737 (1927) ..... I: 155, 156, 603; II: 22, 26, 82, 85, 143; III: 518, 521

Pecos County W.C. & I. Dist. No. 1 v. Williams, 271 S.W.(2d) 503 (Tex. Civ. App. 1954) ..... I: 58; II: 226, 395, 622, 650, 743-745
Perryton v. Houston, 454 S.W.(2d) 435 (Tex. 1970) ..... II: 555
Pleasonton v. Lower Nuces River Supply Dist., 263 S.W.(2d) 797 (Tex. Civ. App. (1953) ..... II: 745
Reed v. State, 175 S.W.(2d) 473 (Tex. Civ. App 1943) ..... II: 123
Rhodes v. Whitehead, 27 Tex. 304 (1863) ..... I: 188; II: 85, 112, 115, 126, 139, 237, 333, 341, 403, 409, 426; III: 520, 522, 523
Richter v. Granite Mfg. Co., 107 Tex. 58, 174 S.W. 284 (1915) ..... II: 34, 36; III: 518
Risien v. Brown, 73 Tex. 135, 10 S.W. 661 (1889) ..... II: 34, 38, 430, 434, 439
Robinson v. Robbins Petroleum Corp., 501 S.W.(2d) 865 (Tex. Sup. Ct. 1973) ... III: 529
Ross v. Green, 135 Tex. 103, 139 S.W.(2d) 565 (1940) ..... I: 91
Samples v. Buckman, 246 S.W.(2d) 283 (Tex. Civ. App. 1951) ..... II: 547
San Antonio v. Texas Water Comm'n, 392 S.W.(2d) 200 (Tex. Civ. App. 1962) ... I: 326
San Antonio v. Texas Water Comm'n, 407 S.W.(2d) 752 (Tex. Sup. Ct. 1966) ..... I: 246, 426, 521, 542, 573; III: 511, 514
Santa Rosa Irr. Co. v. Pecos River Irr. Co., 92 S.W. 1014 (Tex. Civ. App. 1906) ... II: 34, 66, 141, 199, 232, 395; III: 506, 525
Scoggins v. Cameron County W.I. Dist. No. 15, 264 S.W.(2d) 169 (Tex. Civ. App. 1954) ..... I: 570; II: 226, 235, 403; III: 512
Seaway Co. v. Attorney General, 375 S.W.(2d) 923 (Tex. Civ. App. 1964) ..... II: 392
South Texas Water Co. v. Bieri, 247 S.W.(2d) 268 (Tex. Civ. App. 1952) ..... I: 138
Southern Canal Co. v. State Bd. of Water Engineers, 311 S.W.(2d) 938 (Tex. Civ. App. 1958) ..... I: 322
Southern Canal Co. v. State Bd. of Water Engineers, 159 Tex. 227, 318 S.W.(2d) 619 (1958), aff'g 311 S.W.(2d) 931 (Tex. Civ. App. 1958) ..... I: 322; III: 509
St. Paul Fire & Marine Ins. Co. v. Carroll, 106 S.W.(2d) 757 (Tex. Civ. App. 1937) ..... I: 30, 31, 33, 65, 68, 111
Stacy v. Delery, 57 Tex. Civ. App. 242, 122 S.W. 300 (1909) ..... II: 84, 129, 130; III: 521, 524
State v. Arnim, 173 S.W.(2d) 503 (Tex. Civ. App. 1943) ..... II: 41; III: 519
State v. Bradford, 121 Tex. 515, 50 S.W.(2d) 1065 (1932) ..... I: 5
State v. Bryan, 210 S.W.(2d) 455 (Tex. Civ. App. 1948) ..... II: 429
State v. Hidalgo County W.C. & I. Dist. No. 18, No. B-20576, 93rd Dist. Ct., Hidalgo County, Tex. ..... I: 185; II: 235
State v. Hidalgo County W.C. & I. Dist. No. 18, 443 S.W.(2d) 728 (Tex. Civ. App. 1969) ..... I: 157, 356-358, 419; II: 17, 199, 233, 280, 321; III: 517, 527
State v. Starley, 413 S.W.(2d) 451 (Tex. Civ. App. 1967) ..... II: 451; III: 532
State v. Valmont Plantations, No. B-20791, 93rd Dist. Ct. Hidalgo County, Texas (1959) ..... I: 157, 185; II: 58, 129; III: 519-521, 524, 526
State v. Valmont Plantations, 346 S.W.(2d) 853 (Tex. Civ. App. 1961) ..... I: 157, 180, 184, 185, 222, 285; II: 13, 17, 41, 59, 68, 115, 130, 199; III: 517, 518, 520
Stratton v. West, 201 S.W.(2d) 80 (Tex. Civ. App. 1947) ..... II: 232, 410
Stratton v. West & Bennett, 27 Tex. Civ. App. 525, 66 S.W. 244 (1901) ..... II: 36, 41
Sun Oil Co. v. Whitaker, 483 S.W.(2d) 808 (Tex. Sup. Ct. 1972) ..... III: 529
Sun Underwriters Ins. Co. of New York v. Bunkley, 233 S.W.(2d) 153 (Tex. Civ. App. 1950) ..... I: 64, 65, 70, 76; II: 540, 541
Taylor Fishing Club v. Hammett, 88 S.W.(2d) 127 (Tex. Civ. App. 1935) ..... I: 110, 114; II: 123; III: 523
Teel v. Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 104 S.W. 420 (1907) ..... II: 31, 196, 209; III: 521
Tennyson v. Green, 217 S.W.(2d) 179 (Tex. Civ. App. 1948) ..... II: 547
Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927) ..... I: 57, 60, 62, 76, 138, 156, 222, 486; II: 23, 34, 36, 38, 39, 72, 134, 136, 232, 439, 622, 743, 744, 746; III: 523, 526, 528, 529
Texas Water Rights Comm'n v. Wright, 464 S.W.(2d) 642 (Tex. Sup. Ct. (1971) ..... II: 285, 286, 305, 321, 322; III: 514, 515
Tolle v. Correth, 31 Tex. 362 (Military Ct. 1868) ..... I: 4, 188, 189, 221; II: 78, 112, 139; III: 503, 504, 516, 522

Toyaho Creek Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S.W. 101 (1899) ..... II: 359, 622; III: 522
Turner v. Big Lake Oil Co., 62 S.W.(2d) 491 (Tex. Civ. App. 1933) ..... I: 41, 47, 65
Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.(2d) 221 (1936) ..... I: 41, 47, 65; II: 563
Valmont Plantations v. Texas, 163 Tex. 381, 355 S.W.(2d) 502 (1962) ..... I: 157, 180, 184, 185, 189, 194, 222, 285, 357; II: 2, 3, 13, 14, 17, 41, 59, 68, 115, 130, 199; III: 517, 522, 525, 527
Ward County W.I. Dist. No. 2 v. Ward County Irr. Dist. No. 1, 222 S.W. 665 (Tex. Civ. App. 1920) ..... II: 498
Ward County W.I. Dist. No. 3 v. Ward County Irr. Dist. No. 1, 237 S.W. 584 (Tex. Civ. App. 1921) ..... I: 223, 620, 630; II: 133, 143, 144; III: 513, 527
Ward County W.I. Dist. No. 3 v. Ward County Irr. Dist. No. 1, 117 Tex. 10, 295 S.W. 917 (1927) ..... I: 223, 620, 627, 630; II: 24, 91, 133, 506, 510; III: 513, 522, 527
Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905) ..... I: 38, 189, 194; II: 23, 36, 50, 52, 53, 56, 57, 67, 78, 84, 88, 105, 112, 115, 134, 205, 365, 402, 499, 519, 622; III: 503, 506, 516, 519, 522-524
Weatherly v. Jackson, 123 Tex. 213, 71 S.W.(2d) 259 (1934) ..... II: 392, 428
Welder v. State, 196 S.W. 868 (Tex. Civ. App. 1917) ..... I: 114
Wichita Falls v. Bruner, 165 S.W.(2d) 480 (Tex. Civ. App. 1942) ..... III: 512
Willis v. Neches Canal Co., 16 S.W.(2d) 266 (Tex. Comm. App. 1929) ..... I: 559
Wilson v. Hagins, 50 S.W.(2d) 797 (Tex. Comm. App. 1932) ..... I: 94
Wilson v. Reeves County W.I. Dist. No. 1, 256 S.W. 346 (Tex. Civ. App. 1923) ..... II: 144, 499
Woody v. Durham, 267 S.W.(2d) 219 (Tex. Civ. App. 1954) ..... II: 48, 83, 230-232, 387, 388, 410; III: 518
Zavala County W.I. Dist. No. 3 v. Rodgers, 145 S.W.(2d) 919 (Tex. Civ. App. 1940) ..... I: 222

Utah

Adams v. Portage Irr., Res. & Power Co., 95 Utah 1, 72 Pac.(2d) 648 (1937) ..... I: 12, 137, 140, 145, 447, 535, 539, 573, 593; II: 406, 407, 623, 626; III: 547, 553, 555, 557, 558, 562
American Fork Irr. Co. v. Linke, 121 Utah 90, 239 Pac.(2d) 188 (1951) ..... I: 320, 338, 413, 632
Anderson v. Hamson, 50 Utah 151, 167 Pac. 254 (1917) ..... I: 472; III: 554
Baird v. Upper Canal Irr. Co., 70 Utah 57, 257 Pac. 1060 (1927) ..... I: 148, 606
Bastian v. Nebeker, 49 Utah 390, 163 Pac. 1092 (1916) ..... II: 566, 625, 753
Baugh v. Criddle, 19 Utah(2d) 361, 431 Pac.(2d) 790 (1967) ..... II: 297; III: 560
Bear Lake & River Waterworks & Irr. Co. v. Ogden, 8 Utah 494, 33 Pac. 135 (1893) ..... I: 148
Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. 892 (1897) ..... I: 620; II: 195; III: 558
Big Cottonwood Tanner Ditch Co. v. Hyland Realty Inc., 8 Utah(2d) 341, 334 Pac.(2d) 343 (1957) ..... I: 648
Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 197, 159 Pac.(2d) 596 (1945), 174 Pac.(2d) 148 (1946) ..... I: 12, 648
Big Cottonwood Tanner Ditch Co. v. Shurtliff, 49 Utah 569, 164 Pac. 856 (1917) ..... I: 621; III: 545, 558
Big Cottonwood Tanner Ditch Co. v. Shurtliff, 56 Utah 196, 189 Pac. 587 (1919) ..... I: 646, 608; II: 213, 420, 565; III: 559
Bishop v. Duck Creek Irr. Co., 121 Utah 290, 241 Pac.(2d) 162 (1952) ..... I: 433; III: 540, 552
Bountiful City v. DeLuca, 77 Utah 107, 292 Pac. 194 (1930) ..... I: 432, 539; III: 554, 555, 564
Brian v. Fremont Irr. Co., 112 Utah 220, 186 Pac.(2d) 588 (1947) ..... I: 12, 575
Brady v. McGonagle, 57 Utah 424, 195 Pac. 188 (1921) ..... I: 406; III: 549
Brimm v. Cache Valley Banking Co., 2 Utah(2d) 93, 269 Pac.(2d) 859 (1954) ..... I: 461, 482, 484; II: 623; III: 554

Bullock v. Hanks, 22 Utah(2d) 308, 452 Pac.(2d) 866 (1969) ..... III: 549
Bullock v. Tracy, 4 Utah(2d) 370, 294 Pac.(2d) 707 (1956) .....I: 320, 323, 338, 406; II: 625, 749, 751; III: 542, 549, 564
Caldwell v. Erickson, 61 Utah 265, 213 Pac. 182 (1923) ..... III: 541
Calton v. Wadley, 11 Utah(2d) 84, 355 Pac.(2d) 69 (1960) ..... II: 624, 626, 751,755; III: 561
Carbon Canal Co. v. Sanpete Water Users Assn., 10 Utah(2d) 376, 353 Pac.(2d) 916 (1960) ..... I: 374, 377; III: 544-545
Carson Canal Co. v. Sanpete Water Users Assn., 19 Utah(2d) 6, 425 Pac.(2d) 405, (1967) ..... I: 376; III: 545
Cassity v. Castagno, 10 Utah(2d) 16, 347 Pac.(2d) 834 (1959) ..... II: 393, 623; III: 556
Center Creek Water & Irr. Co. v. Lindsay, 21 Utah 192, 60 Pac. 559 (1900) ..... II: 370, 373
Chandler v. Utah Copper Co., 43 Utah 479, 135 Pac. 106 (1913) .....II: 751; III: 567
Clark v. North Cottonwood Irr. & Water Co., 79 Utah 425, 11 Pac.(2d) 300 (1932) ..... I: 602; II: 406, 578; III: 562
Cleary v. Daniels, 50 Utah 494, 167 Pac. 820 (1917) ..... I: 504; II: 594, 623, 624; III: 546
Conant v. Deep Creek & Curlew Valley Irr. Co., 23 Utah 627, 66 Pac. 188 (1901) ..... I: 455; II: 506; III: 553, 554
Coray v. Holbrook. 40 Utah 325. 121 Pac. 572 (1912) ..... I: 286; III: 539
Cortella v. Salt Lake City, 93 Utah 236, 72 Pac.(2d) 630 (1937) ..... I: 461
County Water System v. Salt Lake City, 3 Utah(2d) 46, 278 Pac.(2d) 285 (1954) ..... I: 248; III: 545
Crane v. Winsor, 2 Utah 248 (1878) ..... I: 176, 234, 446, 448; II: 205; III: 538, 557
Crawford v. Lehi Irr. Co., 10 Utah(2d) 165, 350 Pac.(2d) 147 (1960) .....I: 441, 442, 494, 495, 501, 591, 620, 621; III: 552, 554, 558
Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. 244 (1898) .....II: 752
Current Creek Co. v. Andrews, 9 Utah(2d) 324, 344 Pac.(2d) 528 (1959) .....II: 754, 755; III: 565, 566
Dameron Valley Res. & Canal Co. v. Bleak, 61 Utah 230, 211 Pac. 974 (1922) ..... I: 580, 620, 621; III: 558
Deseret Livestock Co. v. Hooppiania, 66 Utah 25, 239 Pac. 479 (1925) ..... I: 317; II: 262, 317, 324, 624-626; III: 542
Deseret Livestock Co. v. Sharp, 123 Utah 353, 259 Pac.(2d) 607 (1953) .....II: 624
Deseret Livestock Co. v. State, 110 Utah 239, 171 Pac.(2d) 401 (1946) ..... I: 528; III: 546
Duchesne County v. Humpherys, 106 Utah 332, 148 Pac.(2d) 338 (1944) ..... III: 543
Eardley v. Terry, 94 Utah 367, 77 Pac.(2d) 362 (1938) ..... I: 406; III: 549
East Bench Irr. Co. v. Deseret Irr. Co., 2 Utah(2d) 170, 271 Pac.(2d) 449 (1954) ..... I: 571, 577, 628; II: 579, 582; III: 556, 558
East Bench Irr. Co. v. Utah, 5 Utah(2d) 235, 300 Pac.(2d) 603 (1956) ..... I: 323; II: 207
Eden Irr. Co. v. District Ct., 61 Utah 103, 211 Pac. 957 (1922) ..... I: 12, 339; III: 541
Elliott v. Whitmore, 7 Utah 49, 24 Pac. 673 (1890) ..... III: 547
Elliot v. Whitmore, 23 Utah 342, 65 Pac. 70 (1901) .....I: 378; II: 431; III: 544, 563
Ephraim Willow Creek Irr. Co. v. Olson, 70 Utah 95, 258 Pac. 216 (1927) ..... II: 352, 367, 368
Fairfield Irr. Co. v. Carson, 122 Utah 225, 247 Pac.(2d) 1004 (1952) ..... III: 542
Fairfield Irr. Co. v. White, 18 Utah(2d) 93, 416 Pac.(2d) 641 (1966) ..... II: 755; III: 551, 565
Falkenberg v. Neff, 72 Utah 258, 69 Pac. 1008 (1928) ..... II: 219
Fenstermaker v. Jorgensen, 53 Utah 325, 178 Pac. 760 (1919) .....I: 579; III: 558
Francis v. Roberts, 73 Utah 98, 272 Pac. 633 (1928) ..... II: 363, 401
Garner v. Anderson, 67 Utah 553, 248 Pac. 496 (1926) ..... I: 441; III: 553
Garns v. Rollins, 41 Utah 260, 125 Pac. 867 (1912) ..... II: 753

Genola v. Santaquin, 96 Utah 88, 80 Pac.(2d) 930 (1938) ..... I: 478, 481, 564; III: 556
Gill v. Malan, 29 Utah 431, 82 Pac. 471 (1905) ..... II: 263, 271, 390, 626
Glenwood Irr. Co. v. Myers, 24 Utah(2d) 78, 465 Pac.(2d) 1013 (1970) ..... III: 560
Glover v. Utah Oil Refining Co., 62 Utah 174, 218 Pac. 955 (1923) ..... II: 752; III: 567
Goodwin v. Tracy, 6 Utah(2d) 1, 304 Pac.(2d) 964 (1956) ..... II: 750; III: 545
Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 Pac. 852 (1918) ..... I: 576; III: 538, 557
Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. 765 (1898) ..... I: 285, 629; III: 538, 546, 559
Hammond v. Johnson, 94 Utah 20, 66 Pac.(2d) 894 (1937) ..... I: 152, 153; II: 258, 266, 317, 324, 325, 353, 367, 371, 388, 406, 407, 626; III: 561, 562
Hanson v. Salt Lake City, 115 Utah 404, 205 Pac.(2d) 255 (1949) ..... I: 317; II: 651, 749, 750, 753; III: 542, 564, 566
Hardy v. Beaver County Irr. Co., 65 Utah 28, 234 Pac. 524 (1924) ..... I: 503, 645, 649; II: 445, 446; III: 546, 554, 556
Harvey v. Haights Bench Irr. Co., 7 Utah(2d) 58, 318 Pac.(2d) 343 (1957) ..... I: 648
Hatch v. Adams, 7 Utah(2d) 73, 318 Pac.(2d) 633 (1957) ..... I: 462, 482, 484; III: 554
Herriman Irr. Co. v. Butterfield Min. Co., 19 Utah 453, 57 Pac. 537 (1899) ..... I: 605; II: 204
Herriman Irr. Co. v. Keel, 25 Utah 96, 69 Pac. 719 (1902) ..... I: 604-605; II: 272, 651
Highland Boy Gold Min. Co. v. Strickley, 28 Utah 215, 78 Pac. 296 (1904) ..... I: 275, 277
Holman v. Christensen, 73 Utah 389, 274 Pac. 457 (1929) ..... I: 32, 33, 38, 58; II: 623, 624
Horne v. Utah Oil Refining Co., 59 Utah 279, 202 Pac. 815 (1921) ..... II: 651, 752; III: 567
Howcroft v. Union & Jordan Irr. Co., 25 Utah 311, 71 Pac. 487 (1903) ..... II: 566, 625, 751; III: 567
Huber v. Deep Creek Irr. Co., 6 Utah(2d) 15, 305 Pac.(2d) 478 (1956) ..... III: 545
Huntsville Irr. Assn. v. District Ct., 72 Utah 431, 270 Pac. 1090 (1928) ..... II: 445, 463
In re Application 7600 to Appropriate Water, 73 Utah 50, 272 Pac. 225 (1928) ..... I: 413
In re Bear River Drainage Area, 2 Utah(2d) 208, 271 Pac.(2d) 846 (1954) ..... I: 12, 145, 152; II: 445; III: 553
In re Drainage Area of Bear River in Rich County, 12 Utah(2d) 1, 361 Pac.(2d) 407 (1961) ..... II: 317, 325, 329, 343, 403, 406-407, 415; III: 562
In re Escalante Valley Drainage Area, 11 Utah(2d) 77, 355 Pac.(2d) 64 (1960) ..... I: 530; III: 546
In re Escalante Valley Drainage Area, 12 Utah(2d) 112, 363 Pac.(2d) 777 (1961) ..... II: 312, 317, 325; III: 560-562
In re Use of Water Within Drainage Area of Green River, 12 Utah(2d) 102, 363 Pac.(2d) 199 (1961) ..... II: 403, 406; III: 562
In re Water Rights of Escalante Valley Drainage Area, 10 Utah(2d) 77, 348 Pac.(2d) 679 (1960) ..... I: 503, 576, 649; II: 750; III: 545, 546, 557
Jackson v. Spanish Fork West Field Irr. Co., 119 Utah 19, 223 Pac.(2d) 827 (1950) ..... II: 406, 414
Jensen v. Birch Creek Ranch Co., 76 Utah 356, 289 Pac. 1097 (1930) ..... I: 263, 530, 574; III: 541, 546, 553, 558
Jordan v. Mt. Pleasant, 15 Utah 449, 49 Pac. 746 (1897) ..... I: 94
Justensen v. Olsen, 86 Utah 158, 40 Pac.(2d) 802 (1935) ..... I: 237; II: 651, 749
Kano v. Arcon Corp., 7 Utah(2d) 431, 326 Pac.(2d) 719 (1958) ..... II: 206, 220
Kirk v. Criddle, 12 Utah(2d) 112, 363 Pac.(2d) 777 (1961) ..... II: 755
Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 166 Pac. 309 (1917) ..... I: 263, 531; III: 546, 553

Lasson v. Seely, 120 Utah 679, 238 Pac.(2d) 418 (1951) ..... I: 605; II: 206, 578; III: 556
Lehi Irr. Co. v. Jones, 115 Utah 136, 202 Pac.(2d) 892 (1949) ..... I: 406; II: 582, 623; III: 543, 548, 549
Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 Pac. 867 (1886) ..... I: 396; II: 433; III: 547, 563
Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 Pac. 116 (1930) ..... I: 12, 406, 605, 607; III: 543, 549
Little Cottonwood Water Co. v. Sandy City, 123 Utah 242, 258 Pac.(2d) 440 (1953) ..... II: 749, 751; III: 564
Logan, Hyde Park & Smithfield Canal Co. v. Logan, 72 Utah 221, 269 Pac. 776 (1928) ..... I: 446, 646; III: 557
Mammoth Canal & Irr. Co. v. Burton, Judge, 70 Utah 239, 259 Pac. 408 (1927) ..... I: 649; II: 446
Manning v. Fife, 17 Utah 232, 54 Pac. 111 (1898) ..... I: 433, 575, 638; III: 552, 556, 558, 559
McGarry v. Thompson, 114 Utah 442, 201 Pac.(2d) 288 (1948) ..... III: 543, 548
McKean v. Lasson, 5 Utah(2d) 168, 298 Pac.(2d) 827 (1956) ..... I: 576, 650; III: 557
McKell v. Spanish Fork City, 6 Utah(2d) 92, 305 Pac.(2d) 1097 (1957) ..... II: 536, 538, 541
McNaughton v. Eaton, 121 Utah 394, 242 Pac.(2d) 570 (1952) ..... II: 563, 578, 582; III: 542, 556
McNaughton v. Eaton, 4 Utah(2d) 223, 291 Pac.(2d) 886 (1955) ..... I: 570, 576, 650; III: 557
Mitchell v. Spanish Fork West Field Irr. Co., 1 Utah(2d) 313, 265 Pac.(2d) 1016 (1954) ..... II: 356, 406
Mosby Irr. Co. v. Criddle, 11 Utah(2d) 41, 354 Pac.(2d) 848 (1960) ..... I: 330; III: 542, 547
Mosley v. Johnson, 22 Utah(2d) 348, 453 Pac.(2d) 144 (1969) ..... II: 756
Mountain Lake Min. Co. v. Midway Irr. Co., 47 Utah 346, 149 Pac. 929 (1915) ..... II: 566, 625, 753
Moyle v. Salt Lake City, 111 Utah 201, 176 Pac.(2d) 882 (1947) ..... II: 225
Munroe v. Ivie, 2 Utah 535 (1880) ..... I: 239; III: 538
Munsee v. McKellar, 39 Utah 282, 116 Pac. 1024 (1911) ..... II: 624
Nash v. Alpine Irr. Co., 58 Utah 84, 197 Pac. 603 (1921) ..... I: 564
Nash v. Clark, 27 Utah 158, 75 Pac. 371 (1904) ..... I: 8, 276, 277, 281, 282
Nielson v. Sandberg, 105 Utah 93, 141 Pac.(2d) 696 (1943) ..... I: 273, 278; II: 422; III: 563
N. M. Long & Co. v. Canon-Papanikolas Const. Co., 9 Utah(2d) 307, 343 Pac.(2d) 1100 (1959) ..... II: 756; III: 566
North Point Consol. Irr. Co. v. Utah & S. L. Canal Co., 23 Utah 199, 63 Pac. 812 (1901) ..... II: 219, 220
Oldroyd v. McCrea, 65 Utah 142, 235 Pac. 580 (1925) ..... I: 141
Ordville Irr. Co. v. Glendale Irr. Co., 17 Utah(2d) 282, 409 Pac.(2d) 616 (1965) ..... III: 544
Orient Min. Co. v. Freckleton, 27 Utah 125, 74 Pac. 652 (1903) ..... II: 433, 626
Park v. Alta Ditch & Canal Co., 23 Utah(2d) 86, 458 Pac.(2d) 625 (1969) ..... III: 556, 557
Patterson v. Ryan, 37 Utah 410, 108 Pac. 1118 (1910) ..... I: 266; II: 623, 624; III: 540
Peterson v. Eureka Hill Min. Co., 53 Utah 70, 176 Pac. 729 (1918) ..... II: 624
Peterson v. Sevier Valley Canal Co., 107 Utah 45, 151 Pac.(2d) 477 (1944) ..... I: 273, 278; III: 563
Peterson v. Wood, 71 Utah 77, 262 Pac. 828 (1927) ..... II: 566, 545, 625, 753
Piute Res. & Irr. Co. v. West Panguitch Irr. & Res. Co., 12 Utah(2d) 168, 364 Pac.(2d) 113 (1961) ..... III: 560
Piute Res. & Irr. Co. v. West Panguitch Irr. & Res. Co., 13 Utah(2d) 6, 367 Pac.(2d) 855 (1962) ..... III: 560
Poynter v. Chipman, 8 Utah 442, 32 Pac. 690 (1893) ..... III: 564

Progress Co. v. Salt Lake City, 53 Utah 596, 173 Pac. 705 (1918) ..... II: 370
Promontory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. 47 (1904) ..... II: 263, 271, 626; III: 561
Provo Bench Canal & Irr. Co. v. Lake, 5 Utah(2d) 53, 296 Pac.(2d) 723 (1956) ..... II: 582
Rasmussen v. Moroni Irr. Co., 56 Utah 140, 189 Pac. 572 (1920) ..... II: 582, 753
Reese v. Qualtrough, 48 Utah 23, 156 Pac. 955 (1916) ..... I: 148
Reimann v. Richards, 12 Utah(2d) 109, 363 Pac.(2d) 499 (1961) ..... I: 323
Richlands Irr. Co. v. Westview Irr. Co., 96 Utah 403, 80 Pac.(2d) 458 (1938) ..... I: 50, 54, 56, 59, 447; II: 563; III: 553
Riordan v. Westwood, 115 Utah 215, 203 Pac.(2d) 922 (1949) ..... I: 266; II: 624, 625, 651, 749, 752; III: 564, 567
Robberts v. Gribble, 43 Utah 411, 134 Pac. 1014 (1913) ..... II: 578
Robinson v. Schoenfield, 62 Utah 233, 218 Pac. 1041 (1923) ..... I: 372, 387; II: 624; III: 540, 547
Rocky Ford Canal Co. v. Cox, 92 Utah 148, 59 Pac.(2d) 935 (1936) ..... I: 620, 621; II: 445; III: 552, 558
Rocky Ford Irr. Co. v. Kents Lake Res. Co., 104 Utah 202, 135 Pac.(2d) 108 (1943) ..... I: 406, 446; II: 300, 312, 317; III: 549, 557
Rocky Ford Irr. Co. v. Kents Lake Res. Co., 104 Utah 216, 140 Pac.(2d) 638 (1943) ..... II: 282, 297, 299, 309; III: 561
Salt Lake City v. Anderson, 106 Utah 306, 148 Pac.(2d) 350 (1944) ..... II: 463, 465, 466
Salt Lake City v. Boundary Springs Water Users Assn., 2 Utah(2d) 141, 270 Pac.(2d) 453 (1954) ..... I: 448, 607, 608, 633; II: 207, 625; III: 557
Salt Lake City v. East Jordan Irr. Co., 40 Utah 126, 121 Pac. 592 (1911) ..... I: 273
Salt Lake City v. Gardner, 39 Utah 30, 114 Pac. 147 (1911) ..... I: 445, 608; II: 213; III: 544, 559
Salt Lake City v. McFarland, 1 Utah(2d) 257, 265 Pac.(2d) 626 (1954) ..... I: 477, 606; III: 554
Salt Lake City v. Salt Lake City Water & Elec. Power Co., 24 Utah 249, 67 Pac. 672 (1902) ..... I: 142, 144, 383, 433, 441, 576, 608; III: 543, 547, 552, 558, 560
Salt Lake City v. Salt Lake City Water & Elec. Power Co., 25 Utah 456, 71 Pac. 1069 (1903) ..... I: 138, 142, 433, 608; II: 213; III: 552, 560
Salt Lake City v. Telluride Power Co., 82 Utah 607, 17 Pac.(2d) 281 (1932) ..... II: 578
Sanford v. University of Utah, 26 Utah(2d) 285, 488 Pac.(2d) 741 (1971) ..... II: 556
Shield v. Dry Creek Irr. Co., 12 Utah(2d) 98, 363 Pac.(2d) 82 (1961) ..... I: 323; III: 549
Shurtleff v. Salt Lake City, 96 Utah 21, 82 Pac.(2d) 561 (1938) ..... II: 224
Sigurd City v. State, 105 Utah 278, 142 Pac.(2d) 154 (1943) ..... II: 224, 625
Silver King Consol. Min. Co. v. Sutton, 85 Utah 297, 39 Pac.(2d) 682 (1934) ..... I: 442; II: 565, 566, 625; III: 552
Smith v. North Canyon Water Co., 16 Utah 194, 52 Pac. 283 (1898) ..... II: 276, 331, 356, 358, 390
Smith v. Sanders, 112 Utah 517, 189 Pac.(2d) 701 (1948) ..... II: 406, 623; III: 542
Smithfield West Bench Irr. Co. v. Union Cent. Life Ins. Co., 105 Utah 468, 142 Pac.(2d) 866 (1943) ..... III: 556
Smithfield West Bench Irr. Co. v. Union Cent. Life Ins. Co., 113 Utah 356, 195 Pac.(2d) 249 (1948) ..... II: 269, 577-579, 582
Sowards v. Meagher, 37 Utah 212, 108 Pac. 1112 (1910) ..... I: 372, 381; III: 545, 553, 556
Spanish Fork Westfield Irr. Co. v. District Ct., 99 Utah 527, 104 Pac.(2d) 353 (1940) ..... I: 145; II: 466; III: 541, 542, 564
Spring Creek Irr. Co. v. Zollinger, 58 Utah 90, 197 Pac. 737 (1921) ..... I: 399, 629; II: 362, 403; III: 547, 559
St. George City v. Kirkland, 17 Utah(2d) 292, 409 Pac.(2d) 970 (1966) ..... III: 556
State v. California Packing Corp., 105 Utah 182, 141 Pac.(2d) 386 (1943) ..... I: 450
State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927) ..... I: 114, 129
Stookey v. Green, 53 Utah 311, 178 Pac. 586 (1919) ..... II: 578, 625

Stowell v. Johnson, 7 Utah 215, 26 Pac. 290 (1891) ..... I: 14, 176, 180; II: 14; III: 564
Stubbs v. Ercanbrack, 13 Utah(2d) 45, 368 Pac.(2d) 461 (1962) .....I: 444; II: 578, 756; III: 553, 567
Sullivan v. Northern Spy Min. Co., 11 Utah 438, 40 Pac. 709 (1895) .....II: 651, 752; III: 553
Syrett v. Tropic & East Fork Irr. Co., 97 Utah 56, 89 Pac.(2d) 474 (1939) .....III: 556, 559
Tanner v. Bacon, 103 Utah 494, 136 Pac.(2d) 957 (1943) .....I: 4, 403, 406, 413, 432; III: 541, 549-551
Tanner v. Humphreys, 87 Utah 164, 48 Pac.(2d) 484 (1935) ..... I: 632
Tanner v. Provo Res. Co., 76 Utah 335, 289 Pac. 151 (1930) .....II: 432, 435; III: 559, 563
Tanner v. Provo Res. Co., 78 Utah 158, 2 Pac.(2d) 107 (1931) .....III: 543
Tanner v. Provo Res. Co., 99 Utah 139, 98 Pac.(2d) 695 (1940) .....I: 366, 633; II: 324, 325, 433; III: 561, 563
Thomas v. Butler, 77 Utah 402, 276 Pac. 597 (1931) .....II: 624
Thompson v. Mckinney, 91 Utah 89, 63 Pac.(2d) 1056 (1937) ....I: 461, 472; III: 554
Torsak v. Rukavina, 67 Utah 166, 246 Pac. 367 (1926) .....I: 317; III: 542, 543
United States v. Caldwell, 64 Utah 490, 231 Pac. 434 (1924) .....I: 578, 603, 605, 607, 608, 631, 646, 649; II: 213; III: 558, 560
United States v. District Ct., 121 Utah 1, 238 Pac.(2d) 1132 (1951) .....I: 322, 413, 628; III: 549
United States v. District Ct., 121 Utah 18, 242 Pac.(2d) 774 (1952) .....I: 323; III: 563
Utah Copper Co. v. Stephen Hayes Estate, 83 Utah 545, 31 Pac.(2d) 624 (1934) .....II: 752; III: 568
Utah Metal & Tunnel Co. v. Groesbeck, 62 Utah 251, 219 Pac. 248 (1923) .....I: 26, 148
Utah State Road Comm'n v. Hardy Salt Co., 26 Utah(2d) 143, 486 Pac.(2d) 391 (1971) .....III: 564
Wasatch Irr. Co. v. Fulton, 23 Utah 466, 65 Pac. 205 (1901) .....II: 373, 402
Wayman v. Murray City Corp., 23 Utah(2d) 97, 458 Pac.(2d) 861 (1969) .....II: 754; III: 566
Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 Pac.(2d) 634 (1943) ..... II: 303, 310, 314, 317, 325, 351, 355, 368, 370-372, 394, 395, 407, 433; III: 540, 561-563
West Point Irr. Co. v. Moroni & Mt. Pleasant Irr. Ditch Co., 21 Utah 229, 61 Pac. 16 (1900) .....II: 227
Whitmore v. Murray City, 107 Utah 445, 154 Pac.(2d) 748 (1944) .....I: 397, 576; III: 543, 553, 558
Whitmore v. Salt Lake City, 89 Utah 387, 57 Pac.(2d) 726 (1936) .....I: 263, 444; III: 553
Whitmore v. Utah Fuel Co., 42 Utah 470, 131 Pac. 907 (1913) .....II: 224, 625
Whitmore v. Welch, 114 Utah 578, 201 Pac.(2d) 954 (1949) .....I: 406; II: 315; III: 549
Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 Pac. 943 (1900) .....II: 624, 752
Wrathall v. Johnson, 86 Utah 50, 40 Pac.(2d) 755 (1935) .....I: 234, 237, 285, 317; II: 651, 659, 749; III: 537, 538, 542
Yardley v. Swapp, 12 Utah(2d) 140, 264 Pac.(2d) 4 (1961) .....III: 541
Yates v. Newton, 59 Utah 105, 202 Pac. 208 (1921) ..... I: 12; II: 625
Yeager v. Woodruff, 17 Utah 361, 53 Pac. 1045 (1898) .....II: 364

Washington

Alexander v. Muenscher, 7 Wash.(2d) 557, 110 Pac.(2d) 625 (1941) .....I: 32, 38, 39, 44, 56, 58, 66; II: 135, 537, 538; III: 594

Allen v. Roseburg, 70 Wash. 422, 126 Pac. 900 (1912) ..... II: 331, 393, 395, 398, 399; III: 590, 591
Allison v. Linn, 139 Wash. 474, 247 Pac. 731 (1926) ..... I: 31, 37, 58, 67, 68, 71; II: 627
Ames Lake Community Club v. State, 69 Wash.(2d) 769, 420 Pac.(2d) 363 (1966) ..... III: 595
Atkinson v. Washington Irr. Co., 44 Wash. 75, 86 Pac. 1123 (1906) ..... III: 592
Avery v. Johnson, 59 Wash. 332, 109 Pac. 1028 (1910) ..... I: 264, 570; III: 587
Bach v. Sarich, 74 Wash.(2d) 575, 445 Pac.(2d) 648 (1968) ..... II: 83, 122, 123; III: 595
Barnes v. Belsaas, 73 Wash. 205, 131 Pac. 817 (1913) ..... II: 401; III: 591
Benton v. Johncox, 17 Wash. 277, 49 Pac. 495 (1897) ..... I: 154, 197, 223, 224, 257; II: 22, 34, 36, 119; III: 572, 592, 593, 596-598
Berg v. Yakima Valley Canal Co., 83 Wash. 451, 145 Pac. 619 (1915) ..... I: 462, 481
Bernot v. Morrison, 81 Wash. 538, 13 Pac. 104 (1914) ..... I: 155, 174, 223; III: 593, 595, 596, 598
Bjorvatn v. Pacific Mechanical Constr. Co., 77 Wash.(2d) 563, 464 Pac.(2d) 432 (1970) ..... III: 603, 604
Botton v. State, 69 Wash.(2d) 751, 420 Pac.(2d) 352 (1966) ..... III: 595, 596, 600
Brand v. Lienkaemper, 72 Wash. 547, 130 Pac. 1147 (1913) ..... I: 591; II: 337, 356, 368; III: 591
Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923) ..... I: 11, 197, 224; II: 3, 14, 24, 80, 101, 136, 200, 627; III: 593, 595, 599, 600
Cass v. Dicks, 14 Wash. 75, 44 Pac. 113 (1896) ..... I: 81, 82; II: 540, 550
Church v. Barnes, 175 Wash. 327, 27 Pac.(2d) 690 (1933) ..... III: 596, 598
Church v. State, 65 Wash. 50, 117 Pac. 711 (1911) ..... II: 390, 629
Colburn v. Winchell, 97 Wash. 27, 165 Pac. 1078 (1917) ..... I: 138, 139; III: 593, 595
Collela v. King County, 72 Wash.(2d) 386, 433 Pac.(2d) 154 (1967) ..... II: 551
Conger v. Pierce County, 116 Wash. 27, 198 Pac. 377 (1921) ..... I: 83
Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28 (1892) ..... I: 138, 139; II: 23; III: 592-594
Dahlgren v. Chicago, M. & P.S. R.R., 85 Wash. 395, 148 Pac. 567 (1915) ..... I: 38; II: 536, 538, 540
Dement Bros. Co. v. Walla Walla, 58 Wash. 60, 107 Pac. 1038 (1910) ..... II: 70
De Ruwe v. Morrison, 28 Wash.(2d) 797, 184 Pac.(2d) 273 (1947) ..... I: 31, 82, 99, 100
Dickey v. Maddux, 48 Wash. 411, 93 Pac. 1090 (1908) ..... II: 628, 629
Dontanello v. Gust, 86 Wash. 268, 150 Pac. 420 (1915) ..... II: 398, 414, 422, 629; III: 590, 591
Downie v. Renton, 167 Wash. 374, 9 Pac.(2d) 372 (1932) ..... II: 347, 351, 352, 356, 357, 367, 369, 401-403; III: 590, 591
Drake v. Smith, 54 Wash.(2d) 57, 337 Pac.(2d) 1059 (1959) ..... I: 224, 258, 450, 472; III: 572, 586, 587, 599
Dunsmuir v. Port Angeles Gas, Water, Elec. Light & Power Co., 24 Wash. 104, 63 Pac. 1095 (1901) ..... I: 138, 139, 149
Eastlake Community Council v. Roanoke Assn., Inc., 82 Wash.(2d) 475, 513 Pac.(2d) 36 (1973) ..... III: 582
Edendale Land Co. v. Morgan, 93 Wash. 554, 161 Pac. 360 (1916) ..... II: 424
Elgin v. Weatherstone, 123 Wash. 429, 212 Pac. 562 (1923) ..... II: 69, 588, 589
Ellis v. Pomeroy Improvement Co., 1 Wash. 572, 21 Pac. 27 (1889) ..... I: 288; III: 572, 573, 577, 586
Evans v. Seattle, 182 Wash. 450, 47 Pac.(2d) 984 (1935) ..... II: 628, 652; III: 602, 603
Farwell v. Brisson, 66 Wash. 305, 119 Pac. 814 (1911) ..... II: 358, 361, 368, 374, 395; III: 595
Funk v. Bartholet, 157 Wash. 584, 289 Pac. 1018 (1930) ..... I: 320, 406, 412
Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314 (1889) ..... I: 28, 35, 223; II: 204, 627, 628; III: 572, 586, 598

Grant Realty Co. v. Ham, Yearsley & Ryrie, 96 Wash. 616, 165 Pac. 495 (1917) ..... I: 279, 376, 383; III: 577, 578
Haberman v. Sander, 166 Wash. 453, 7 Pac.(2d) 563 (1932) ..... I: 631; II: 207; III: 589
Harmon v. Gould, 1 Wash.(2d) 1, 94 Pac.(2d) 749 (1939) ..... II: 540
Harvey v. Northern Pac. Ry., 63 Wash. 669, 116 Pac. 464 (1911) ..... I: 82, 85
Hayward v. Mason, 54 Wash. 653, 104 Pac. 141 (1909) ..... II: 74; III: 597
Healy v. Everett & Cherry Valley Traction Co., 78 Wash. 628, 139 Pac. 609 (1914) ..... I: 82
Hint v. Entus, 37 Wash.(2d) 418, 224 Pac.(2d) 620 (1950) ..... I: 90, 91
Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909) ..... I: 58, 96, 97; II: 78, 440, 593, 594, 627, 629; III: 591
Hunter Land Co. v. Langenour, 140 Wash. 558, 250 Pac. 41 (1926) ..... I: 224; II: 105, 259; III: 578, 586, 589, 594, 598, 599
Hutchinson v. Mt. Vernon Water & Power Co., 49 Wash. 469, 95 Pac. 1023 (1908) ..... I: 245; II: 206; III: 598
In re Ahtanum Creek, 139 Wash. 84, 245 Pac. 758 (1926) ..... I: 57, 264, 321, 622, 631; II: 370, 399, 402, 430, 511, 627, 629; III: 588, 589, 591
In re Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924) ..... I: 197, 223, 224, 264, 380, 495, 638; II: 3, 22, 101, 361, 627; III: 572, 574, 577, 578, 586, 587, 591, 592, 598, 600
In re Crab Creek, 194 Wash. 634, 79 Pac.(2d) 323 (1938) ..... I: 618; III: 575, 588, 611
In re Crab Creek & Moses Lake, 134 Wash. 7, 235 Pac. 37 (1925) ..... I: 124, 321; II: 20, 54, 511; III: 578
In re Doan Creek, 125 Wash. 14, 215 Pac. 343 (1923) ..... I: 223, 378, 380; II: 20; III: 577, 578, 598
In re Deer Creek & Its Tributaries, 171 Wash. 205, 17 Pac.(2d) 856 (1933) ..... III: 575
In re Johnson Creek, 159 Wash. 629, 294 Pac. 566 (1930) ..... I: 33, 45, 54, 60, 62, 68
In re Martha Lake Water Co. No. 1, 152 Wash. 53, 277 Pac. 382 (1929) ..... I: 359; II: 121; III: 596, 598
In re Sinlakekin Creek, 162 Wash. 635, 299 Pac. 649 (1931) ..... I: 16, 197, 223, 224; II: 3, 101; III: 598, 600, 601
In re Stranger Creek & Tributaries in Stevens County, 77 Wash.(2d) 649, 466 Pac.(2d) 508 (1970) ..... II: 20, 54; III: 592, 600, 602, 606
Isaacs v. Barber, 10 Wash. 124, 38 Pac. 871 (1894) ..... I: 288; III: 572, 573
Kalama Elec. Light & Power Co. v. Kalama Driving Co., 48 Wash. 612, 94 Pac. 469 (1908) ..... II: 117, 206; III: 597
Kelly v. Gifford, 63 Wash.(2d) 221, 386 Pac.(2d) 415 (1963) ..... II: 547, 550
Kendall v. Joyce, 48 Wash. 489, 93 Pac. 1091 (1908) ..... II: 22; III: 575, 579, 592
King County v. Boeing Co., 62 Wash.(2d) 545, 384 Pac.(2d) 122 (1963) ..... II: 550
Kirkland v. Cochrane, 87 Wash. 528, 151 Pac. 1082 (1915) ..... II: 136
Kiser v. Douglas County, 70 Wash. 242, 126 Pac. 622 (1912) ..... II: 392, 629
Lawrence v. Southard, 192 Wash. 287, 73 Pac.(2d) 722 (1937) ..... III: 586
Litka v. Anacortes, 167 Wash. 259, 9 Pac.(2d) 88 (1932) ..... I: 359; III: 595
Longmire v. Smith, 26 Wash. 439, 67 Pac. 246 (1901) ..... I: 288; III: 572, 573, 587
Longmire v. Yakima Highlands Irr. & Land Co., 95 Wash. 302, 163 Pac. 782 (1917) ..... I: 78, 89; II: 69, 95, 248; III: 596
Mack v. Eldorado Water Dist., 56 Wash.(2d) 584, 354 Pac.(2d) 917 (1960) ..... I: 320, 406
Madison v. McNeal, 171 Wash. 669, 19 Pac.(2d) 97 (1933) ..... I: 147, 152, 406, 445, 457; II: 383, 401; III: 585, 586, 591
Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915) ..... I: 629; II: 55, 88, 331, 362, 398, 421, 426; III: 589, 591, 593, 595

Malnati v. Ramstead, 50 Wash.(2d) 105, 309 Pac.(2d) 754 (1957) ..... II: 259, 335, 354, 365, 369, 375, 628; III: 589, 591
Marshland Flood Control Dist. of Snohomish County v. Great N. Ry. Co., 71 Wash.(2d) 365, 428 Pac.(2d) 531 (1968) ..... I: 83
Mason v. Yearwood, 58 Wash. 276, 108 Pac. 608 (1910) ..... II: 78, 205, 398, 628, 629; III: 591
Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901) ..... I: 97, 98
McEvoy v. Taylor, 56 Wash. 357, 105 Pac. 851 (1909) ..... II: 82; III: 594
McFadden v. Ferguson, 99 Wash. 683, 170 Pac. 365 (1918) ..... II: 269
Methow Cattle Co. v. Williams, 64 Wash. 457, 117 Pac. 239 (1911) ..... I: 149, 606; II: 26; III: 593
Meyer v. Tacoma Light & Water Co., 8 Wash. 144, 35 Pac. 601 (1894) ..... III: 602
Miller v. Baker, 68 Wash. 19, 122 Pac. 604 (1912) ..... II: 125; III: 594
Miller v. Eastern R.R. & Lumber Co., 84 Wash. 31, 146 Pac. 171 (1915) ..... II: 540
Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. 996 (1902) ..... I: 600; III: 587
Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641 (1909) ..... I: 602, 604; II: 263, 269, 271, 362, 588, 596, 627, 628; III: 588, 589
Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 318 (1904) ..... II: 131, 206
Morton v. Hines, 112 Wash. 612, 192 Pac. 1016 (1920) ..... I: 82, 85
Murray v. Briggs, 29 Wash. 245, 69 Pac. 765 (1902) ..... I: 462
Naches & Cowiche Ditch Co. v. Weikel, 87 Wash. 224, 151 Pac. 494 (1915) ..... I: 446, 450; III: 587
Narrows Realty Co. v. State, 52 Wash.(2d) 843, 329 Pac.(2d) 836 (1958) ..... I: 131
Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032 (1907) ..... I: 245; III: 572, 592, 595, 597, 598
New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901) ..... II: 63, 118, 597, 598
Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155 (1907) ..... II: 78, 627; III: 594
Ochfoen v. Kominsky, 121 Wash. 60, 207 Pac. 1050 (1922) ..... II: 339, 343; III: 590
Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1899) ..... I: 592, 630; III: 586
Ortel v. Stone, 119 Wash. 500, 205 Pac. 1055 (1922) ..... I: 359, 442, 493; III: 587
Osborn v. Chase, 119 Wash. 476, 205 Pac. 844 (1922) ..... I: 621; II: 126; III: 597
Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076 (1913) ..... II: 652; III: 602
Pays v. Roseburg, 123 Wash. 82, 211 Pac. 750 (1923) ..... I: 58; II: 267, 275, 627; III: 589
Petition of Clinton Water Dist. of Island County, 36 Wash.(2d) 284, 218 Pac.(2d) 309 (1950) ..... I: 359; II: 22, 25, 73, 83, 110, 121; III: 593, 596
Pleasant Valley Irr. & Power Co. v. Barker, 98 Wash. 459, 167 Pac. 1092 (1917) ..... I: 603; III: 588
Pleasant Valley Irr. & Power Co. v. Okanogan Power & Irr. Co., 98 Wash. 401, 167 Pac. 1122 (1917) ..... II: 272; III: 577, 579, 589
Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925) ..... I: 197, 224; II: 3, 23, 73, 80, 101, 627; III: 593, 595, 600
Raymond v. Willapa Power Co., 102 Wash. 278, 172 Pac. 1176 (1918) ..... II: 402
Rhoades v. Barnes, 54 Wash. 145, 102 Pac. 884 (1909) ..... II: 358
Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147 (1894) ..... I: 38, 138, 139, 142, 156; II: 25, 28, 44, 63, 82, 118, 230, 430, 434, 442; III: 591-594, 597
Rogers v. Cation, 9 Wash.(2d) 369, 115 Pac.(2d) 702 (1941) ..... II: 390
Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913) ..... I: 264; II: 262, 264, 266, 353, 361, 384; III: 586, 589, 592
Schumacher v. Brand, 72 Wash. 543, 130 Pac. 1145 (1913) ..... II: 274
Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. 883 (1911) ..... I: 498, 618; III: 587
Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254 (1894) ..... I: 647; II: 83, 127; III: 594, 597
Smith v. Nechanicky, 123 Wash. 8, 211 Pac. 880 (1923) ..... II: 34, 399; III: 591, 592, 594
Snively v. Jaber, 48 Wash.(2d) 815, 296 Pac.(2d) 1015 (1956) ..... II: 73, 122, 123; III: 595, 600

Spring Creek Irr. Co. v. Zollinger, 58 Wash. 90, 197 Pac. 737 (1921) ..... II: 395
State v. American Fruit Growers, Inc., 135 Wash. 156, 237 Pac. 498 (1925) ..... I: 16, 224; II: 3, 14, 44, 101, 136, 200, 542, 627; III: 599
State v. Anderson, 134 Wash. 331, 235 Pac. 809 (1925) ..... III: 577
State v. Icicle Irr. Dist., 159 Wash. 524, 294 Pac. 245 (1930) ..... III: 579
State v. Ponten, 77 Wash.(2d) 463, 463 Pac.(2d) 150 (1969) ..... III: 603, 605-607
State ex rel. Andersen v. Superior Ct., 119 Wash. 406, 205 Pac. 1051 (1922) ..... I: 9, 435; III: 585
State ex rel. Ham, Yearsley & Ryrie v. Superior Ct., 70 Wash. 442, 126 Pac. 945 (1912) ..... I: 128, 267, 387; II: 80, 200; III: 579, 596
State ex rel. Liberty Lake Irr. Co. v. Superior Ct., 47 Wash. 310, 91 Pac. 968 (1907) ..... I: 224; II: 101; III: 599
State ex rel. Roseburg v. Mohar, 169 Wash. 368, 13 Pac.(2d) 454 (1932) ..... II: 465; III: 611
Stempel v. Department of Water Resources, 82 Wash.(2d) 109, 508 Pac.(2d) 166 (1973) ..... III: 577, 580-582, 584, 602
Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466 (1911) ..... I: 78, 89, 174, 384, 387; II: 18, 131; III: 572, 579, 594, 596
St. Martin v. Skamania Boom Co., 79 Wash. 393, 140 Pac. 355 (1914) ..... II: 383, 402; III: 591
Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 31 Pac. 220 (1913) ..... II: 117, 131; III: 579
Sund v. Keating, 43 Wash.(2d) 36, 259 Pac.(2d) 1113 (1953) ..... I: 76, 80-83, 85; II: 535, 541
Tacoma v. Taxpayers of Tacoma, 60 Wash.(2d) 66, 371 Pac.(2d) 938 (1962) ... III: 580
Tacoma Eastern R.R. v. Smithgall, 58 Wash. 445, 108 Pac. 1091 (1910) ..... II: 131
Tedford v. Wenatchee Reclamation Dist., 127 Wash. 495, 221 Pac.. 328 (1923) ..... III: 585, 586
Thomas v. Spencer, 69 Wash. 433, 125 Pac. 361 (1912) ..... II: 370; III: 591
Thompson v. Short, 6 Wash.(2d) 71, 106 Pac.(2d) 720 (1940) ..... I: 462; II: 504; III: 585, 586, 610, 611
Thorp v. McBride, 75 Wash. 466, 135 Pac. 228 (1913) ..... I: 380; II: 264, 271; III: 578, 589
Thorpe v. Spokane, 78 Wash. 488, 139 Pac. 221 (1914) ..... II: 540
Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588 (1889) ..... I: 264, 288; III: 572, 573, 587
Tierney v. Yakima County, 136 Wash. 481, 239 Pac. 248 (1925) ..... I: 31
Van Dissell v. Holland-Horr Mill Co., 91 Wash. 239, 157 Pac. 687 (1916) ..... II: 63, 118; III: 596
Villa v. Keylor, 93 Wash. 164, 160 Pac. 297 (1916) ..... III: 595
Wallace v. Weitman, 52 Wash.(2d) 585, 328 Pac.(2d) 157 (1958) ..... I: 224, 257, 490; II: 67; III: 586, 592, 596, 598
Watson v. County Commr's of Adams Co., 38 Wash. 662, 80 Pac. 201 (1905) .... II: 629
Weidensteiner v. Mally, 55 Wash. 79, 104 Pac. 143 (1909) ..... II: 363, 364; III: 591
Weitensteiner v. Engdahl, 125 Wash. 106, 215 Pac. 378 (1923) ..... I: 224; III: 599
Wenatchee Reclamation Dist. v. Titchenal, 175 Wash. 398, 27 Pac.(2d) 734 (1933) ..... I: 637
Wendler v. Woodward, 93 Wash. 684, 161 Pac. 1043 (1916) ..... II: 266; III: 589
White v. Paque, 49 Wash.(2d) 481, 303 Pac.(2d) 524 (1956) ..... II: 629
Wilbour v. Gallager, 77 Wash.(2d) 329, 462 Pac.(2d) 232 (1969) ..... I: 122; II: 123
Wilkening v. State, 54 Wash.(2d) 692, 344 Pac.(2d) 204 (1969) ..... II: 633; III: 604
Wilson v. Angelo, 176 Wash. 157, 28 Pac.(2d) 276 (1934) ..... I: 503; II: 440; III: 579, 591
Yearsley v. Cater, 149 Wash. 285, 270 Pac. 804 (1928) ..... II: 41, 50, 53; III: 593

Wyoming

Anderson v. Wyoming Dev. Co., 60 Wyo. 417, 154 Pac.(2d) 318 (1944) ..... III: 638

Anita Ditch Co. v. Turner, 389 Pac.(2d) 1018 (Wyo. 1964) ..... III: 647
Auchmuty v. Chicago, B. & Q.R.R., 349 Pac.(2d) 193 (Wyo. 1960) ..... I: 96
Bamforth v. Ihmsen, 28 Wyo. 282, 204 Pac. 345 (1922) ..... II: 491
Binning v. Miller, 55 Wyo. 451, 102 Pac.(2d) 54 (1940) ..... I: 32, 39, 59, 66; II: 564, 652; III: 639
Bishop v. Casper, 420 Pac.(2d) 446 (Wyo. 1966) ..... III: 642
Bower v. Big Horn Canal Assn., 77 Wyo. 80, 307 Pac.(2d) 593 (1957) ..... III: 639
Bruegman v. Johnson Ranches, Inc., 520 Pac.(2d) 489 (Wyo. 1974) ..... III: 634
Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 100 Pac.(2d) 124, 102 Pac.(2d) 745 (1940) ..... II: 262, 281, 290, 351, 356, 357, 361, 362, 368, 370, 401, 410, 411, 454, 487, 490; III: 619, 623, 629, 634, 636, 644
Collett v. Morgan, 21 Wyo. 117, 128 Pac. 626 (1912) ..... II: 491
Condict v. Ryan, 79 Wyo. 211, 333 Pac.(2d) 684 (1958) ..... I: 353, 463, 473, 484; III: 624
Day v. Armstrong, 362 Pac.(2d) 137 (Wyo. 1961) ..... I: 121, 544; III: 628, 638
Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258 (1900) ..... I: 314, 319, 320; II: 446, 449, 454, 455, 463, 464, 489, 490; III: 628, 638
Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475 (1894) ..... I: 152, 471-473, 475; III: 628, 629
Groo v. Sights, 22 Wyo. 19, 134 Pac. 269 (1913) ..... I: 631
Gustin v. Harting, 20 Wyo. 1, 121 Pac. 522 (1912) ..... II: 331, 341, 363, 364, 375; III: 636, 637
Haines v. Galles, 76 Wyo. 411, 303 Pac.(2d) 1004 (1956) ..... III: 637
Hamp v. State, 19 Wyo. 377, 118 Pac. 653 (1911) ..... I: 314; II: 489, 491; III: 648
Holt v. Cheyenne, 22 Wyo. 212, 137 Pac. 876 (1914) ..... I: 248, 627; II: 391; III: 622, 637
Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 Pac.(2d) 572 (1939) ..... II: 262, 307, 313; III: 638
Hunt v. Laramie, 26 Wyo. 160, 181 Pac. 137 (1914) ..... II: 630, 652; III: 639
Hunziker v. Knowlton, 78 Wyo. 241, 322 Pac.(2d) 141 (1958) ..... I: 141, 153, 457, 462, 477, 634; II: 351, 401, 411; III: 628, 636, 649
In re Owl Creek Irr. Dist., 71 Wyo. 70, 258 Pac.(2d) 220 (1953) ..... I: 611
Johnston v. Little Horse Creek Irr. Co., 13 Wyo 208, 79 Pac. 22 (1904) ..... I: 137, 462, 477, 574, 575, 618, 629, 649; III: 628-630
Kearney Lake, Land & Res. Co. v. Lake DeSmet Res. Co, 475 Pac.(2d) 548 (Wyo. 1970) ..... II: 307; III: 624
Kearney Lake, Land & Res. Co. v. Lake DeSmet Res. Co., 487 Pac.(2d) 324 (Wyo. 1971) ..... II: 307, 308; III: 631, 649
King v. White, 499 Pac.(2d) 585 (Wyo. 1972) ..... III: 629
Lake DeSmet Res. Co. v. Kaufmann, 75 Wyo. 87, 292 Pac.(2d) 482 (1956) ..... I: 141, 365, 381; II: 269; III: 622, 627-629
Laramie Irr. & Power Co. v. Grant, 44 Wyo. 392, 13 Pac.(2d) 235 (1932) ..... II: 454, 487; III: 622, 644, 646, 648
Laramie Rivers Co. v. Le Vasseur, 65 Wyo. 414, 202 Pac.(2d) 680 (1949) ..... I: 316; II: 269, 303; III: 619, 623, 647
Louth v. Kaser, 364 Pac.(2d) 96 (Wyo. 1961) ..... II: 465, 490
McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773 (1894) ..... I: 371, 473
Merrill v. Bishop, 69 Wyo. 45, 237 Pac.(2d) 186 (1951) ..... II: 510; III: 628, 648
Merrill v. Bishop, 74 Wyo. 298, 287 Pac.(2d) 620 (1955) ..... I: 152
Mitchell Irr. Dist. v. Whiting, 59 Wyo. 52, 136 Pac.(2d) 502 (1943) ..... I: 393, 580; III: 629
Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845 (1896) ..... I: 14, 262, 366, 383, 447; II: 14, 630; III: 615, 618, 622, 628, 638
Newcastle v. Smith, 28 Wyo. 371, 205 Pac. 302 (1922) ..... I: 436; III: 627
Nichols v. Hufford, 21 Wyo. 487, 133 Pac. 1084 (1913) ..... III: 626, 629
Parshall v. Cowper, 22 Wyo. 385, 143 Pac. 302 (1914) ..... II: 455, 488, 490; III: 646, 649

246-767 O - 77 - 47

Quinn v. John Whitaker Ranch Co., 54 Wyo. 367, 92 Pac.(2d) 568 (1939) .....I: 494, 499; III: 625, 629
Ramsay v. Gottsche, 51 Wyo. 516, 69 Pac.(2d) 535 (1937) .....I: 627; II: 262, 273, 303, 313, 327
Riggs Oil Co. v. Gray, 46 Wyo. 504, 30 Pac.(2d) 145 (1934) .....II: 538, 564
Rutherford v. Lucerne Canal & Power Co., 12 Wyo. 299, 75 Pac. 445 (1904) .....II: 269
Ryan v. Tutty, 13 Wyo 122, 78 Pac. 661 (1904) .....I: 447; II: 630; III: 649
Scheik v. Nichols, 55 Wyo. 4, 95 Pac.(2d) 74 (1939) .....I: 267, 381, 549; II: 269, 327; III: 622, 628, 633
Simmons v. Ramsbottom, 51 Wyo. 419, 68 Pac.(2d) 153 (1937) .....II: 449, 465, 490
State v. Laramie Rivers Co., 59 Wyo. 9, 136 Pac.(2d) 487 (1943) .....I: 441, 493, 558, 563, 566, 567, 634; III: 620, 628, 629
State ex rel. Mitchell Irr. Dist. v. Parshall, 22 Wyo. 318, 140 Pac. 830 (1914) ..... I: 392; II: 491
Stoner v. Mau, 11 Wyo. 366, 72 Pac. 193 (1903) .....II: 259, 273, 274
Sturgeon v. Brooks, 73 Wyo. 436, 281 Pac.(2d) 675 (1955) .....I: 353, 463, 473; II: 307, 310, 435; III: 637
Van Buskirk v. Red Buttes Land & Live Stock Co., 24 Wyo. 183, 156 Pac. 1122, 160 Pac. 387 (1916) .....III: 648, 649
Van Tassel Real Estate & Live Stock Co. v. Cheyenne, 49 Wyo. 333, 54 Pac.(2d) 906 (1936) .....I: 248, 536, 627, 630; II: 282, 310, 326; III: 622
Ward v. Yoder, 357 Pac.(2d) 180 (Wyo. 1960) .....II: 306, 327; III: 633
Whalon v. North Platte Canal & Colonization Co., 11 Wyo. 313, 71 Pac. 995 (1903) .....I: 387; II: 277; III: 622
Wheatland Irr. Dist. v. Pioneer Canal Co., 464 Pac.(2d) 533 (Wyo. 1970) .....II: 307; III: 620, 624
White v. Wheatland Irr. Dist., 413 Pac.(2d) 252 (Wyo. 1966) .....I: 627; III: 637
Willey v. Decker, 11 Wyo. 496, 73 Pac. 210 (1903) .....I: 391, 396, 446; III: 67, 614, 618, 622, 628, 639
Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764 (1925) .....I: 137, 314, 316; II: 326, 583; III: 619
Wyoming v. Hiber, 48 Wyo. 172, 44 Pac.(2d) 1005 (1935) .....I: 29, 30, 32, 39, 41, 47, 65; II: 536, 540, 541, 564
Yentzer v. Hemenway, 440 Pac.(2d) 7 (Wyo. 1968) .....II: 298, 307, 313, 316, 327

U.S. Supreme Court

Alabama v. Georgia, 64 U.S. 505 (1859) ..... I: 41
Albuquerque Land & Irr. Co. v. Gutierrez, 188 U.S. 545 (1903) .....I: 546, 550, 558, 562
Arizona v. California, 283 U.S. 423 (1931) .....I: 104, 107, 111, 113, 114, 117; III: 24, 25, 29, 99
Arizona v. California, 298 U.S. 558 (1936) ..... I: 104, 105, 120, 124, 386, 396, 500
Arizona v. California, 347 U.S. 986 (1954) .....III: 75
Arizona v. California, 373 U.S. 546 (1963) ..... III: 26-28, 34, 35, 42-50, 55, 56, 60, 68, 99, 100, 104-107
Arizona v. California, 376 U.S. 340 (1964) ..... III: 26, 34, 42-47, 104, 105
Arizona Copper Co. v. Gillespie, 230 U.S. 46 (1913) ..... I: 451, 453; II: 209
Asbell v. Kansas, 209 U.S. 251 (1908) .....III: 110
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) .....I: 103; III: 3, 53, 54
Atchison v. Peterson, 87 U.S. 507 (1874) .....I: 170, 258, 259, 451, 452, 498, 523, 638; II: 60, 205, 206, 237, 262, 274; III: 325
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) .....III: 105
Basey v. Gallagher, 87 U.S. 670 (1875) .....I: 170, 258, 259, 396, 523; II: 192, 193; III: 317
Baumann v. Smrha, 352 U.S. 863 (1956) .....I: 16, 196, 211, 315; II: 5, 101, 114, 610, 642

Bean v. Morris, 221 U.S. 485 (1911) ..... II: 313; III: 310
Bear Lake & River Waterworks & Irr. Co. v. Garland, 164 U.S. 1 (1896) ..... I: 271
Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909) ..... I: 188; III: 170
Borden v. Trespalacios Rice & Irr. Co., 204 U.S. 667 (1907) ..... III: 506
Broder v. Water Co., 101 U.S. 274 (1879) ..... I: 172, 256, 269, 270, 528
California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) ..... I: 7, 16, 174, 206, 218, 219, 255, 256, 269, 270, 315; II: 12, 18, 19, 60, 61, 92, 113, 114, 595, 602; III: 40, 41, 202, 462, 464, 492
Clark v. Nash, 198 U.S. 361 (1905) ..... I: 9, 276, 277, 281, 282; III: 345
Colorado v. Kansas, 320 U.S. 383 (1943) ..... III: 68, 69
Connecticut v. Massachusetts, 282 U.S. 660 (1931) ..... III: 66, 69, 71
Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) ..... III: 21
Coyle v. Oklahoma, 221 U.S. 559 (1911) ..... I: 105, 129
Cubbins v. Mississippi River Comm'n, 241 U.S. 351 (1916) ..... I: 43, 77, 104, 114
Cummings v. Chicago, 188 U.S. 410 (1903) ..... III: 5, 24
Daniel Ball, The, 77 U.S. (10 Wall.) 557 (1871) ..... I: 106, 113, 114; III: 16, 17
Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419 (1940) ..... III: 86
Devine v. Los Angeles, 202 U.S. 313 (1906) ..... II: 148, 154
Donnelly v. United States, 228 U.S. 243 (1913) ..... I: 130
Dugan v. Rank, 372 U.S. 609 (1963) ..... I: 520; II: 500, 501; III: 34, 35, 58, 60
Dyer v. Simms, 341 U.S. 22 (1951) ..... III: 84
Economy Light & Power Co. v. United States, 256 U.S. 113 (1921) ..... III: 3, 4, 17
Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954) ..... III: 9, 30, 31
Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955) ..... III: 39-41, 49, 60
Federal Power Comm'n v. Union Elec. Co., 381 U.S. 90 (1965) ..... III: 8, 10, 23
First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) ..... I: 541; III: 9, 10, 21-23
Forbes v. Gracey, 94 U.S. 762 (1877) ..... I: 172, 259
Fresno v. California, 372 U.S. 627 (1963) ..... I: 520; III: 35
Geer v. Connecticut, 161 U.S. 519 (1896) ..... III: 109, 110, 112, 113
Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) ..... III: 67, 73, 75, 109, 112
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) ..... III: 3
Gilman v. City of Philadelphia, 70 U.S.(3 Wall.) 713 (1865) ..... III: 3
Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U.S. 58 (1898) ..... III: 53
Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) ..... III: 81
Gutierres v. Albuquerque Land & Irr. Co., 188 U.S. 545 (1903) ..... I: 259, 562
Hardin v. Jordan, 140 U.S. 371 (1891) ..... I: 129
Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) ..... III: 72
Henry Ford & Son, Inc. v. Little Falls Fibre Co., 280 U.S. 369 (1930) ..... III: 9, 36
Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) ..... I: 623; III: 66, 70, 71, 75, 81, 85, 86, 105, 390, 393
Hooker v. Los Angeles, 188 U.S. 314 (1903) ..... II: 148, 151, 154, 669
Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) ..... III: 67, 108, 109, 112, 113, 115
Ide v. United States, 263 U.S. 497 (1924) ..... I: 407; II: 582
Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) ..... I: 130
Illinois v. Milwaukee, 406 U.S. 91 (1972) ..... III: 13, 14, 66, 73, 75-77, 79, 81
International Bridge Co. v. New York, 254 U.S. 126 (1920) ..... III: 5, 24
International Paper Co. v. United States, 282 U.S. 399 (1931) ..... III: 54
Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275 (1958) ..... I: 142; II: 215; III: 35, 36, 50, 52
Jennison v. Kirk, 98 U.S. 453 (1879) ..... I: 164, 166, 168, 173, 254, 256, 269, 270, 396; III: 182
Kansas v. Colorado, 185 U.S. 125 (1902) ..... III: 67, 108, 109, 294, 301
Kansas v. Colorado, 206 U.S. 46 (1907) ..... I: 60, 61; II: 70; III: 66-69, 71, 109
Kentucky v. Indiana, 281 U.S. 163 (1930) ..... III: 72, 73
Kern River Co. v. United States, 257 U.S. 147 (1921) ..... I: 272
Lindsay v. Natural Gas Co., 220 U.S. 61 (1911) ..... III: 113

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) ..... III: 48
Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U.S. 217 (1910). . .II: 148, 154, 159
Louisiana v. Texas, 176 U.S. 1 (1900) ..... III: 83
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) ..... III: 48
Missouri v. Illinois, 180 U.S. 208 (1901) ..... III: 67, 68
Missouri v. Illinois, 200 U.S. 496 (1906) ..... III: 68
Missouri v. Nebraska, 196 U.S. 23 (1904) ..... I: 92
Montello, The, 87 U.S. (20 Wall.) 430 (1874) ..... III: 17
Montezuma Canal Co. v. Smithville Canal Co., 218 U.S. 371 (1910) .....I: 558; II: 519; III: 167
Montgomery v. Portland, 190 U.S. 89 (1903) ..... III: 5, 24
Moss v. Ramey, 239 U.S. 538 (1916) ..... I: 132, 134
Nebraska v. Iowa, 143 U.S. 359 (1892) .....I: 91-93
Nebraska v. Wyoming, 325 U.S. 589 (1945) .....I: 252; III: 70, 71
New Hampshire v. Louisiana, 108 U.S. 76 (1883) ..... III: 74
New Jersey v. New York, 283 U.S. 336 (1931) .....I: 26; III: 71, 72
New Jersey v. New York, 345 U.S. 369 (1953) ..... III: 73, 74
New York v. Illinois, 287 U.S. 578 (1932) ..... III: 75
New York v. New Jersey, 256 U.S. 296 (1921) ..... III: 68
North Carolina v. Tennessee, 235 U.S. 1 (1914) ..... III: 83
North Dakota v. Minnesota, 263 U.S. 365 (1923) ..... III: 68, 74
Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) ..... III: 113
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) ..... III: 77-80
Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941) .....I: 104, 108, 118; III: 3, 4
Oklahoma v. Texas, 258 U.S. 514 (1922) ..... I: 108, 112, 114, 129, 134, 135
Oklahoma v. Texas, 260 U.S. 606 (1923) ..... I: 42, 92
Oklahoma v. Texas, 261 U.S. 340 (1923) ..... I: 42
Oklahoma v. Texas, 265 U.S. 500 (1924) ..... I: 42
Oklahoma (West) v. Kansas Natural Gas Co., 221 U.S. 229 (1911) .... III: 111-113, 115
O'Neil v. Northern Colo. Irr. Co., 242 U.S. 20 (1916) .....II: 478
Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916) ..... II: 450, 457, 494; III: 213, 475, 477
Pacific Power & Light Co. v. Bayer, 273 U.S. 647 (1926) ..... III: 464
Pennsylvania v. West Virginia, 262 U.S. 553 (1923) ..... III: 111, 113
Richards v. United States 369 U.S. 1 (1962) ..... III: 34
Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910) ..... II: 508; III: 80
Sanitary Ditch of Chicago v. United States, 266 U.S. 405 (1925) ..... III: 3-5, 7, 24
San Joaquin & Kings River Canal & Irr. Co. v. County of Stanislaus, 233 U.S. 454 (1914) ..... I: 557, 559, 560
San Jose Land & Water Co. v. San Jose Ranch Co.. 189 U.S. 177 (1903) ..... I: 259
Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912) .... II: 8, 9, 211; III: 278
Scott v. Lattig, 227 U.S. 229 (1913) ..... I: 129, 132, 133
Snake Creek Min. & Tunnel Co. v. Midway Irr. Co., 260 U.S. 596 (1923) .....II: 651
South Carolina v. Georgia, 93 U.S. 4 (1876) ..... III: 3
Stearns v. Minnesota, 179 U.S. 223 (1900) ..... III: 83
St. Louis v. Rutz, 138 U.S. 226 (1891) ..... I: 130
Strickley v. Highland Boy Gold Min. Co., 200 U.S. 527 (1906) ..... I: 277
Sturr v. Beck, 133 U.S. 541 (1890) .....I: 190, 213, 220, 259, 396; II: 21, 22, 615; III: 408, 416, 418, 478, 488, 489
Swan v. Adams, 385 U.S. 440 (1967) ..... III: 111
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) ..... III: 77
Union Bridge Co. v. United States, 204 U.S. 364 (1907) ..... III: 3, 4
United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) ...I: 103, 104, 106, 107, 113-118, 126; III: 3, 15-17, 29
United States v. Arizona, 295 U.S. 174 (1935) ..... III: 28
United States v. Butler, 297 U.S. 1 (1936) ..... III: 55, 57
United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) ....I: 103, 113, 126, 130, 133; III: 29, 30, 31, 53

United States v. Chicago, M. St. P. & P. R.R., 312 U.S. 592 (1941) ..... I: 103, 104, 112; III: 31
United States v. Commodore Park, Inc., 324 U.S. 386 (1945) ..... III: 3, 30, 31
United States v. Cress, 243 U.S. 316 (1917) ..... III: 17, 33
United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971) ..... II: 501; III: 49, 59, 60
United States v. District Court in and for Water Division No. 5, 401 U.S. 527 (1971) ..... II: 501; III: 49, 60
United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) ..... I: 117-119, 124, 127, 201, 205, 209, 210, 270; II: 79, 112, 127, 198, 243, 244, 246; III: 30, 34, 36, 55-57, 199, 201, 205, 206
United States v. Grand River Dam Authority, 363 U.S. 229 (1960) ..... III: 33
United States v. Holt State Bank, 270 U.S. 49 (1925) ..... I: 112
United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) ..... III: 33
United States v. Nevada, 412 U.S. 534 (1973) ..... III: 73, 77
United States v. Oregon, 295 U.S. 1 (1935) ..... I: 11, 114, 122, 128-130, 134, 135; III: 16
United States v. Pennsylvania Chemical Corp., 411 U.S. 655 (1973) ..... III: 14
United States v. Powers, 305 U.S. 527 (1939) ..... III: 48
United States v. Rands, 389 U.S. 121 (1967) ..... I: 119; III: 31, 53
United States v. Republic Steel Corp., 362 U.S. 482 (1960) ..... III: 5, 7, 13
United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899) ..... I: 105, 108-110, 113, 124, 161, 259; III: 3, 4, 21, 29, 32-34, 41, 42, 52
United States v. River Rouge Improvement Co., 269 U.S. 411 (1926) ..... I: 117, 120, 126
United States v. Santa Fe, 165 U.S. 675 (1897) ..... II: 159
United States v. Standard Oil Co., 384 U.S. 224 (1966) ..... III: 13
United States v. Twin City Power Co., 350 U.S. 222 (1956) ..... III: 30, 53
United States v. Utah, 283 U.S. 64 (1931) ..... I: 106-108, 111, 115, 129, 130, 134
United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961) ..... I: 119; III: 31
United States v. Willow River Power Co., 324 U.S. 499 (1945) ..... I: 126; III: 31
United States v. Winans, 198 U.S. 371 (1905) ..... III: 39, 43, 44, 48, 49
Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) ..... I: 271
Vermont v. New York, 417 U.S. 270 (1974) ..... III: 75
Virginia v. Tennessee, 148 U.S. 503 (1893) ..... III: 82-84
Virginia v. West Virginia, 246 U.S. 565 (1918) ..... III: 84
Walker v. New Mexico & S.P. R.R., 165 U.S. 593 (1897) ..... I: 46, 54
Washington v. Oregon, 297 U.S. 517 (1936) ..... I: 377, 379, 497, 580; II: 236, 283, 441, 442; III: 69, 455
Weiland v. Pioneer Irr. Co., 259 U.S. 498 (1922) ..... I: 391; III: 115
Wharton v. Wise, 153 U.S. 155 (1894) ..... III: 83
Williams v. Wichita, 375 U.S. 7 (1963) ..... III: 300, 304
Winters v. United States, 207 U.S. 564 (1908) ..... III: 39, 41, 43, 44, 48, 49
Wisconsin v. Illinois, 271 U.S. 650 (1926) ..... III: 75
Wisconsin v. Illinois & Sanitary Dist. of Chicago, 278 U.S. 367 (1929) ..... III: 6, 7, 73
Wisconsin v. Illinois & Sanitary Dist. of Chicago, 281 U.S. 179 (1930) ..... III: 73
Wyoming v. Colorado, 259 U.S. 419 (1922) ..... I: 407; III: 69-71
Wyoming v. Colorado, 260 U.S. 1 (1922) ..... III: 69
Wyoming v. Colorado, 286 U.S. 494 (1932) ..... III: 71
Wyoming v. Colorado, 287 U.S. 579 (1932) ..... III: 75
Wyoming v. Colorado, 298 U.S. 573 (1936) ..... III: 71
Wyoming v. Colorado, 353 U.S. 953 (1957) ..... III: 71
Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) ..... III: 81

Other Federal Courts

Adams-McGill Co. v. Hendrix, 22 Fed. Supp. 789 (D. Nev. 1938) ... I: 538, 593; II: 612

Alaska Juneau Gold Min. Co. v. Ebner Gold Min. Co., 239 Fed. 638 (9th Cir. 1917) ..... I: 233, 291; III: 144, 147
Albion-Idaho Land Co. v. Naf Irr. Co., 97 Fed.(2d) 439 (10th Cir. 1938) ..... I: 579
Almo Water Co. v. Jones, 39 Fed.(2d) 37 (9th Cir. 1930) ..... I: 259, 647
Altus, Oklahoma v. Carr, 255 Fed. Supp. 828 (W.D. Tex. 1966) ..... III: 107, 110-115
American Cyanamid Co. v. Sparto, 267 Fed.(2d) 420 (5th Cir. 1959) ..... III: 520
Anderson v. Bassman, 140 Fed. 14 (C.C.N.D. Cal. 1905) ..... I: 500, 502, 620; II: 91, 133, 139, 372, 431, 507; III: 373, 376, 377
Anderson v. Seeman, 252 Fed.(2d) 321 (5th Cir. 1958) ..... III: 37
Anderson Land & Stock Co. v. McConnell, 188 Fed. 818 (C.C.D. Nev. 1910) ..... I: 45, 530, 531, 594; II: 267, 277; III: 372, 374, 377
Bader Gold Min. Co. v. Oro Elec. Corp., 245 Fed. 449 (9th Cir. 1917) ..... I: 138, 144
Balabanoff v. Kellog, 118 Fed.(2d) 597 (9th Cir. 1940) ..... I: 17, 19, 199, 207; II: 2, 6, 48, 119, 264; III: 144, 146, 148-150
Baumann v. Smrha, 145 Fed. Supp. 617 (D. Kans. 1956) ..... I: 16, 196, 211, 315; II: 5, 101, 114, 610, 642, 643; III: 300
Bergman v. Kearney, 241 Fed. 884 (D. Nev. 1917) ..... I: 5, 7, 320, 441; III: 383
Blake v. United States, 295 Fed.(2d) 91 (4th Cir. 1961) ..... I: 124, 127; II: 79
Brooks v. United States, 119 Fed.(2d) 636 (9th Cir. 1941) ..... II: 509
Bunker Hill & Sullivan Min. & Concentrating Co. v. Polak, 7 Fed.(2d) 583 (9th Cir. 1925) ..... I: 429, 454; III: 272
Burley Irr. Dist. v. Ickes, 116 Fed.(2d) 529 (D.C. Cir. 1940) ..... I: 498
Cairo, Vincennes & Chicago R.R. v. Brevoort, 62 Fed. 129 (C.C.D. Ind. 1894) ..... II: 536, 538
Caldwell v. Twin Falls Salmon River Land & Water Co., 225 Fed. 584 (D. Idaho 1915) ..... I: 501
California v. Rank, 293 Fed.(2d) 340 (9th Cir. 1961) ..... I: 520
California v. Rank, 307 Fed.(2d) 96 (9th Cir. 1962) ..... I: 520
California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed.(2d) 555 (9th Cir. 1934) ..... I: 16, 142, 155, 156, 195, 205, 219, 315; II: 3, 12, 98, 100, 114, 495; III: 464, 465
California Pastoral & Agric. Co. v. Enterprise Canal & Land Co., 127 Fed. 741 (C.C.S.D. Cal. 1903) ..... II: 55, 234, 384
Cascade Town Co. v. Empire Water & Power Co., 181 Fed. 1011 (C.C.D. Colo. 1910) ..... I: 596
Copper King v. Wabash Min. Co., 114 Fed. 991 (C.C.S.D. Cal. 1902) ..... II: 670
Cruse v. McCauley, 96 Fed. 369 (C.C.D. Mont. 1899) ..... I: 370, 375
Dern v. Tanner, 60 Fed.(2d) 626 (D. Mont. 1932) ..... I: 499, 513, 645; II: 203; III: 320
Doyle v. San Diego Land & Town Co., 46 Fed. 709 (C.C.S.D. Cal. 1891) ..... II: 36, 37
East Side Canal & Irr. Co. v. United States, 76 Fed. Supp. 836 (Ct. Cl. 1948) ..... II: 273, 309, 316, 317
Eastern Oregon Land Co. v. Willow River Land & Irr. Co., 201 Fed. 203 (9th Cir. 1912) ..... I: 89
El Paso County W.I. Dist. No. 1 v. El Paso, 133 Fed. Supp. 894 (W.D. Tex. 1955) ..... I: 249, 393, 426, 435, 490, 536, 604; II: 48, 63, 84, 118, 165; III: 510, 512, 520, 521, 523
Empire Water & Power Co. v. Cascade Town Co., 205 Fed. 123 (8th Cir. 1913) ... I: 597
Finney County Water Users' Assn. v. Graham Ditch Co., 1 Fed.(2d) 650 (D. Colo. 1924) ..... I: 12, 339; III: 294
Garden City Co. v. Bentrup, 228 Fed.(2d) 334 (10th Cir. 1955) ..... II: 338, 343, 403, 422; III: 292
Gerlach Livestock Co. v. United States, 76 Fed. Supp. 87 (Ct. Cl. 1948) ..... II: 198, 243, 246, 518
Griffiths v. Cole, 264 Fed. 369 (D. Idaho 1919) ..... I: 585; II: 215; III: 272
Gulf C. & S.F. Ry. v. Clark, 101 Fed. 678 (8th Cir. 1900) ..... I: 87
Hardy Salt Co. v. Southern Pac. Trans. Co., 501 Fed.(2d) 1156 (10th Cir. 1974) ..... III: 18

Hewitt v. Story, 64 Fed. 510 (9th Cir. 1894) ..... I: 368, 370, 377, 437, 495, 499, 500, 528, 573
Hidalgo County W.C. & I. Dist. v. Hedrick, 226 Fed.(2d) 1 (5th Cir. 1955) ..... II: 25, 43
Hilbert v. Vallejo, 19 Fed.(2d) 510 (9th Cir. 1927) ..... II: 26
Hudspeth County Conservation & Reclamation Dist. v. Robbins, 213 Fed.(2d) 425 (5th Cir. 1954) ..... II: 499
Hughes v. Lincoln Land Co., 27 Fed. Supp. 972 (D. Wyo. 1939) ..... I: 634
Humboldt Land & Cattle Co. v. Allen, 14 Fed.(2d) 650 (D. Nev. 1926) ..... I: 314; III: 383
Humboldt Livestock Irr. Light & Power Co. v. Smith, 25 Fed. Supp. 571 (D. Nev. 1938) ..... I: 7, 314; III: 368
Hunter v. United States, 388 Fed.(2d) 148 (9th Cir. 1967) ..... I: 270, 594, 630
Inez Min. Co. v. Kinney, 46 Fed. 832 (C.C.D. Idaho 1891) ..... II: 277
Integral Quicksilver Min. Co. v. Altoona Quicksilver Min. Co., 75 Fed. 379 (9th Cir. 1896) ..... II: 258, 264
Kalur v. Resor, 335 Fed. Supp. 1 (D.D.C. 1971) ..... III: 14
Krall v. United States, 79 Fed. 241 (9th Cir. 1897) ..... I: 259
Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co., 49 Fed. 430 (C.C.D. Idaho 1892) ..... I: 636
Lindsay v. McClure, 136 Fed.(2d) 65 (10th Cir. 1943) ..... I: 151, 390, 396, 627; III: 390, 393, 400
Marks v. Hilger, 262 Fed. 302 (9th Cir. 1920) ..... I: 496; II: 202, 573, 580, 592
Martin v. Burford, 181 Fed. 922 (9th Cir. 1910) ..... III: 144
Martinez v. Maverick County W.C. & I. Dist. No. 1, 219 Fed.(2d) 666 (5th Cir. 1955) ..... II: 499, 514
Miller & Lux v. Rickey, 127 Fed. 573 (C.C.D. Nev. 1904) ..... I: 368, 493, 497, 592, 630; II: 507; III: 372, 374
Miller & Lux v. Rickey, 146 Fed. 574 (C.C.D. Nev. 1906) ..... II: 507
Miocene Ditch Co. v. Jacobsen, 146 Fed. 680 (9th Cir. 1906) ..... III: 143, 147, 148
Miocene Ditch Co. v. Lyng, 138 Fed. 544 (9th Cir. 1905) ..... III: 148
Mitchell Irr. Dist. v. Sharp, 121 Fed.(2d) 964 (10th Cir. 1941) ..... I: 393
Montana Co. v. Gehring, 75 Fed. 384 (9th Cir. 1896) ..... I: 451; II: 206
Morris v. Bean, 146 Fed. 423 (C.C.D. Mont. 1906) ..... I: 345, 375, 388, 579; II: 261, 313, 327, 359, 362, 369, 374, 403, 439, 441; III: 311
Morris v. Bean, 159 Fed. 651 (9th Cir. 1908) ..... II: 313, 343, 439, 441
Murphy v. Kerr, 296 Fed. 536 (D.N. Mex. 1923) ..... I: 5, 441, 444, 460, 562, 566, 567, 591; III: 390, 394-396
Murphy v. Kerr, 5 Fed.(2d) 908 (8th Cir. 1925) ..... I: 5, 562, 567
Nevada ex rel. Shamburger v. United States, 279 Fed.(2d) 699 (9th Cir. 1960) ..... III: 41
Nevada ex rel. Shamburger v. United States, 165 Fed. Supp. 600 (D. Nev. 1968) ..... III: 41, 51
Northern Min. & Trading Co. v. Alaska Gold Recovery Co., 20 Fed.(2d) 5 (9th Cir. 1927) ..... III: 148
Oscarson v. Norton, 39 Fed.(2d) 610 (9th Cir. 1930) ..... I: 370 377, 584; II: 215
Pacific Livestock Co. v. Lewis, 217 Fed. 95 (D. Oreg. 1914) ..... II: 494
Pacific Live Stock Co. v. Read, 5 Fed.(2d) 466 (9th Cir. 1925) ..... I: 5, 530; III: 368, 369
Pacific States Savings & Loan Corp. v. Schmitt, 103 Fed.(2d) 1002 (9th Cir. 1939) ..... I: 459, 481; III: 372
Pocatello v. Murray, 206 Fed. 72 (D. Idaho 1913) ..... I: 248
Ramshorn Ditch Co. v. United States, 269 Fed. 80 (8th Cir. 1920) ..... II: 310, 583
Rank v. Krug, 90 Fed. Supp. 773 (S.D. Cal. 1950) ..... II: 669, 674
Rank v. (Krug) United States, 142 Fed. Supp. 1 (S.D. Cal. 1956) ..... I: 520
Rank v. (Krug) United States, 155 Fed. Supp. 872 (S.D. Cal. 1957) ..... I: 520; II: 243, 246
Reconstruction Finance v. Schmitt, 20 Fed. Supp. 816 (D. Nev. 1937) ..... I: 482

Reno Power, Light & Water Co. v. Public Serv. Comm'n, 300 Fed. 645 (D. Nev. 1921) ..... I: 242, 460, 558, 561, 567; III: 373
Richert v. Thompson, 72 Fed.(2d) 807 (9th Cir. 1934) ..... III: 148
Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11 (9th Cir. 1907) ..... I: 153, 441, 445, 446, 459; II: 508, 509; III: 369
Rincon Water & Power Co. v. Anaheim Union Water Co., 115 Fed. 543 (C.C.S.D. Cal. 1902) ..... II: 215
Rodgers v. Pitt, 129 Fed. 932 (C.C.D. Nev. 1904) ..... I: 371, 374, 375, 502, 505, 530
Sain v. Montana Power Co., 20 Fed. Supp. 843 (D. Mont. 1937) ..... I: 633
San Joaquin & Kings River Canal & Irr. Co. v. County of Stanislaus, 191 Fed. 875 (C.C.N.D. Cal. 1911) ..... I: 557
Sauve v. Abbott, 19 Fed.(2d) 619 (D. Idaho 1927) ..... I: 142, 585
Schodde v. Twin Falls Land & Water Co., 161 Fed. 43 (9th Cir. 1908) ..... II: 211
Schwab v. Bean, 86 Fed. 41 (C.C.D. Colo. 1898) ..... II: 8; III: 228
Sierra Club v. Callaway, 499 Fed.(2d) 982 (5th Cir. 1974) ..... III: 38
Sierra Club v. Froehlke, 359 Fed. Supp. 1289 (S.D. Tex. 1973) ..... III: 38
Silver Peak Mines v. Valcalda, 79 Fed. 886 (C.C.D. Nev. 1897) ..... I: 531; II: 612; III: 368
Slack v. Walcott, 22 Fed. Cas. 309 (No. 12, 932) (C.C.D. R.I. 1825) ..... III: 67
Snyder v. Colorado Gold Dredging Co., 181 Fed. 62 (8th Cir. 1910) ..... II: 8; III: 228
Spillway Marina, Inc. v. United States, 330 Fed. Supp. 611 (D. Kans. 1970) ..... III: 38
Spillway Marina, Inc. v. United States, 445 Fed.(2d) 876 (10th Cir. 1971) ..... III: 34, 38
Sun Co. v. Gibson, 295 Fed. 118 (5th Cir. 1923) ..... II: 52, 78, 622; III: 519
Territory of Hawaii v. Gay, 52 Fed.(2d) 356 (9th Cir. 1931) ..... I: 17, 199, 203; II: 8, 48, 52, 69, 176, 186, 187
Territory of Hawaii v. Hutchinson Sugar Plantation, 272 Fed. 856 (9th Cir. 1921) ..... II: 393
Texas v. Chuoke, 154 Fed.(2d) 1 (5th Cir. 1946) ..... I: 110
Texas v. Pankey, 441 Fed.(2d) 236 (10th Cir. 1971) ..... III: 77
Thorndyke v. Alaska Perseverance Min. Co., 164 Fed. 657 (9th Cir. 1908) ..... I: 233, 291; III: 144-149
Trillingham v. Alaska Housing Authority, 109 Fed. Supp. 924 (D. Alaska 1953) ..... II: 634; III: 152
Turner v. Kings River Cons. Dist., 360 Fed.(2d) 184 (9th Cir. 1966) ..... III: 37
Tweedy v. Texas Co., 286 Fed. Supp. 383 (D. Mont. 1968) ..... III: 39, 41
Twin Falls Co. v. Damman, 277 Fed. 331 (D. Idaho 1920) ..... II: 572
Twin Falls Land & Water v. Twin Falls Canal Co., 7 Fed. Supp. 238 (D. Idaho 1933) ..... I: 497, 500, 565
Union Mill & Min. Co. v. Dangberg, 81 Fed. 73 (C.C.D. Nev. 1897) ..... I: 10, 204, 378, 382, 384, 385, 398, 487, 492, 495, 497, 501, 502, 538, 573, 577, 579, 580, 594, 620; II: 10, 351, 356, 362, 369, 403, 422; III: 366, 368, 373, 374, 378, 379
Union Mill & Min. Co. v. Ferris, 24 Fed. Cas. 594 (No. 14,371) (C.C. Nev. 1872) ..... III: 376, 378
Union Water Supply Corp. of Garciasville v. Vaughn, 355 Fed. Supp. 211 (S.D. Tex., 1972) ..... III: 512, 517
United States v. 4.105 Acres of Land in Pleasanton, 68 Fed. Supp. 279 (N.D. Cal. 1946) ..... II: 670, 674
United States v. 967.905 Acres of Land, Etc., Minn., 447 Fed.(2d) 764 (8th Cir. 1971) ..... III: 32
United States v. 8,968.06 Acres of Land, Etc., Texas, 326 Fed. Supp. 546 (S.D. Tex. 1971) ..... III: 32
United States v. Ahtanum Irr. Dist., 236 Fed.(2d) 321 (9th Cir. 1956) ..... III: 48
United States v. Ahtanum Irr. Dist., 330 Fed.(2d) 897 (9th Cir. 1964) ..... I: 224; II: 102
United States v. American Ditch Assn., 2 Fed. Supp. 867 (D. Idaho 1933) ..... I: 504, 508
United States v. Ashland Oil & Transp. Co., 504 Fed.(2d) 1317 (6th Cir. 1975) ..... III: 20

United States v. Cappaert, 508 Fed.(2d) 313 (9th Cir. 1974) ..... III: 41
United States v. Central Stockholder's Corp. of Vallejo, 52 Fed.(2d) 332 (9th Cir. 1931) ..... I: 256; II: 33, 55, 195, 196, 395
United States v. Eldredge, 33 Fed. Supp. 337 (D. Mont. 1940) ..... I: 131
United States v. Fallbrook Pub. Util. Dist., 101 Fed. Supp. 298 (S. D. Cal. 1951) ..... III: 51
United States v. Fallbrook Pub. Util. Dist., 108 Fed. Supp. 72 (S. D. Cal. 1952) ..... II: 400
United States v. Fallbrook Pub. Util. Dist., 165 Fed. Supp. 806 (S.D. Cal. 1958) ..... III: 49, 51
United States v. Gossett, 277 Fed. Supp. 11 (C. D. Cal. 1967) ..... I: 131
United States v. Haga, 276 Fed. 41 (D. Idaho 1921) ..... I: 448, II: 202, 567, 572, 583
United States v. Holland, 373 Fed. Supp. 665 (M.D. Fla. 1974) ..... III: 17
United States v. Ramshorn Ditch Co., 254 Fed. 842 (D. Nebr. 1918) ..... II: 583
United States v. Rickey Land & Cattle Co., 164 Fed. 496 (C.C.N.D. Cal. 1908) ..... I: 271, 584
United States v. Tilley, 124 Fed.(2d) 850 (8th Cir. 1942) ..... I: 465, 634; III: 342
United States v. Walker River Irr. Dist., 11 Fed. Supp. 158 (D. Nev. 1935) ..... III: 377
United States v. Walker River Irr. Dist., 104 Fed.(2d) 334 (9th Cir. 1939) ..... I: 259
United States v. Warmsprings Irr. Dist., 38 Fed. Supp. 239 (D. Oreg. 1940) ..... III: 456
United States Freehold Land & Emmigration Co. v. Galleges, 89 Fed. 769 (8th Cir. 1898) ..... I: 192; II: 8; III: 229
Utah Light & Traction Co. v. United States, 230 Fed. 343 (8th Cir. 1915) ..... I: 270
Utah Power & Light Co. v. United States, 209 Fed. 554 (8th Cir. 1913) ..... I: 271
Valcalda v. Silver Peak Mines, 86 Fed. 90 (9th Cir. 1898) ..... II: 262, 264; III: 374
Van Dyke v. Midnight Sun Min. & Ditch Co., 177 Fed. 85 (9th Cir. 1910) ..... II: 2, 6, 119; III: 143, 144, 146, 148, 149, 151
Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co., 245 Fed. 30 (9th Cir. 1917) ..... I: 13, 396, 495, 499, 501, 502, 530; II: 508; III: 368, 372
Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 Fed. 9 (9th Cir. 1917) ..... I: 317, 318, 377, 497, 531, 546, 574, 636; II: 508, 591; III: 276, 369, 374
Watson v. United States, 260 Fed. 506 (9th Cir. 1919) ..... II: 569
Weiland v. Pioneer Irr. Co., 258 Fed. 519 (8th Cir. 1916) ..... I: 391

Miscellaneous

Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843) ..... II: 634
Armstrong v. Francis Corp., 20 N.J. 320, 120 Atl.(2d) 4 (1958) ..... II: 556
Chatfield v. Wilson, 28 Vt. 49 (1855) ..... I: 227
Frazier v. Brown, 12 Ohio St. 294 (1861) ..... II: 744; III: 528
Lawrie v. Silsby, 82 Vt. 505, 74 Atl. 94 (1909) ..... II: 136, 197; III: 433
Mannville Co. v. Worcester, 138 Mass. 89 (1884) ..... III: 67
Mason v. Hill, 5 Barn. & Adol. 1, 110 Eng. Rep. 692 (1833) ..... I: 182
Opinion of the Justices, 344 Mass. 770, 184 N.E.(2d) 353 (1962) ..... III: 84
Wood v. Waud, 3 Exch. 748, 154 Eng. Rep. 1047 (1849) ..... I: 182

GENERAL INDEX

SCOPE OF INDEX

This index is primarily an alphabetical arrangement of the chapter and subchapter headings throughout volumes I, II, and III. In addition, references in the text of chapters 1 through 23 to specific subjects as they relate to a particular State have been incorporated under the appropriate State entries in the index. However, references to particular States which appear only in the footnotes have not been incorporated under the State entries. Moreover, the various subjects discussed in the State summaries in the Appendix appear under the respective State entries and have not been incorporated under the particular subject matter entries for chapters 1 through 23.

Page

ABANDONMENT OF WATER RIGHTS IN WATERCOURSES. *See* LOSS OF WATER RIGHTS IN WATERCOURSES–ABANDONMENT AND STATUTORY FORFEITURE *and* CHARACTER OF RIGHT.

ADJUDICATION OF WATER RIGHTS IN WATERCOURSES .....II: 444-518
See also State entries.

ADJUDICATION OF WATER RIGHTS IN WATERCOURSES–INTRODUCTION ..... II: 444

ADJUDICATION OF WATER RIGHTS IN WATERCOURSES–SOME GENERAL PROCEDURAL MATTERS IN WATER RIGHTS LITIGATION .....II: 497-518
See also PROTECTION OF WATER RIGHTS IN WATERCOURSES–REMEDIES FOR INFRINGEMENT.
- judgments and decrees .....II: 510-518
  - binding effect: conclusiveness .....II: 510-511
  - conditional decree .....II: 513-514
  - declaratory decree ..... II: 514
  - physical solution .....II: 515-518
    - Arizona ..... II: 515
    - California .....II: 515-518
      - development of principle ..... II: 515
      - duty of trial court ....II: 516-518
      - power of trial court ..... II: 516
  - quantity of water .....II: 511-513
- jurisdiction .....II: 504-509
  - general ..... II: 504
  - relation to actions of other types .....II: 504-505
    - contempt .....II: 504-505
    - mandamus ..... II: 504
  - reservation of continuing jurisdiction .....II: 505-506
  - stream crossing State line .....II: 506-509
- parties .....II: 498-502
  - appropriators and riparian owners .....II: 501-502
  - proper and necessary or indispensable parties ..II: 498-500
- venue .....II: 502-504
  - California ..... II: 502
  - Colorado ..... II: 502
  - Hawaii ..... II: 503
  - Idaho ..... II: 503
  - Texas .....II: 503-504

ADJUDICATION OF WATER RIGHTS IN WATERCOURSES – SPECIAL STATUTORY ADJUDICATION PROCEDURES ....II: 444-497
See also APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – water rights administration.
- administrative function, characterization and validity of .....II: 448-451
- comprehensiveness of statutory adjudication proceedings .....II: 461-463

Page

evolvement and implementation of statutory adjudication concept .....II: 447-448
general classification of statutory procedures ...II: 444-445
generally not exclusive ...II: 463-466
principal variations in statutory adjudication proceedings, some .....II: 451-459
Bien Code system .....II: 458-459
Colorado system .....II: 452-454
Oregon system .....II: 456-458
Wyoming system .....II: 454-456
private actions in which State agencies participate ...II: 467-470
court reference procedure .....II: 468-469
more ways in which State agencies may participate in private actions ....II: 469-470
purposes of statutory procedures .....II: 445-447
statutory adjudication procedures in selected States .....II: 470-497
Colorado .....II: 470-486
Adjudication Act of 1943 .....II: 473-479
Adjudication and Limitation Act of 1919 ...II: 472-473
original adjudication statutes .....II: 471-472
Water Right Determination and Administration Act of 1969 .....II: 479-486
North Dakota .....II: 496-497
Bien Code provisions ...II: 496-497
another statutory adjudication provision ..... II: 497
Oregon .....II: 491-496
constitutionality of statutory adjudication procedure .....II: 494-495
court transfer provision .... II: 495
early water rights ..... II: 496
statutory adjudication procedure .....II: 491-494
statutory adjudication procedure, some other judicial views regarding ..... II: 495
Wyoming .....II: 486-491
constitutionality of adjudication statute ...II: 489-490
some aspects of adjudication ..... II: 490
binding on water distributors ..... II: 490
relation to tributaries .... II: 490
some aspects of Board's jurisdiction .....II: 490-491
duty to act .....II: 490-491
not exclusive ..... II: 490
not rights among ditch owners ..... II: 491
State statutory adjudication procedure .....II: 486-489
Territorial procedure ..... II: 486
statutory provisions in Kansas and Hawaii .....II: 459-460
transfer of private actions to statutory adjudication proceedings .....II: 466-467
ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER .....II: 519-534
See also APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – water rights administration; APPROPRIATIVE RIGHT, EXERCISE OF – DIVERSION, DISTRIBUTION, AND STORAGE WORKS; APPROPRIATIVE RIGHT, ELEMENTS OF APPROPRIATIVE RIGHT – sale, rental, or distribution of water; *and State entries.*
ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER – CURRENT STATUS .....II: 523-534
abstracts of procedures in the several States .....II: 523-534
Alaska ..... II: 523
Arizona ..... II: 524
California ..... II: 524
Colorado .....II: 524-525
Hawaii ..... II: 525
Idaho .....II: 525-526
Kansas ..... II: 526
Montana .....II: 526-527
Nebraska ..... II: 527
Nevada .....II: 527-528
New Mexico ..... II: 528
North Dakota .....II: 528-529
Oklahoma ..... II: 529
Oregon .....II: 529-530
South Dakota .....II: 530-531
Texas .....II: 531-532
Utah .....II: 532-533
Washington ..... II: 533
Wyoming ..... II: 534

Page

ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER – DEVELOPMENT OF THE PRINCIPLE .....II: 519-523
ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER – IMPORTANCE ..... II: 519
ADVERSE POSSESSION *and* ADVERSE USE. *See* LOSS OF WATER RIGHTS IN WATERCOURSES – PRESCRIPTION.
ALASKA –
abandonment ...II: 284; III: 148, 159
administrative agency, State ....I: 171, 228, 309; III: 142
adverse possession and use. *See* ALASKA – prescription negated.
Alaska Water Use Act of 1966 –
appropriation of water, provides for ..... I: 171, 228, 298; III: 153-154
ground water .....I: 230; II: 631, 634, 653; III: 161
procedure regarding appropriation of water –
determination of preexisting rights .....II: 456; III: 156
distribution of water ..... I: 301, 306; II: 523; III: 160
exempted water uses ..... III: 158
loss of appropriative right –
abandonment ...II: 284; III: 159
prescription, negated .....II: 381, 405
statutory forfeiture .....II: 291; III: 159-160
penalties ..... II: 456; III: 160-161
permit terms and conditions .....I: 414-415; III: 159
permits and certificates ..I: 414-415; III: 156-158
preexisting water rights ..... III: 156
preferred use ..... I: 423, 436; III: 159
priority .....III: 158-159
time for construction and completion ..... III: 159
transfer and change of appropriations .. I: 456, 641; III: 160
riparian rights, effect upon .... I: 17-19, 199, 203-204, 207; II: 3; III: 154-155

Page

See also ALASKA – dual systems of water rights, *and* riparian doctrine prior to 1966.
waters subject to appropriation ..... III: 154
appropriation of water of watercourses prior to 1966 –
appropriative right, some judicially declared aspects of –
change in exercise of right ..... I: 625-627; III: 147
condemnation of rights-of-way for conveyance of water ..... III: 148
loss of appropriative right ..... III: 148
quantity of water ..... III: 147
sale of water right with land ..... III: 147
prior appropriation, doctrine of –
early recognition of appropriative rights by Congress .....I: 288, 291; III: 143
early recognition by judiciary .....I: 17, 171, 232-233; III: 143-145
procedure for appropriating water –
local customs, laws, and court decisions .... I: 233, 288; III: 146-147
purpose of use .....I: 18-19; III: 142-143
organized mining districts ..... I: 233, 288, 291; III: 145-146
constitutional provisions of 1959 .....III: 152-153
determination and adjudication of existing water rights prior to 1966 ..... III: 152
diffused surface waters II:540-541, 556
dual systems of water rights –
enactment of 1917 statute .....III: 150-151
interrelationships prior to 1966 ..... I: 18-19, 206-207; III: 150
See also ALASKA – Alaska Water Use Act of 1966 – riparian rights, effect upon; *and* riparian doctrine prior to 1966.
riparian legislation in 1966, repeal of ....I: 17, 199, 203-204, 207; II: 3; III: 151

Page

sequence summarized ....I: 206-207; III: 151
estoppel ..... III: 148
governmental status .....I: 1-3; III: 141-142
international law affecting water rights – Boundary Waters Treaty of 1909 ..... III: 120
percolating ground water prior to 1966, rights to use .....II: 634; III: 152
prescription negated ..... II: 381, 405
riparian doctrine prior to 1966 – early uncertain status ..II: 2; III: 148
effect of 1917 statute ..... I: 17, 199, 203, 206-207; II: 2, 119; III: 149-150
summary of handling of riparian questions .....II: 6; III: 148-149
See also ALASKA – Alaska Water Use Act of 1966 – riparian rights, effect upon; *and* dual systems of water rights.
spring waters ..... II: 596
statutory forfeiture .....II: 291; III: 148, 159-160
water policy, declarations of State ..... I: 17-19

APPROPRIATION DOCTRINE. *See* APPROPRIATION OF WATER; APPROPRIATIVE RIGHT; WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – ESTABLISHMENT OF APPROPRIATION DOCTRINE IN WEST, *and* INTERRELATIONSHIPS OF DUAL WATER RIGHTS SYSTEMS; *and State entries.*

APPROPRIATION OF WATER ..... I: 226-436
See also APPROPRIATION DOCTRINE; APPROPRIATIVE RIGHT; *and State entries.*

APPROPRIATION OF WATER – DEFINITIONS ....I: 226

APPROPRIATION OF WATER – LAND FACTOR IN APPROPRIATING WATER ..... I: 254-269
See also APPROPRIATIVE RIGHT – PROPERTY CHARACTERISTICS.

Page

historical development of relationship ..... I: 254-260
public domain ..... I: 254-258
congressional legislation and its effect I:255-258
confirmation of right to appropriate on public domain ..... I: 255-256
early State court views regarding land-water relationship .... I: 256-258
places of diversion and use .....I: 258
relation to local custom and law .....I: 256
prior to congressional legislation ..... I: 254-255
State lands ..... I: 259-260
appropriation by others in relation to State lands ..... I: 259-260
appropriation of water by State for use of State lands .....I: 259
private lands ..... I: 261-269
appropriator's ownership of land used ..... I: 261-265
Arizona rule ..... I: 264-265
general rule ..... I: 261-264
initiation of appropriative right in trespass ..... I: 265-269
early differences ..... I: 265-266
purposes of trespassing on land ..... I: 267-269
voidability as against owner of land trespassed upon ..... I: 267-269

APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES ... I: 283-436
administration, water rights ..... I: 298-312
See also subtopics current appropriation procedure, *and* statutory.
administrative agencies ... I: 306-312
changes in the several States ..... I: 309-312
changes over the years .. I: 307-309
preeminence of office of State Engineer .....I: 307
administrative control of surface water rights .... I: 298-306
changeover to administrative control of new appropriations ..... I: 298-301

Page

beginning of public control ..... I: 298
Colorado ..... I: 299
Wyoming ..... I: 299-301
other States ..... I: 301
threefold State administrative system pertaining to watercourses ..... I: 301-306
adjudication of water rights ..... I: 302-304
appropriation of water ..... I: 302
completeness of State administrative system authorizations ..... I: 306
distribution of water ..... I: 304-306
See also ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER.
appropriation of water for use in another State ..... I: 389-396
court decision ..... I: 390-394
in absence of State statutes ..... I: 391-394
some fundamental points recognized by judiciary and problems involved ... I: 390-391
State statutes: salient points summarized ..... I: 394-396
See also INTERSTATE DIMENSIONS OF WATER RIGHTS – VALIDITY OF STATE LEGISLATIVE RESTRICTIONS ON TAKING WATER OUT OF STATE.
completion of appropriation ..... I: 366-389
diligence ..... I: 373-377
basic requirement of diligence ..... I: 373-374
principles respecting diligence ..... I: 374
question of fact ..... I: 374-375
some circumstances excusing delays ..... I: 375
some inexcusable circumstances ..... I: 375-377
in general ..... I: 375
lack of diligence ..... I: 377
lack of pecuniary means ..... I: 376
elements of valid appropriation ..... I: 366
gradual or progressive development ..... I: 377-382

Page

application of rule under administration statutes ..... I: 380-382
development of rule ..... I: 378-380
general principles ..... I: 377-378
progressive development versus future use ..... I: 382
relation, doctrine of ..... I: 382-389
administration statutes ..... I: 388-389
postponement of priority ..... I: 389
relation back to first step ..... I: 388-389
in absence of statute ..... I: 383-386
initiation of claim ..... I: 385-386
local custom ..... I: 386
reason for doctrine ..... I: 384-385
statement of doctrine ..... I: 383-384
nature and importance ..... I: 382-383
nonadministration statutes ..... I: 386-388
what constitutes completion of appropriation ..... I: 366-373
application of water to beneficial use ..... I: 372-373
completion of construction ..... I: 371-372
development of rules ..... I: 366-370
California ..... I: 367-368
Idaho ..... I: 368
nonpermit statutes ..... I: 369-370
permit statutes ..... I: 368-369
theory of possessory system ..... I: 367
Wiel ..... I: 366-367
diversion of water ..... I: 371
intent ..... I: 370-371
current appropriation procedures ..... I: 312-348
See also subtopics statutory, *and* water rights administration.
administrative ..... I: 312-343
additional appropriation ..... I: 342-343
constitutionality of legislation ..... I: 314-315
effect on riparian rights ..... I: 315
exercise of State's police power ..... I: 314-315
exclusiveness of statutory procedure ..... I: 315-318
generally held to be exclusive ..... I: 315-317
Idaho, definite exception in ..... I: 317-318
Utah experience ..... I: 317
judicial review of administrative action ..... I: 321-323

Page

nature of powers of administrators ..... I: 318-321
administrative and quasi-judicial ..... I: 318-320
exercise of discretion .....I: 320
no judicial powers .... I: 320-321
procedural steps in appropriating water ..... I: 323-342
application to State administrator .... I: 327-331
certificate of appropriation or license .... I: 339-342
certificate of completion of construction .....I: 339
exceptional preapplication provisions .. I: 326-327
in general ..... I: 323-326
permit: effect on preexisting rights ..... I: 337-339
permit: types ..... I: 336-337
permit to appropriate water ..... I: 331-336
purposes of legislation ..... I: 312-313
states and agencies vested with supervision over appropriation of water .....I: 312
not administratively controlled ..... I: 343-346
Colorado ..... I: 343-345
Montana ..... I: 345-346
not exclusively administratively controlled: Idaho ..... I: 346-348
nonstatutory ..... I: 284-290
earliest Western locations ..... I: 284-290
California gold rush ..... I: 286-287
Spanish settlements in Southwest ..... I: 284-285
Utah Mormon colonies ..... I: 285-286
other Western situations ..... I: 287-290
priority of appropriation ..... I: 396-400
importance and value of fixed priority ..... I: 396-397
essential element of doctrine ..... I: 396
date of priority ..... I: 396-397
priority principle in operation ..... I: 397-400
current legislative declarations ..... I: 399-400

Page

effect of statutory administration restrictions .....I: 400
location of diversion works on watercourse .....I: 399
priorities of successive appropriations on one stream ..... I: 397-398
relation of priority to diversion works .....I: 398
succeeding appropriations by first user .....I: 398
See also subtopic completion of appropriation – relation, doctrine of; APPROPRIATIVE RIGHT – ELEMENTS OF APPROPRIATIVE RIGHT – priority of right; *and* APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS.
procedures. *See subtopic* current appropriation procedures.
restrictions and preferences in appropriation of water ..... I: 400-436
preferences in water appropriation ..... I: 419-436
acquisition of rights to appropriate water ... I: 425-428
preferences regarding application for permit ..... I: 425-426
preferences regarding location of land .....I: 427
withdrawal of unappropriated water from appropriation ..... I: 427-428
order of preferences in individual States ... I: 423-425
order of preferences in purpose of use ..... I: 419-423
agriculture, stock watering, manufacturing .....I: 422
domestic and municipal ..... I: 420-422
hydroelectric power .....I: 423
mining .....I: 423
recreation .....I: 423
other uses of water .....I: 423

Page

taking for superior use a right to water already appropriated for inferior use ..... I: 433-436
compensation, matter of ..... I: 433-434
procedures for condemning prior low preference water rights .. I: 435-436
subjection of future appropriations to taking without compensation .. I: 434-435
use of appropriated water: in time of water shortage ..... I: 428-433
use of appropriated water: priority of right .....I: 428
restrictions on right to appropriate water ..... I: 401-419
availability of unappropriated water ..... I: 403-407
difficulties in determining the question ... I: 404-407
practically uniform requirement ..... I: 403-404
conformance to specific requirements of statute ...I: 403
constitutional prohibitions against denial of right to appropriate water ... I: 401-403
detriment to public welfare, question of .... I: 409-415
development of hydroelectric power ..... I: 417-419
no unqualified right of appropriation under water permit statutes .....I: 403
nonimpairment of existing water rights ..... I: 407-409
qualified and limited right ..... I: 415-417
other factors .....I: 419
statutory ..... I: 290-298
original statutory appropriation procedures ..... I: 290-292
California procedure .....I: 290
other Western States ..... I: 290-292
See also subtopics current appropriation procedures, *and* administration, water rights.
preadministrative procedures, inadequacies of ..... I: 292-298

Page

abandonment of most posting and filing methods .. I: 297-298
California experience ... I: 295-296
limited value of posting and filing ..... I: 294-295
need for formal procedure .....I: 293
purpose of early statutory procedures .....I: 293
Utah experience ..... I: 296-297
storage water appropriation ..... I: 348-365
impounded water, disposal of .....I: 365
method of appropriation ..... I: 350-358
relative priorities of direct flow and storage water rights ..... I: 354-358
separate appropriations .....I: 354
separate permits for storage and for application of stored water to beneficial use .... I: 352-354
storage and direct flow procedures integrated ..... I: 350-351
public policy ..... I: 348-350
reservoir functions ..... I: 361-364
on-channel versus off-channel storage ..... I: 361-362
some small storages .....I: 364
storage carryover ..... I: 363-364
storage versus regulation ..... I: 362-363
storage location ..... I: 358-361
natural lake ..... I: 358-359
relation of storage site to watercourse ..... I: 359-360
storage of water in ground ..... I: 360-361

APPROPRIATION OF WATER – PREFERENCES IN APPROPRIATION OF WATER. *See* APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – restrictions and preferences in appropriation of water.

APPROPRIATION OF WATER – PRIORITY OF APPROPRIATION.

Page

See APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – priority of appropriation.

APPROPRIATION OF WATER – RIGHTS-OF-WAY FOR WATER CONTROL AND RELATED PURPOSES ..... I: 269-283
private lands ..... I: 274-283
condemnation by individual for his own use ..... I: 276-283
constitutional foundation for principle ..... I: 276-277
right-of-way for new ditch ..... I: 277-281
right of entry upon other land to obtain data .. I: 282-283
right to enlarge another's existing ditch ..... I: 281-282
condemnation by organization for public service ..... I: 275-276
use of water for beneficial purposes a public use .. I: 274-275
public lands ..... I: 269-273
public lands of United States ..... I: 269-272
early acts of Congress ..... I: 269-271
later acts of Congress .....I: 271
some other United States Supreme Court interpretations ..... I: 271-272
State lands ..... I: 272-273
California .....I: 273
Federal projects .....I: 273
Idaho .....I: 272
Nebraska .....I: 272
Oregon ..... I: 272-273
South Dakota .....I: 272
Texas .....I: 272
Utah .....I: 273

APPROPRIATION OF WATER – WATERS SUBJECT TO APPROPRIATION ..... I: 227-238
previous court declarations ..... I: 232-238
ground water appropriative rights ..... I: 235-238
definite underground stream ..... I: 235-236
percolating water ..... I: 236-238
underflow of surface stream .....I: 236

Page

stream water appropriative rights ..... I: 232-235
Alaska ..... I: 232-233
other jurisdictions ..... I: 233-235
statutory declarations ..... I: 227-232
all waters ..... I: 227-228
ground waters ..... I: 230-231
all ground waters ..... I: 230-231
definite underground stream and underflow of surface stream .....I: 231
ground water body with ascertainable boundaries .....I: 231
miscellaneous ..... I: 231-232
multiple classifications of watercourses .....I: 229
natural streams ..... I: 228-229
navigable waters .....I: 229
See also NAVIGABLE WATERS – WATER RIGHTS IN NAVIGABLE WATERS – appropriative rights.
stream waters .....I: 228
See also APPROPRIATION OF WATER – RESTRICTIONS AND PREFERENCES – restrictions on right to appropriate water – availability of unappropriated water.

APPROPRIATION OF WATER – WHO MAY APPROPRIATE WATER ..... I: 238-254
governmental agencies and entities other than districts ..... I: 245-254
municipality ..... I: 245-250
appropriation of water by municipality for future use ..... I: 247-249
court decisions ..... I: 247-249
legislation .....I: 247
general situation in the West ..... I: 245-246
other means of reserving water for future needs of municipality .....I: 249
policy declarations ..... I: 246-247
preferences in obtaining water supplies .....I: 246
special considerations, some other ..... I: 249-250
State ..... I: 250-251
general observations .....I: 250
some individual State situations ..... I: 250-251
United States ..... I: 252-254

Page

appropriation without specific statutory authorization ..... I: 252
special statutory provisions relating to the United States ..... I: 252-254
specific authorization in most statutes ..... I: 252
nongovernmental applicants ..... I: 238-245
group organizations ..... I: 240-243
appropriations under current statutes ..... I: 241-243
corporation ..... I: 241
other private group organizations ..... I: 242
public districts ..... I: 243
early statutory and nonstatutory appropriations ..... I: 240-241
person ..... I: 238-240
landownership in relation to appropriator qualifications ..... I: 240
natural person, organization, public entity ... I: 239-240
riparian proprietor ..... I: 243-245
California ..... I: 243-244
Oregon ..... I: 245
Texas ..... I: 244
Washington ..... I: 244-245
APPROPRIATIVE RIGHT ..... I: 437, 589
See also APPROPRIATION OF WATER; *and State entries.*
APPROPRIATIVE RIGHT – ELEMENTS OF APPROPRIATIVE RIGHT ..... I: 488-569
diversion of water from watershed or area of origin ..... I: 517-522
long recognition of qualified right ..... I: 517-519
some statutory authorizations and restrictions ..... I: 519-522
California ..... I: 519-520
Nebraska ..... I: 522
New Mexico ..... I: 520
North Dakota ..... I: 520
Texas ..... I: 520-521
measure of appropriative right ..... I: 491-515
beneficial use of water ..... I: 493-497
beneficial use defined ..... I: 494

Page

constitutional and statutory declarations ..... I: 495
some incidents of rule of beneficial use ..... I: 495-497
intention ..... I: 495
irrigation is beneficial use in arid land ..... I: 497
original beneficial use diminishes ..... I: 496
quantity of water too small to be beneficial ..... I: 497
rules out speculation ..... I: 496
streamflow not appropriated by others ..... I: 496
the rule and its reasons ..... I: 494-495
beneficial use, other terms associated with ..... I: 497-503
actual needs of water user ..... I: 499
economical use ..... I: 501-502
exclusion of unnecessary waste ..... I: 497-499
overall association ..... I: 503
reasonable beneficial use ..... I: 501
reasonable use ..... I: 500-501
capacity of ditch as factor ..... I: 492-493
duty of water ..... I: 506-513
conveyance losses ..... I: 512-513
obligation imposed on water user ..... I: 512
place of measurement of appropriated water.. I: 512-513
reasonable conveyance loss allowable ..... I: 512-513
how quantity determined ..... I: 507-509
significance of term .... I: 506-507
statutory provisions .... I: 510-512
beneficial use as limit of right ..... I: 510
criteria in directives to administrators .... I: 511-512
quantitative limitations ..... I: 510-511
excessive allowance of water ..... I: 514-515
period of use of water ..... I: 503-506
appropriation under permit pursuant to administrative statute ..... I: 505-506
established rule ..... I: 503-504
some questioning or nonapplication of rule .. I: 504-505

Page

place of use of water ..... I: 517
See also subtopic diversion of water from watershed or area of origin; *and* APPROPRIATIVE RIGHT, EXERCISE OF – CHANGE IN EXERCISE OF WATER RIGHT – place and purpose of use.
point of diversion of water ..... I: 515-516
See also APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS – reciprocal rights and obligations of appropriators – relative locations on stream; *and* APPROPRIATIVE RIGHT, EXERCISE OF – CHANGE IN EXERCISE OF WATER RIGHT – point of diversion.
priority of right ..... I: 488-489
basic rule ..... I: 488
current application of rule ..... I: 488-489
some facets of priority of right ..... I: 489
See also APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – priority of appropriation; *and* APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS.
purpose of use of water ..... I: 522-546
See also APPROPRIATIVE RIGHT, EXERCISE OF – CHANGE IN EXERCISE OF WATER RIGHT – place and purpose of use.
beneficial, use must be .... I: 522-523
beneficial, uses held not to be ..... I: 545-546
California ..... I: 545
Idaho ..... I: 546
Nevada-Idaho ..... I: 546
Oregon ..... I: 546
constitutional mandates .. I: 524-525
domestic and municipal relationships ..... I: 531-537
domestic ..... I: 531-532
domestic and municipal .. I: 532-536
definitions ..... I: 532-533
highly favored uses ..... I: 533-536

Page

terms are closely related ... I: 532
domestic and stockwatering ..... I: 536-537
early uses of water in West ..... I: 525-526
irrigation ..... I: 528-531
irrigation of cultivated land ..... I: 528-530
crops ..... I: 528-529
emergence of irrigation .... I: 528
importance of period of use of water ..... I: 529-530
irrigation defined ..... I: 530
minor streams in South Dakota ..... I: 529
Oklahoma requirements ..... I: 529
irrigation of uncultivated land ..... I: 530-531
exceptions regarding particular circumstances ..... I: 531
general rule ..... I: 530
mining and irrigation ..... I: 526-528
other purposes of use of water ..... I: 539-545
in general ..... I: 539
industrial use ..... I: 541-542
navigation ..... I: 545
power ..... I: 539-541
recharge of ground water supply ..... I: 544-545
recreation ..... I: 542-544
some statutory listings ..... I: 523-524
stockwatering ..... I: 537-539
sale, rental, or distribution of water ..... I: 546-569
See also ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER; *and* APPROPRIATIVE RIGHT, EXERCISE OF – DIVERSION, DISTRIBUTION, AND STORAGE WORKS.
appropriation initiated by one party and completed by another ..... I: 548-549
appropriation of water by individuals and organizations for delivery to consumers ... I: 549, 550
formal title to appropriative right ..... I: 558
profit and nonprofit enterprises ..... I: 552-554

Page

private nonprofit irrigation enterprises ..... I: 552-553
private profit enterprises ..... I: 553-554
public nonprofit enterprises ..... I: 553
public regulation of rates and services ..... I: 554-558
regulatory agencies ..... I: 555-556
value of water right as element of rate base ... I: 556-558
what enterprises subject to public regulation .... I: 554-555
public supervision and regulation of water supply enterprises ..... I: 554
public use ..... I: 546-548
real appropriator ..... I: 559-567
commercial enterprise .. I: 559-563
ownership of water right by company ..... I: 559-561
ownership of water right by consumer ..... I: 561-563
mutual enterprise ..... I: 563-566
principal and agent ..... I: 566-567
public agency ..... I: 567
right of consumer to receive water from distributing agency ..... I: 567-569
commercial company ... I: 567-568
district ..... I: 569
municipality ..... I: 569
mutual irrigation company ..... I: 568-569
water supply enterprises .. I: 550-552
incorporated water company ..... I: 552
individual ..... I: 551
public agency ..... I: 552
unincorporated group of appropriators ..... I: 551
specific quantity of water .. I: 489-491
appropriations made under water administrative procedures ..... I: 491
general rule ..... I: 489-490
some exceptions ..... I: 490-491
APPROPRIATIVE RIGHT – INCHOATE APPROPRIATIVE RIGHT ..... I: 583-589
conditional decrees and water rights in Colorado ..... I: 587-589
nature and extent of right ..... I: 583-584
permit to appropriate water ..... I: 585-587

Page

property nature of inchoate right ..... I: 584-585
See also PROTECTION OF WATER RIGHTS IN WATERCOURSES – INCHOATE APPROPRIATIVE RIGHT.
APPROPRIATIVE RIGHT – JUNIOR AND SENIOR APPROPRIATORS, RELATIVE RIGHTS. *See* APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS.
APPROPRIATIVE RIGHT – LOSS OF RIGHT IN WATERCOURSE. *See* LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT – appropriative right.
APPROPRIATIVE RIGHT – PROPERTY CHARACTERISTICS ..... I: 438-488
appurtenance of water right to land ..... I: 454-468
See also APPROPRIATION OF WATER – LAND FACTOR IN APPROPRIATING WATER.
appurtenant and not generally severable without loss of right ..... I: 462-466
Nebraska ..... I: 463-466
Wyoming ..... I: 462-463
generally appurtenant, but severable ..... I: 455-462
some court decisions in harmony with statutes ..... I: 457
some individual State situations ..... I: 457-462
Arizona ..... I: 457
California ..... I: 457-458
Colorado ..... I: 458
Kansas ..... I: 458
Montana ..... I: 458-459
Nevada ..... I: 459-460
New Mexico ..... I: 460
South Dakota ..... I: 460-461
Texas ..... I: 461
Utah ..... I: 461-462
Wyoming ..... I: 462
statutes ..... I: 456-457
recognition in West, early and widespread ..... I: 454-455
severability and conditions of severance ..... I: 466-468

Page

beneficial use, right of ..... I: 438-442
concurring judicial rule ..... I: 440-442
consummation of intended use ..... I: 441-442
intent to apply water to beneficial use ..... I: 440-441
measure of right ..... I: 442
usufruct ..... I: 441
State constitutions and statutes ..... I: 438-440
constitutions ..... I: 438
statutes ..... I: 439-440
conveyance of title to appropriative right ..... I: 468-488
sale and assignment of water right ..... I: 468-469
some aspects of conveyance of appropriative titles .... I: 469-488
conveyance of land on or in connection with which water rights are exercised ..... I: 469-474
some controversies decided in Western courts .. I: 471-474
summary by Weil ..... I: 469-470
water right statutes of several States ..... I: 470-471
conveyance of land together with appurtenances .. I: 474-475
conveyance of possessory rights on public domain ..... I: 469
conveyance of water right represented by shares in mutual irrigation corporation ..... I: 477-482
general observations .. I: 478-479
litigated examples .... I: 479-482
nature of mutual company ..... I: 477-478
conveyance of water right separate and apart from land ..... I: 476-477
formalities of conveyance ..... I: 483-487
assignment of permit .. I: 484-485
effect of informal transfer upon priority of right ... I: 485
executed parol license .... I: 486-487
general rule ..... I: 483-484
possessory rights on public domain ..... I: 485
mortgage of water right .. I: 482-483
privity between claimant and original appropriator .... I: 487-488

Page

reservation of water right in conveyance of land .. I: 475-476
property, right of ..... I: 442-454
flow of water, right to ... I: 445-454
general rule ..... I: 445
incorporeal hereditament ..... I: 445
quality of water ..... I: 448-454
development of rule in California ..... I: 448-449
general principle ..... I: 448
grant by appropriator of easement to pollute stream ..... I: 454
material deterioration of quality a question of fact ..... I: 451
mining versus agriculture .... I: 452-454
relation to purposes of use of injured appropriator... I: 449-450
substantial injury, question of ..... I: 450-451
substantial injury, remedies for ..... I: 451-452
quantity of water in stream ..... I: 446
quantity of water in tributaries ..... I: 446-448
ownership of appropriative right ..... I: 443-444
in general ..... I: 443
multiple ownerships of appropriative right .... I: 443-444
separable ownerships of ditch and water right ..... I: 444
separable ownerships of land and water right ..... I: 444
private property, right of ..... I: 151-153, 443
appropriative right is species of property ..... I: 151
valuable property ..... I: 152
real property: general rule ..... I: 152-153
appropriative right is real property ..... I: 152
quiet title actions ..... I: 153
real property: Montana rule ..... I: 153-154
applicability of general rule in Montana ..... I: 153
Montana rule with respect to taxation ..... I: 153-154
See also PROPERTY NATURE OF WATER AND WATER RIGHTS PERTAINING TO WATERCOURSES.

Page

APPROPRIATIVE RIGHT – PURPOSE OF USE OF WATER. *See* APPROPRIATIVE RIGHT – ELEMENTS OF APPROPRIATIVE RIGHT – purpose of use of water.
APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS ..... I: 569-583
reciprocal rights and obligations of appropriators .. I: 578-583
burden of proof ..... I: 582-583
effect of losses of water in stream channel ..... I: 579-582
appropriator not penalized because of natural upstream losses .....I: 579
difficulties of enforcement of prior rights on long, losing stream channel ... I: 581-582
downstream appropriator entitled to usable quantity ... I: 580-581
upstream appropriator entitled to flow that would be lost ..... I: 579-580
no encroachment by either party .....I: 578
relative locations on stream ..... I: 578-579
rights of junior appropriator ..... I: 573-578
appropriation of unappropriated water .....I: 573
maintenance of stream conditions ..... I: 576-577
protection against enlargement of senior rights .. I: 573-574
reasonable limitation of senior right .....I: 576
substitution of water .... I: 577-578
use of water when not needed by senior ..... I: 574-576
rights of senior appropriator ..... I: 569-573
exclusive to extent of prior appropriation ..... I: 569-570
increase in amount of appropriation, when lawful .....I: 572
maintenance of stream conditions ..... I: 570-572
noninjurious changes in exercise of senior right .....I: 572
quantity and quality of water, and right to flow of tributaries .....I: 572

Page

reasonable means of diversion .....I: 573
See also APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – priority of appropriation; *and* PROTECTION OF WATER RIGHTS IN WATERCOURSES – APPROPRIATIVE RIGHT, *and* MEANS OF DIVERSION.
APPROPRIATIVE RIGHT, EXERCISE OF ..... I: 590-650
APPROPRIATIVE RIGHT, EXERCISE OF – CHANGE IN EXERCISE OF WATER RIGHT ..... I: 623-644
major changes ..... I: 623-624
place and purpose of use ... I: 633-641
place of use ..... I: 633-637
some judicial points .... I: 634-637
some statutory situations ..... I: 633-634
purpose of use ..... I: 637-641
some judicial points .... I: 638-641
some statutory situations ..... I: 637-638
point of diversion ..... I: 625-633
effect of change on validity of appropriation ..... I: 630-631
no abandonment or forfeiture .....I: 630
no effect on priority of right ..... I: 630-631
injury, question of resulting ..... I: 631-633
burden of proof ..... I: 632-633
resulting injury bars change of diversion ..... I: 631-632
uninjured party may not complain .....I: 633
judicial decisions ..... I: 626-628
exclusiveness of statutory procedure .....I: 628
independent of statutes .... I: 626-627
purpose of statutory procedure ..... I: 627-628
legislation ..... I: 625-626
rule respecting change of diversion as announced by courts ..... I: 628-630
general rule ..... I: 628-629
some other aspects of the rule ..... I: 629-630
summary of statutory authorizations and restrictions ... I: 641-644

Page

See also APPROPRIATIVE RIGHT, EXERCISE OF – NATURAL CHANNELS AND RESERVOIRS; *and* ROTATION IN USE OF WATER.
APPROPRIATIVE RIGHT, EXERCISE OF – DIVERSION, DISTRIBUTION, AND STORAGE WORKS .... I: 590-601
See also ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER; *and* APPROPRIATIVE RIGHT, ELEMENTS OF APPROPRIATIVE RIGHT – sale, rental, or distribution of water.
relation of physical works to water right ..... I: 598-601
control of waterworks ... I: 598-599
joint occupancy and use of works ..... I: 600-601
separable ownerships of waterworks and water right .... I: 599-600
some features of waterworks ..... I: 590-598
diversion and distribution works ..... I: 590-592
artificial diversion works usually necessary .....I: 591
common phenomenon in the West .....I: 590
mode of diversion not material ..... I: 591-592
statutory mention of works ..... I: 590-591
storage works .....I: 598
use of streamflow without conduit ..... I: 592-597
dipping or drinking from stream ..... I: 592-593
natural overflow ..... I: 594-596
scenic beauty and other purposes ..... I: 596-597
APPROPRIATIVE RIGHT, EXERCISE OF – EFFICIENCY OF PRACTICES ..... I: 644-650
diversion, conveyance, and distribution of water ... I: 645-648
conveyance and distribution of water ..... I: 647-648
diversions of water ..... I: 646-647
use of water ..... I: 649-650

Page

APPROPRIATIVE RIGHT, EXERCISE OF – NATURAL CHANNELS AND RESERVOIRS ..... I: 601-615
use of natural channel ..... I: 601-614
commingling ..... I: 603-605
burden of proof .....I: 605
general rule .....I: 603
limitations on exercise .. I: 604-605
no abandonment .....I: 604
conveyance of water ..... I: 602-603
privilege impermanent .....I: 603
responsibility for injury .... I: 602-603
statutes .....I: 603
well settled rule .....I: 602
exchange or substitution of water ..... I: 606-611
burden of proof .....I: 608
interrelationships .....I: 606
limitations on exercise .....I: 607
other waters at the surface .....I: 611
principle, the ..... I: 606-607
some statutory constructions ..... I: 608-611
Colorado ..... I: 608-610
Idaho .....I: 610
Montana .....I: 610
New Mexico .....I: 611
Wyoming .....I: 611
substitution of prior appropriator's diversion .....I: 608
summary of State statutory provisions ..... I: 611-614
three interrelated functions ..... I: 601-602
use of natural reservoir .....I: 615
APPROPRIATIVE RIGHT, EXERCISE OF – ROTATION IN USE OF WATER ..... I: 615-623
imposition of rotation plan by court decree ..... I: 619-620
interstate compact ..... I: 622-623
problem and the plan ..... I: 615-616
qualification, questioning, or disapproval of compulsion .. I: 620-622
rotation agreements ..... I: 618-619
appropriators on watercourse .....I: 618
users on enterprise ditch system ..... I: 618-619
statutory authorization to rotate water uses ..... I: 616-618

Page

ARIZONA –
abandonment. *See* ARIZONA – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* ARIZONA – determination of conflicting water rights.
administration of stream water rights and distribution of water ....I: 298, 301, 306; II: 524; III: 178-179
administrative agency, State ... I: 309; III: 162
adverse possession and use. *See* ARIZONA – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....III: 165-166
appropriation of water for use in another State ..... I: 394; III: 107-108
current procedure ..... III: 165
early procedure ...I: 289-291, 316; III: 164
exclusiveness of procedure ..I: 316-317; III: 164
land factor in appropriating water ... I: 264-265; III: 164
purpose of use of water ... I: 9, 13; III: 164
storage water appropriation .. I: 353;
waters subject to appropriation .... I: 228-229; III: 164
who may appropriate water .....I: 239-240, 247; III: 164, 167
recognition of doctrine of prior appropriation ... I: 160-162, 171, 173, 284, 289-290; III: 163
restrictions and preferences in appropriation of water .... I: 20, 323, 334, 341, 417, 423, 425, 428-429, 557; III: 166-167
some aspects of Arizona appropriative right –
appurtenance of water right to land ...I: 456, 457; III: 167
beneficial use ..... I: 9, 13, 438; III: 164
change in exercise of water right ..... I: 625-627, 637-638, 641-642; III: 168-169

Page

condemnation of right-of-way ..... I: 278-279
conveyance of title to appropriative right ..... I: 479-480
diversion, distribution, and storage works .....I: 590, 599
efficiency of practices .....I: 646
natural channels, use of .....I: 611
property, right of .....I: 446
See also ARIZONA – property nature of water and water rights.
rotation in use of water ..... III: 168
sale, rental, or distribution of water ..... I: 549, 557, 562-563, 565-566, 568-569
substitution of water ..... III: 168
determination of conflicting water rights –
court transfer procedure .....II: 466; III: 177
physical solution ..... II: 246, 515
procedural matters in water rights litigation, some general .....II: 505-506, 509
special statutory adjudication procedure .....I: 303; 457-458, 462; III: 177
water rights registration .... III: 177
See also ARIZONA – protection of water rights in watercourses.
diffused surface waters ..... II: 551
distribution of water. *See* ARIZONA – administration of stream water rights and distribution of water; *and* appropriation of water of watercourses – some aspects of Arizona appropriative right – diversion, distribution, and storage works, *and* sale, rental, or distribution of water.
estoppel. *See* ARIZONA – loss of water rights in watercourses.
Federal-State relations –
commerce power .....III: 24-29, 34
proprietary power and reservation doctrine .....III: 42-49
welfare power .....III: 55-57
governmental status .... I: 1-3; III: 162
ground waters –
artesian waters ..... II: 653
definite underground stream .. I: 231; II: 632; III: 171-172
designated critical ground water areas .....II: 659-660

Page

percolating ground waters ....II: 635; III: 172-176
underflow of surface stream .....I: 236; III: 172
interstate dimensions of water rights –
Federal regulatory laws and projects, water allocation affected by .....III: 104-106
restriction on taking water out of State ..I: 394; III: 107-108
loss of water rights in watercourses –
abandonment .....III: 169-170
estoppel .....II: 432; III: 170
prescription ..... III: 170
statutory forfeiture .....II: 291-292; III: 169-170
navigable waters –
uses .....I: 117
water rights in navigable water .....I: 124
prescription. *See* ARIZONA – loss of water rights in watercourses.
property nature of water and water rights .....I: 146; III: 164
See also ARIZONA – appropriation of water and water rights – some aspects of Arizona appropriative right.
protection of water rights in watercourses –
generally ..... III: 166
means of diversion .....II: 211-213
physical solution .....II: 246
quantity and quality of water ..... III: 167
See also ARIZONA – determination of conflicting water rights.
remedies. *See* ARIZONA – protection of water rights in watercourses.
riparian doctrine of water rights, repudiation of .....I: 14, 192-193; II: 1, 6-7; III: 170-171
spring waters .....II: 596-597
statutory forfeiture. *See* ARIZONA – loss of water rights in watercourses.
waste waters .....II: 569
watercourse, characteristics of .....I: 34, 41, 45-46, 53-54, 62, 76-77, 84, 99
water enterprises, pre-American .....I: 160-162; III: 162
water policy, declarations of State .....I: 5, 9, 13-14, 20

Page

CALIFORNIA –
abandonment. *See* CALIFORNIA – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* CALIFORNIA – determination of conflicting water rights.
administration of stream water rights and distribution of water ...I: 6-7, 298, 301, 305-306; II: 522, 524; III: 213-214
administrative agencies, State ..I: 306-310; III: 181, 185
adverse possession and use. *See* CALIFORNIA – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals ....I: 321-322; III: 186-187
appropriation of water for use in another State .....I: 394
completion of appropriation ..... I: 366, 368, 373, 375, 382; III: 191
constitutionality of current procedures ..... I: 314-315
current procedure ..... I: 176, 179, 329-334, 338, 340-342; III: 184-187
exclusiveness of procedure... I: 316; III: 185
land factor in appropriating water ....I: 254, 256-260, 262, 265, 268-269
nonstatutory and civil code methods of appropriating water. ..I: 175-176, 284, 286-287, 290-292; III: 183-184
inadequacies of procedures ..... I: 292-298
See also subtopic recognition of doctrine of prior appropriation.
priority of appropriation ... I: 396, 398, 400, 488
purpose of use of water .... I: 526-530, 533, 535-537, 539-542, 544-545; III: 185
relation, doctrine of ..... I: 383-386; III: 187

Page

storage water appropriation .. I: 348, 350, 360-362, 364
waters subject to appropriation ..... I: 227, 229, 231, 237-238; III: 185
who may appropriate water. . .I: 241-244; 246-247, 251; III: 186
recognition of doctrine of prior appropriation ..... I: 160, 162, 164-170, 173, 233-234, 286-287; III: 181-183
restrictions and preferences in appropriation of water ... I: 405, 409-411, 416, 420-421, 423, 425, 432; III: 187-190
some aspects of California appropriative right –
appurtenance of water right to land .... I: 457-458; III: 191
beneficial use .....I: 9, 11-12, 439, 494-497, 500-501, 523; III: 185
change in exercise of water right .....I: 623, 625, 628-629, 634-635, 638, 642; III: 191
commingling of water ..... I: 605; III: 192
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of title to appropriative right ..... I: 468, 473-474, 481, 483-484; III: 191
Desert Land Act of 1877, interpretation of .....I: 174
diversion, distribution, and storage works .....I: 599
diversion of water from watershed ..... I: 518-520
efficiency of practices ..... I: 647-649; III: 191
inchoate appropriative right ..... I: 584-586
measure of the appropriative right .....I: 506, 507, 510
natural channels, use of ..... I: 602, 611-612
property, right of ..... I: 443, 445, 448-450, 452-454
See also CALIFORNIA – property nature of water and water rights.
relative rights of senior and junior appropriators ..... I: 569-572, 578, 582

Page

reservoirs, use of .....I: 615
rights-of-way for water control and related purposes .... I: 271, 273, 275, 278-279; III: 193-194
rotation in use of water ..... I: 619; III: 191-200
sale, rental, or distribution of water ....I: 8, 547-548, 550, 552-555, 557, 559-560, 564-565; III: 191
stockponds, rights clarified .....III: 190-191
See also CALIFORNIA – interrelationships of dual systems of water rights.
determination of conflicting water rights –
court reference procedure ..... I: 304; II: 468-469; III: 211
modification of decree ..... III: 213
physical solution ..... II: 245-246, 515-518
procedural matters in water rights litigation, some general .....II: 502, 504, 506-508, 510, 512-514
statutory adjudication procedure .....I: 303; II: 451, 457, 510, 512-518; III: 211-213
See also CALIFORNIA – protection of water rights in watercourses.
diffused surface waters .....II: 536, 541-543, 553-555, 557-559
distribution of water. *See* CALIFORNIA – administration of stream water rights and distribution of water; *and* appropriation of water of watercourses – some aspects of California appropriative right – diversion, distribution, and storage works, *and* sale, rental, or distribution of water.
estoppel. *See* CALIFORNIA – loss of water rights in watercourses.
Federal-State relations –
commerce power .. III: 24-29; 34-37
Federal-State coordination and cooperation III:63-65
proprietary power and reservation doctrine ....III: 42-49
welfare power .....III: 55-57

Page

See also CALIFORNIA – appropriation of water of watercourses – some aspects of California appropriative right – Desert Land Act of 1877, interpretation of.
governmental status .... I: 1-3; III: 179
ground waters –
artesian waters ..... II: 653-654, 683-685; III: 211
definite underground stream ..... II: 72, 665-666; III: 208
coordination of rights in ground water and surface watercourses .....II: 690-696
exercise of ground water rights .....II: 685-687
miscellaneous statutory provisions ..... II: 687-689; III: 211
percolating waters .....II: 634, 635-639; III: 209-210
underflow of surface streams ..... II: 70-71, 666; III: 208-209
See also GROUND WATER RIGHTS IN SELECTED STATES – CALIFORNIA.
interrelationships of dual systems of water rights –
constitutional amendment of 1928 .....I: 209-210; II: 241-245; III: 204-207
relative superiority of conflicting rights ..... I: 207-208; III: 202-203
superior appropriative rights ..... III: 203
superior riparian rights ..... I: 209-210; III: 203-204
interstate dimensions of water rights –
appropriation of water for use in another State .....I: 394
Federal regulatory laws and projects, water allocation affected by ..... III: 104
loss of water rights in watercourses –
abandonment .....II: 261, 263, 268, 273-278, 282; III: 192
estoppel ..... II: 427-428, 435-436, 441-442; III: 193
prescription .....II: 42, 255, 330-336, 340-342, 345-347, 349, 352, 355-363, 365, 367-373, 377-378, 382-385, 387-392, 395, 397, 399-400, 411-413, 415-418, 421-424, 426; III: 193
statutory forfeiture .....II: 289-292, 308-309, 312, 314, 316; III: 192-193
navigable waters –
control over navigation and navigability .....I: 103, 105
lands underlying navigable waters, title to .....I: 130
lands underlying nonnavigable waters, title to ..... I: 135-136
water rights in navigable waters ..... I: 124-125, 127
prescription. *See* CALIFORNIA – loss of water rights in watercourses.
property nature of water and water rights .....I: 137, 139-140, 142-143, 149-152, 156; III: 185, 191
See also CALIFORNIA – appropriation of water of watercourses – some aspects of California appropriative right; *and* riparian doctrine – property characteristics of riparian right.
protection of water rights in watercourses –
appropriative right .....II: 193-194
burden of proof .....II: 251-254
damages .....II: 220-222
declaratory decree and reservation of continuing jurisdiction ..... II: 247
inchoate appropriative right .....II: 214-215
injunction ....II: 225, 230, 233-234
injunction or damages or both .....II: 237, 241-245
judicial recognition of need for protection ..... II: 192
means of diversion ..... II: 210, 212
physical solution .....II: 245-246
quantity and quality of water .....II: 205-208
reverse or inverse condemnation .....II: 247-249
riparian right .....II: 197-198
source of supply ..... II: 201-202, 204-205
See also CALIFORNIA – determination of conflicting water rights.

Page

pueblo water right ..... II: 145-158, 160-164, 166-167, 256, 694; III: 207-208
remedies. *See* CALIFORNIA – protection of water rights in watercourses.
return waters .... II: 584-587, 589-591
riparian doctrine –
accrual of riparian right .....II: 15-16, 18-19; III: 194-195
diversion of water ..... II: 124-127; III: 201
measure of riparian right ..I: 15; II: 81, 83-84, 86-91, 95-96, 99-100; III: 195-196
place of use of water .. II: 134-135, 138; III: 200
property characteristics of riparian right –
beneficial use, right of ..... II: 23-25; III: 195
change of title to land, preservation of riparian right on ..... III: 194-195
flow of water, right to ....II: 28-30, 32-33; III: 195
property, right of .....II: 26-27
severance of riparian right from land ..... II: 37-46; III: 196-197
See also CALIFORNIA – property nature of water and water rights.
purpose of use of water ....II: 104, 106-113, 116-121; III: 198-199
recognition of riparian doctrine ..... I: 15, 181, 183, 186-188, 193; II: 2-3; III: 194
relations between organizations and riparian proprietors ..II: 140-142
return of unused water to stream .....II: 139-140; III: 201
riparian lands .....II: 47-50, 52-55, 57-58; III: 197
riparian proprietors .. II: 60-62, 64-65
riparian waters ..... II: 65-72, 74-79; III: 197-198
rotation in use of water .....II: 132-133
storage of water ..II: 128-129; III: 200
summary of riparian doctrine ... II: 7
See also CALIFORNIA – interrelationships of dual systems of water rights.
Spanish-Mexican water enterprises –
colonization agencies and organizations ..... III: 179

Page

influence of Spanish-Mexican water rights in State water law .....I: 183; III: 180
water rights ..... III: 179
spring waters .....II: 597-603
statutory forfeiture. *See* CALIFORNIA – loss of water rights in watercourses.
waste waters .....II: 569-570
watercourse, characteristics of ... I: 33-34, 39-44, 48-49, 52, 60-62, 73-78, 80-81, 84, 86, 88-90, 93, 96, 98
water policy, declarations of State .....I: 4-9, 11-12, 15
CLASSIFICATION, DEFINITION, AND DESCRIPTION OF AVAILABLE WATER SUPPLIES ... I: 21-25
See also WATERCOURSE, CHARACTERISTICS OF; NAVIGABLE WATERS; DIFFUSED SURFACE WATERS; OTHER WATERS AT THE SURFACE; *and* GROUND WATER RIGHTS.
COLORADO –
abandonment. *See* COLORADO – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* COLORADO – determination of conflicting water rights.
administration of stream water rights and distribution of water ... I: 298-299, 301, 305-306; II: 520-521, 524-525; III: 242-243
administrative agencies, State ..... I: 176-177, 307-310; III: 215
adverse possession and use. *See* COLORADO – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water ....I: 17, 19, 401-402, 407, 423, 429, 524; III: 221-222
procedure for appropriating water –
appropriation of water for use in another State ..... I: 391, 394; III: 107
current procedure ..... I: 299, 302, 369; III: 217
early legislation .....I: 292
land factor in appropriating water ..... I: 261-262

Page

not administratively controlled ... I: 289, 299, 302, 312, 343-345; II: 447; III: 217
priority of appropriation .... I: 10, 14, 19, 397, 630-631; III: 217-218
purpose of use of water ..... I: 17, 19, 524, 531, 543-544; III: 219-221
See also subtopic some aspects of Colorado appropriative right – diversion, distribution, and storage works.
relation, doctrine of ..... III: 219
waters subject to appropriation .....I: 228, 238
who may appropriate water .... I: 243, 248, 253-254
recognition of doctrine of prior appropriation ..... I: 13, 170, 173; III: 215-217
some aspects of Colorado appropriative right –
appurtenance of water right to land ....I: 458, 467: III: 222
beneficial use .....I: 9-10, 13, 495, 502; III: 219
change in exercise of water right ....I: 625, 627-628, 630-632, 639-640, 642; III: 225-226
commingling of water .... III: 223-224
condemnation of right-of-way .....I: 278, 282; III: 227
conveyance of title to appropriative right ..... I: 476, 480-481; III: 223
diversion, distribution, and storage works ..... I: 590, 593-597, 600-601; III: 223
diversion of water from watershed .....I: 518
efficiency of practices .....I: 647
exchange of water ..... I: 607-610; III: 224-225
inchoate appropriative right .....I: 587-589; II: 216
measure of appropriative right .....I: 506, 509, 605
natural channels, use of .....I: 612
natural reservoirs, use of ....I: 615
property, right of .....I: 447, 450
See also COLORADO – property nature of water and water rights.

Page

relative rights of senior and junior appropriators .... I: 571, 577, 581-582
rotation in use of water .....I: 622-623
sale, rental, or distribution of water .....I: 556-557, 561-562, 567; III: 223
determination of conflicting water rights –
procedural matters in water rights litigation, some general .....II: 502, 513-514
special statutory adjudication procedure ... I: 299, 304, 344-345; II: 444, 446-448, 450-454, 464, 470-486; III: 217, 238-242
See also COLORADO – protection of water rights in watercourses.
developed waters .....II: 567
diffused surface waters .....II: 548, 551-552
distribution of water. *See* COLORADO – administration of stream water rights and distribution of water; *and* appropriation of water of watercourses – some aspects of Colorado appropriative right – sale, rental, or distribution of water.
estoppel. *See* COLORADO – loss of water rights in watercourses.
Federal-State relations –
commerce power .....III: 24-29, 34
McCarren Amendment ... III: 49, 59
welfare power ..... III: 56
governmental status .... I: 1-3; III: 214
ground waters –
definite underground stream .....II: 633, 696; III: 230
ground waters not tributary to surface watercourse: designated ground waters ..... II: 704-710; III: 233-236
ground waters outside designated ground water basins...III: 236-238
ground waters tributary to surface watercourse .....II: 697-703; III: 230-232
percolating waters .....II: 639-640
underflow of surface stream ..... II: 696-697; III: 230

Page

interstate dimensions of water rights –
effects of interstate compacts upon private or public rights under State law .....I: 622-623; III: 85-86
existing water apportionment compacts involving Western States ..... II: 88, 96, 101
restrictions on taking water out of State ..... I: 391, 394; III: 107
loss of water rights in watercourses –
abandonment ..... II: 258-260, 267-268, 278-281, 284; III: 226
estoppel ..... II: 429, 441
prescription .. II: 333, 336-338, 366, 376-377, 382, 392, 418; III: 227
statutory forfeiture .. II: 292; III: 226
prescription. *See* COLORADO – loss of water rights in watercourses.
property nature of water and water rights ... I: 5-6, 146; III: 222
See also COLORADO – appropriation of water of watercourses – some aspects of Colorado appropriative right.
protection of water rights in watercourses –
burden of proof .....II: 252-253
damages ..... II: 219-221, 223-224
inchoate appropriative right ..... II: 216
injunction ..... II: 217-218, 227-228
judicial recognition of need for protection ..... II: 192
means of diversion ..... II: 212
reverse or inverse condemnation ..... II: 249
See also COLORADO – determination of conflicting water rights.
remedies. *See* COLORADO – protection of water rights in watercourses.
return waters ....II: 580-581, 585, 588
riparian water-use doctrine not generally recognized ..... I: 183, 192-193; II: 1, 7-8; III: 227-230
salvaged waters ..... II: 567
seepage waters .....II: 570-571
spring waters .....II: 603-605
statutory forfeiture. *See* COLORADO – loss of water rights in watercourses.
waste waters .....II: 570-571

Page

watercourse, characteristics of ..... I: 26, 49-50, 59, 62, 95
water enterprises, early ..... I: 284; III: 214-215
water policy, declarations of State .. I: 5-6, 9-10, 13-14, 17, 19
DEVELOPED WATERS. *See* SALVAGED AND DEVELOPED WATERS.
DIFFUSED SURFACE WATERS .....II: 535-564
DIFFUSED SURFACE WATERS – PHYSICAL CHARACTERISTICS .....II: 535-542
See also State entries.
essential characteristics of diffused surface waters .....II: 538-542
duration .....II: 541-542
origin .....II: 538-539
flood overflows .....II: 538-539
no permanent source of water supply ..... II: 538
precipitation, springs, swamps ..... II: 538
situation .....II: 539-541
general definition of diffused surface waters and their importance .....II: 535-537
definitions .....II: 535-536
gradation of diffused surface waters into watercourse .....II: 536-537
importance of problem ..... II: 537
DIFFUSED SURFACE WATERS – RIGHTS OF LANDOWNERS. .II: 542-564
See also State entries.
drainage, obstruction, riddance .....II: 542-556
civil law or natural flow rule .....II: 542-547
some judicial views and distinctions .....II: 542-544
some State statutes .....II: 544-547
Kansas ..... II: 545
South Dakota .....II: 544-545
Texas .....II: 545-547
common enemy rule ..... II: 547
common enemy and/or common law rules .....II: 547-549
distinguished .....II: 548-549
not distinguished .....II: 547-548
modifications of civil law and common enemy or common law rules .....II: 549-555

Page

rule of reasonable use ....II: 555-556
rights of use .....II: 557-564
California .....II: 557-559
Idaho ..... II: 559
Kansas .....II: 559-560
Montana ..... II: 560
Nebraska ..... II: 560
Oklahoma .....II: 560-561
South Dakota .....II: 561-562
Texas .....II: 562-563
Utah ..... II: 563
Wyoming ..... II: 564
DISTRIBUTION OF WATER. *See* ADMINISTRATION OF STREAM WATER RIGHTS AND DISTRIBUTION OF WATER; APPROPRIATIVE RIGHT, EXERCISE OF – DIVERSION, DISTRIBUTION, AND STORAGE WORKS; *and* APPROPRIATIVE RIGHT, ELEMENTS OF APPROPRIATIVE RIGHT – sale, rental, or distribution of water.
ESTOPPEL. *See* LOSS OF WATER RIGHTS IN WATERCOURSES – ESTOPPEL.
FEDERAL-STATE RELATIONS. .III:1-65
See also INTERSTATE DIMENSIONS OF WATER RIGHTS; NAVIGABLE WATERS; APPROPRIATION OF WATER – WHO MAY APPROPRIATE WATER – government agencies and entities other than districts – United States; APPROPRIATION OF WATER – RIGHTS-OF-WAY FOR WATER CONTROL AND RELATED PURPOSES – public lands; APPROPRIATION OF WATER – LAND FACTOR IN APPROPRIATING WATER – historical development of relationship – public domain; WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – ESTABLISHMENT OF APPROPRIATION DOCTRINE IN WEST – development of appropriation doctrine – congressional legislation; RIPARIAN DOCTRINE – RIPARIAN RIGHT – accrual of right – source of title of land – Federal land grants, riparian lands – relation to chain of title – original grant from government, *and* riparian proprietor – public domain; LOSS OF WATER RIGHTS IN WATERCOURSES – PRESCRIPTION – establishment of prescriptive title – adverse parties – United States; *and State entries.*
FEDERAL-STATE RELATIONS – COMMERCE POWER .....III: 2-37
definition of navigable waters for commerce power purposes .....III: 15-20
effect on private rights obtained under State law .....III: 29-37
exercise of commerce power. . .III: 3-15
Corps of Engineers .....III: 4-8
Environmental Protection Agency .....III: 10-15
Federal Power Commission . .III: 8-10
in general .....III: 2-3
limitations on applicability of State laws .....III: 21-29
FEDERAL-STATE RELATIONS – COORDINATION AND COOPERATION .....III: 62-65
FEDERAL-STATE RELATIONS – GENERAL ALLOCATION OF FEDERAL AND STATE POWERS .....III: 1-2
FEDERAL-STATE RELATIONS – OTHER FEDERAL POWERS. .III: 38-57
proprietary power and reservation doctrine .....III: 38-53
war power .....III: 53-54
welfare power .....III: 54-57
FEDERAL-STATE RELATIONS – SOVEREIGN IMMUNITY AND McCARRAN AMENDMENT .....III: 57-60
FEDERAL-STATE RELATIONS – VARIOUS LEGISLATIVE PROPOSALS .....III: 60-62
FORFEITURE OF WATER RIGHTS IN WATERCOURSES. *See* LOSS OF WATER RIGHTS IN WATERCOURSES – ABANDONMENT AND STATUTORY FORFEITURE, *and* CHARACTER OF RIGHT.
GROUND WATER RIGHTS. . .II: 631-664
See also GROUND WATER RIGHTS IN SELECTED STATES; *and State entries.*
GROUND WATER RIGHTS – ARTESIAN WATERS . . .II: 653-659
Alaska ..... II: 653
Arizona ..... II: 653

Page

California ..... II: 653-654
Hawaii ..... II: 654-655
Idaho ..... II: 655
Kansas ..... II: 655-656
Montana ..... II: 656
Nebraska ..... II: 656
Nevada ..... II: 656
New Mexico ..... II: 656-658
artesian conservancy districts ..... II: 657-658
artesian wells ..... II: 656-657
North Dakota ..... II: 658
South Dakota ..... II: 658
Texas ..... II: 658-659
Utah ..... II: 659
Washington ..... II: 659
GROUND WATER RIGHTS – CLASSIFICATION ..... II: 631-632
GROUND WATER RIGHTS – DEFINITE UNDERGROUND STREAMS ..... II: 632-633
burden of proof ..... II: 633
rights of use ..... II: 633
stream and channel ..... II: 632
GROUND WATER RIGHTS – DESIGNATED CRITICAL OR OTHER GROUND WATER AREAS ..... II: 659-664
Arizona ..... II: 659-660
Hawaii ..... II: 660
Idaho ..... II: 661
Montana ..... II: 661
Nebraska ..... II: 661
Nevada ..... II: 661-662
Oregon ..... II: 662
Texas ..... II: 662-663
Wyoming ..... II: 663-664
GROUND WATER RIGHTS – PERCOLATING WATERS. II: 633-653
nature of percolating waters ..... II: 633-634
rights of use ..... II: 634-653
Alaska ..... II: 634
Arizona ..... II: 635
California ..... II: 635-639
Colorado ..... II: 639-640
Hawaii ..... II: 640
Idaho ..... II: 640-641
Kansas ..... II: 641-643
Montana ..... II: 643
Nebraska ..... II: 643-644
Nevada ..... II: 644
New Mexico ..... II: 645-646
North Dakota ..... II: 646-647
Oklahoma ..... II: 647-648
Oregon ..... II: 648-649
South Dakota ..... II: 649-650
Texas ..... II: 650-651

Page

Utah ..... II: 651-652
Washington ..... II: 652
Wyoming ..... II: 652-653
GROUND WATER RIGHTS IN SELECTED STATES ... II: 665-756
See also State entries; and GROUND WATER RIGHTS.
GROUND WATER RIGHTS IN SELECTED STATES – CALIFORNIA ..... II: 665-696
artesian waters ..... II: 683-685
public regulation of artesian wells ..... II: 684-685
rights of use ..... II: 683-684
classification ..... II: 665
coordination of rights in ground waters and surface watercourses ..... II: 690-696
ground water supply fed by percolation from watercourse ..... II: 694-696
percolating water tributary to watercourse ..... II: 690-694
exceptional situation: Pueblo rights ..... II: 694
former rule ..... II: 690
present rule ..... II: 690-694
definite underground streams ..... II: 665-666
characteristics ..... II: 665-666
rights of use ..... II: 666
appropriative rights ..... II: 666
burden of proof ..... II: 666
riparian rights ..... II: 666
subject to law of watercourses ..... II: 666
exercise of ground water rights ..... II: 685-687
changes in exercise of rights ..... II: 686-687
method of diversion ..... II: 687
place of use and purpose of use ..... II: 687
point of diversion ..... II: 686
diversion facilities ..... II: 686
storage of water in ground ..... II: 685
substitution of water and physical solution ..... II: 685-686
miscellaneous statutory provisions ..... II: 687-689
statutes regarding protection of water quality ..... II: 687-688
statutes relating to overdrawn ground water supplies in specified areas ..... II: 689
Water Replenishment District Act ..... II: 688-689

Page

percolating waters .....II: 668-683
appropriation of surplus percolating waters ....II: 679-682
appropriative rights ....II: 680-681
effect of wrongful taking of water ..... II: 682
public use .....II: 681-682
what constitutes surplus water ..... II: 680
California doctrine of correlative rights .....II: 670-679
apportionment of water among overlying landowners. .II: 672-673
correlative and riparian rights, analogy between ....II: 674-675
correlative rights to waters needed are paramount. .II: 673-674
development of correlative doctrine ..... II: 671
mutual prescription: troublesome, controversial concept ....II: 676-679
concept not adopted in California water rights law .....II: 676-679
erroneous use of words ... II: 676
Pasadena v. Alhambra, adjustment of rights in .....II: 675-676
rights of overlying land owners as against each other .....II: 671-672
constitutional amendment of 1928, effect of .....II: 682-683
former doctrine of rights of use ..... II: 670
English rule of absolute ownership ..... II: 670
qualification regarding absence of malice ..... II: 670
nature of percolating waters .....II: 668-669
physical characteristics .....II: 668-669
distinct from definite underground stream ...II: 668-669
ground waters escaped from stream ..... II: 669
ground waters presumed to be percolating ..... II: 669
property characteristics .... II: 669
rights of use as property ..II: 669-670
grant of right of use ..... II: 670
real property, parcel of land .....II: 669-670
underflow of surface streams .....II: 666-668
characteristics .....II: 666-667
lateral limits of underflow ..... II: 667
underflow is part of watercourse ..... II: 667
rights of use .....II: 667-668
appropriative rights ..... II: 667
riparian rights .....II: 667-668
GROUND WATER RIGHTS IN SELECTED STATES – COLORADO .....II: 696-710
definite underground stream ..... II: 696
ground waters not tributary to a surface watercourse .....II: 704-710
appropriability of nontributary ground water ....II: 704-706
Ground Water Management Act of 1965 .....II: 705-710
ground waters tributary to a surface watercourse ..II: 697-703
background .....II: 697-698
legislation in 1957 and 1965 .....II: 698-699
Water Right Determination and Administration Act of 1969 .....II: 700-703
underflow or subsurface flow of surface stream .....II: 696-697
GROUND WATER RIGHTS IN SELECTED STATES – HAWAII .....II: 711-730
development of ground water rights during territorial status ..... II: 716-724
definite underground streams .....II: 716-720
legal principles .....II: 716-719
established mainland principle .....II: 718-719
repeated dicta ..... II: 718
supreme court decisions .....II: 717-718
physical characteristics ..... II: 716
underflow of surface stream .....II: 719-720
ground waters not flowing in defined streams ....II: 720-723
artesian waters .....II: 722-723
cases involving artesian waters but not fundamental rights of use ... II: 722
City Mill case, defining ownership of artesian waters .....II: 722-723
what City Mill case actually decided ..... II: 723
nonartesian percolating waters .....II: 720-722

Page

regulation of artesian wells ..... II: 723-724
general territorial statute ..... II: 723-724
wells in District of Honolulu ..... II: 724
Ground Water Use Act of 1959 ..... II: 725-730
occurrences of ground water in Hawaii ..... II: 711-716
basal water ..... II: 712
coastal artesian areas of Oahu ..... II: 713-715
artesian wells ..... II: 714
character and functions of caprock ..... II: 713
creation of artesian conditions ..... II: 713-714
Honolulu artesian system ..... II: 715
isopiestic areas ..... II: 714-715
high-level water ..... II: 712-713
high-level artesian water ..... II: 713
perched-water supplies ..... II: 712-713
water confined by dikes ..... II: 712
origin and source of ground water ..... II: 711-712
physical and legal interrelationships ..... II: 715-716
GROUND WATER RIGHTS IN SELECTED STATES – IDAHO ..... II: 730-736
court decisions relating to appropriability of ground waters ..... II: 730-733
definite underground streams ..... II: 730-731
percolating waters ..... II: 731-732
a 1922 decision ..... II: 731-732
definite adoption of appropriation doctrine ..... II: 732
early decisions ..... II: 731
ground waters tributary to adjudicated stream ... II: 732
protection in means of diversion ..... II: 732-733
ground water legislation ... II: 733-736
adjudication of ground water right ..... II: 736
administrative determination of adverse claims ..... II: 735-736
appeal to court ..... II: 736
applicability of general appropriation statue ..... II: 736

Page

appropriability of ground water ..... II: 734
appropriation procedure, including critical areas ..... II: 734-735
artesian waters ..... II: 736
broadened powers of administrator ..... II: 735
definition and ownership of ground water ..... II: 733
licensing of well drillers ..... II: 736
GROUND WATER RIGHTS IN SELECTED STATES – NEBRASKA ..... II: 736-739
court decisions ..... II: 736-737
ground water statutes ..... II: 737-739
GROUND WATER RIGHTS IN SELECTED STATES – NEVADA ..... II: 740-742
court decisions ..... II: 740
definite underground streams ..... II: 740
percolating waters ..... II: 740
ground water statutes ..... II: 740-742
GROUND WATER RIGHTS IN SELECTED STATES – TEXAS ..... II: 742-748
characteristics of ground water ..... II: 742-743
classification ..... II: 743
definition ..... II: 742
definite underground streams .. II: 743
characteristics ..... II: 743
rights of use ..... II: 743
court decisions ..... II: 743
district statute ..... II: 743
percolating waters ..... II: 744-747
distinguished from definite underground stream ..... II: 744
landowner's right as property ..... II: 746-747
presumption that ground waters are percolating ..... II: 744
right of use ..... II: 744-745
waste, question of ..... II: 745-746
public regulation of artesian water ..... II: 747
underflow of surface streams ..... II: 743-744
underground water conservation districts ..... II: 747-748
GROUND WATER RIGHTS IN SELECTED STATES – UTAH ..... II: 748-756
appropriation of ground water ..... II: 748-751

Page

certain percolating waters excluded from appropriation doctrine ..... II: 749
current procedure for appropriating ground water ..... II: 749-750
extent of existing rights ..... II: 750-751
limited to reasonable beneficial use ..... II: 750-751
with respect to new appropriations ..... II: 751
ground water subject to appropriation doctrine ... II: 748-
prestatutory procedure for appropriating percolating ground water ..... II: 750
classification of ground water ..... II: 748
early decisions relating to ground water ..... II: 751-752
percolating waters ..... II: 751-752
announcement of rule of absolute ownership ..... II: 751-752
correlative rights doctrine ..... II: 752
subterranean watercourses ... II: 751
definite underground stream ..... II: 751
underflow of surface stream ..... II: 751
exceptions to rules announced in early decisions ..... II: 752-753
percolating waters on public domain ..... II: 752-753
waste water from irrigation ..... II: 753
some other features of use and control of ground water ..... II: 753-756
administration and distribution of ground waters .... II: 756
control of artesian wells ..... II: 756
drainage of land versus interference with ground water rights ..... II: 756
loss of water rights ..... II: 755
abandonment ..... II: 755
statutory forfeiture ..... II: 755
protection of means of diversion ..... II: 753-754
wells and well drillers ..... II: 756
control of well drillers ..... II: 756
replacement wells provided for ..... II: 756

Page

HAWAII –
adjudication of water rights in watercourses. *See* HAWAII – determination of conflicting water rights.
administration of stream water rights and distribution of water, no statutory procedure ..... I: 304, 306; II: 520, 525.
administrative agency, State ... I: 307; III: 204
basis of Hawaiian system of water rights ..... II: 172-173
determination of conflicting water rights –
courts of equity ..... II: 189; III: 260
decrees ..... III: 260-261
generally ..... I: 304; II: 189, 460; III: 259
private ways and water rights ..... II: 189; III: 259-260
procedural matters in water rights litigation, some general ..... II: 503-510
governmental status ..... I: 1-3; III: 243-244
ground waters –
artesian waters ..... II: 654-655, 722-723; III: 256
artesian wells, regulation of ..... II: 723-724; III: 256
definite underground stream .... II: 190, 633, 716-720; III: 255
designated critical ground water areas ..... II: 660
Ground Water Use Act ..... II: 633, 725-730; III: 256-259
nonartesian percolating waters ..... II: 640, 720-722; III: 256
occurences of ground water in Hawaii ..... II: 711-716
relation of underflow to rights in surface stream ... II: 719-720; III: 255-256
See also GROUND WATER RIGHTS IN SELECTED STATES – HAWAII.
interrelationship of land titles and water titles ..... II: 173-174; III: 244-245
irrigation in Hawaii, early ..... III: 244
spring waters ..... II: 605-607
water policy, declarations of State ..... I: 17

water rights in surface watercourses –
ancient water rights –
ahupuaas and ilis kupono ... II: 176-178; III: 246
appurtenant rights ..... II: 178-180; III: 247-248
See also subtopic loss of ancient water rights – prescription, *and* prescriptive rights.
loss of ancient water rights –
abandonment ..... II: 256-257, 272; III: 248
estoppel ..... II: 256; III: 248
prescription ..... II: 256, 332, 337, 339-340, 342, 390, 393, 414, 425; III: 248
See also subtopic appurtenant rights, *and* prescriptive rights.
statutory forfeiture ..... II: 256, 290, 292; III: 249
rights conveyed by konohiki ..... III: 245-246
some aspects of ancient rights ..... II: 180-184
appropriative rights not recognized ..... I: 17, 157, 171, 199, 203, 302, 312; II: 4
general nature and classification ..... II: 175-176; III: 245
McBryde decision ..... III: 250-255
prescriptive rights ..... II: 184-185, 339-340; III: 249
See also subtopic ancient water rights – appurtenant rights, *and* loss of ancient water rights – prescription.
riparian rights ..... I: 17, 52, 157, 199, 203; II: 4, 8, 69, 185-189; III: 250
statutory rights of occupants in ahupuaa ... III: 249

IDAHO –
abandonment. *See* IDAHO – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* IDAHO – determination of conflicting water rights.
administration of stream water rights and distribution of water ..... I: 301, 306; II: 522, 525-526; III: 284-286
administrative agency, State ..... I: 309-310; III: 262
adverse possession and use. *See* IDAHO – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriation of water –
appeals ..... III: 267
appropriation of water for use in another State ..... I: 394; III: 107
completion of appropriation ..... I: 369, 381; III: 268
constitutional method ..... I: 178, 289, 317-318, 346-348, 369; III: 263-265, 267
constitutionality of procedures ..... I: 314
current procedure ..II: 342; III: 267
early legislation ..... I: 298, 368
land factor in appropriating water ..... I: 260, 263, 268
priority of appropriation ... I: 14, 169; III: 266, 273
purpose of use of water ..... I: 17-18, 524, 531, 546; III: 266, 269-270
relation, doctrine of ..... III: 267
statutory method ..... I: 178, 289, 317-318, 346-348, 369; III: 263-265, 267
trespass on private property, no right acquired by ..... I: 283; III: 271
waters subject to appropriation ... I: 229, 232, 237
who may appropriate water ..... I: 248, 253; III: 267, 268, 269-270
recognition of doctrine of prior appropriation ..... I: 13, 171, 173; III: 262-263

Page

restrictions and preferences in appropriation of water ..... I: 17-19, 402, 417, 419, 422-424, 429, 433, 453-454, 524; III: 271-272
some aspects of Idaho appropriative right –
appurtenance of water right to land ..... III: 272
beneficial use ..... I: 9, 495, 499, 502; III: 266
change in exercise of water right ....I: 625-626, 628, 632, 635-636, 642; III: 275-277
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of appropriative title to water .... I: 473; III: 272
efficiency of practices ..... I: 645; II: 274, 276
entry upon private land to obtain data .....I: 283
exchange or substitution of water ..... I: 607, 610; III: 275
inchoate appropriative right .....I: 585-587; II: 215
measure of the appropriative right ..... I: 510-511; III: 274
natural channels, use of .....I: 612
property, right of ..... I: 453-454
See also IDAHO – property nature of water and water rights.
relative rights of senior and junior appropriations ....III: 273-274
rights-of-way for water control and related purposes .....I: 272; III: 278
sale, rental, or distribution of water ..... I: 8, 557, 565; III: 273
determination of conflicting water rights –
adjudication legislation of 1969 .... II: 462; III: 282-283
administrative determination of certain adverse claims ..... III: 284

Page

procedural matters in water rights litigation, some general ..... II: 498-499, 503, 506, 508-509, 510
request by trial court for hydrographic examination .....II: 467; III: 283
summary supplemental action .....III: 283-284
See also IDAHO – protection of water rights in watercourses.
diffused surface waters .....II: 559
distribution of water. *See* IDAHO – administration of stream water rights and distribution of water; *and* appropriation of water of watercourses – some aspects of Idaho appropriative right – sale, rental, or distribution of water.
early water uses .....III: 261-262
estoppel. *See* IDAHO – loss of water rights in watercourses.
governmental status .... I: 1-3; III: 261
ground waters –
artesian waters .....II: 655
court decisions relating to appropriability of ground water .....II: 730-733
designated critical ground water areas .....II: 661
legislation regarding ground water ..... I: 335; II: 733-736; III: 280-282
percolating waters ..... II: 640-641; III: 279-280
subterranean watercourse ..... III: 279
See also GROUND WATER RIGHTS IN SELECTED STATES – IDAHO
international law affecting water rights ..... III: 129
interstate dimensions of water rights –
appropriation of water for use in another State .....I: 394; III: 107
loss of water rights in watercourses –
abandonment .....I: 336; II: 266, 268, 280; III: 277
estoppel .....II: 428, 439, 442-443; III: 278

Page

prescription .....II: 334, 337, 356, 364, 397; III: 277
statutory forfeiture .....II: 292-293, 302-303, 310; III: 277
navigable waters, title to lands underlying ..... I: 132-134
prescription. *See* IDAHO – loss of water rights in watercourses.
property nature of water and water rights ..... I: 6, 145, 153; III: 266, 272
See also IDAHO – appropriation of water of watercourses – some aspects of Idaho appropriative right.
protection of water rights in watercourses –
burden of proof ..... II: 252
damages ..... II: 223
inchoate appropriative right ..... II: 215
See also IDAHO – determination of conflicting water rights.
remedies. *See* IDAHO – protection of water rights in watercourses.
return waters .....II: 582-583
riparian water-use doctrine, not generally recognized .....I: 192; II: 1, 6, 8; III: 278-279
seepage waters .....II: 571-572
statutory forfeiture. *See* IDAHO – loss of water rights in watercourses.
waste waters .....II: 571-572
watercourse, characteristics of ..... I: 48-49, 62, 86
water policy, declarations of State .... I: 6, 8-9, 13-14, 17-19

INTERNATIONAL LAW AFFECTING WATER RIGHTS .....III: 116-140
See also State entries.

INTERNATIONAL LAW AFFECTING WATER RIGHTS – BOUNDARY WATERS TREATY OF 1909 .....III: 120-129

INTERNATIONAL LAW AFFECTING WATER RIGHTS – COLUMBIA RIVER TREATY OF 1961 .....III: 129-133

INTERNATIONAL LAW AFFECTING WATER RIGHTS – CONCLUSIONS .....III: 139-140

INTERNATIONAL LAW AFFECTING WATER RIGHTS – INTRODUCTION .....III: 116-120

Page

INTERNATIONAL LAW AFFECTING WATER RIGHTS – RIO GRANDE, COLORADO AND TIJUANA TREATY OF 1944 .....III: 134-139
general provisions .....III: 138-139
water allocation .....III: 134-138

INTERNATIONAL LAW AFFECTING WATER RIGHTS – RIO GRANDE IRRIGATION CONVENTION OF 1906 .....III: 133-134

INTERSTATE DIMENSIONS OF WATER RIGHTS .....III: 66-115
See also FEDERAL-STATE RELATIONS, *and State entries.*

INTERSTATE DIMENSIONS OF WATER RIGHTS – COMPACTS OR AGREEMENTS RELATING TO WATER .....III: 81-103
consent requirement .....III: 82-84
effects of interstate compacts upon private or public rights under State law .....III: 85-86
existing water apportionment compacts involving Western States .....III: 87-103

INTERSTATE DIMENSIONS OF WATER RIGHTS – LITIGATION BETWEEN STATES .....III: 66-75

INTERSTATE DIMENSIONS OF WATER RIGHTS – OTHER LITIGATION WITH INTERSTATE DIMENSIONS .....III: 75-81

INTERSTATE DIMENSIONS OF WATER RIGHTS – VALIDITY OF STATE LEGISLATIVE RESTRICTIONS ON TAKING WATER OUT OF STATE .....III: 107-115

INTERSTATE DIMENSIONS OF WATER RIGHTS – WATER ALLOCATION AFFECTED BY FEDERAL REGULATORY LAWS AND PROJECTS III:103-106

KANSAS –
abandonment. *See* KANSAS – loss of water rights in watercourse.
adjudication of water rights in watercourses. *See* KANSAS – determination of conflicting water rights.
administration of stream water rights and distribution of water ..... I: 301, 306; II: 526; III: 307-308

administrative agency,
State .....I: 307, 309-310; II: 522-523; III: 286
adverse possession and use. *See* KANSAS – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals ..... III: 289
current procedure ..... I: 327, 333-334; III: 287-289
early procedures ..... III: 287
priority of appropriation .....III: 288-289
purpose of use of water .....I: 535, 543; III: 288
relation, doctrine of .....I: 389; III: 288
storage water appropriation .....I: 351; III: 291
waters subject to appropriation ...I: 228, 230; III: 287
who may appropriate water .....I: 240, 252; III: 288
recognition of doctrine of prior appropriation ..... I: 169, 171, 289; III: 286-287
restrictions and preferences in appropriation of water .....I: 408, 411, 420-424, 433; III: 289-290
some aspects of Kansas appropriative right –
appurtenance of water right to land .....I: 458; III: 290
beneficial use ..... I: 10, 13; III: 287-288, 290
change in exercise of water right ....I: 642; III: 291
condemnation of right-of-way ....I: 274-275; III: 291
conveyance of title to appropriative right ..... I: 470, 483; III: 290
natural channels, use of .....I: 612; III: 291
rotation in use of water .....I: 617; III: 291
sale, rental, or distribution of water .....I: 549, 563
State Water Plan Storage Act ..... III: 292-293
See also KANSAS – interrelationships of dual systems of water rights.
determination of conflicting water rights –
rights of water users on effective date of 1945 act .....II: 459-460; III: 303-306
reference by court in water rights action .....I: 303-304; II: 469; III: 306-307
See also KANSAS – protection of water rights in watercourses.
diffused surface waters .....II: 545, 559-560
distribution of water. *See* KANSAS – administration of stream water rights and distribution of water.
estoppel. *See* KANSAS – loss of water rights in watercourses.
governmental status .... I: 1-3; III: 286
ground waters –
appropriation statute applies to all ground waters ..... I: 228 230, 334; II: 631; III: 288, 301-302
artesian waters .....II: 655, 656; III: 302-303
ground water management districts ..... III: 303
ground waters tributary to surface watercourse ..... III: 302
percolating waters .....II: 641-643
underflow of stream ..... III: 301
interrelationships of dual systems of water rights –
effective 1945 statute ..... I: 313, 315; II: 211, 245; III: 298-300
ineffective modification of riparian doctrine by earlier statutes .... II: 201; III: 297-298
judicial recognition of interrelationships . .II: 210; III: 296-297
summary of interrelationships .....I: 210-211; III: 300-301
interstate dimensions of water rights –
existing water apportionment compacts involving Western States .....III: 89, 102-103
litigation between States ...III: 67-69

Page

loss of water rights in watercourses –
abandonment and forfeiture interrelated ..... II: 319-320, 327; III: 292
estoppel ..... II: 440; III: 292
prescription ..... II: 338, 382-383, 405; III: 292
statutory forfeiture ..... II: 287, 293
navigable waters, title to lands underlying ..... I: 131
prescription. *See* KANSAS – loss of water rights in watercourses.
property nature of water and water rights ....I: 139, 144, 147; III: 290
See also KANSAS – appropriation of water of watercourses – some aspects of Kansas appropriative right; *and* riparian doctrine – property characteristics of riparian right.
protection of water rights in watercourses –
injunction or damages or both ..... II: 245
riparian right ..... II: 201
See also KANSAS – determination of conflicting water rights.
remedies. *See* KANSAS – protection of water rights in watercourses.
riparian doctrine –
measure of riparian right ..... I: 15, 204, 313, 315; II: 5, 81, 92-94, 100, 102
place of use of water ..... II: 138
property characteristics of riparian right –
flow of water, right to .....II: 28; III: 295
property, right of ..... III: 295
severance of riparian right from land ..... II: 46
See also KANSAS – property nature of water and water rights.
purpose of use of water .....II: 114-115; III: 296
recognition of riparian doctrine ..... I: 15, 181, 193, 196; III: 294
riparian lands .....II: 51, 53-54; III: 294
riparian proprietors .....III: 294-295

Page

riparian waters ..... III: 294
storage of water ..... II: 131
summary of riparian doctrine ..... II: 9
See also KANSAS – interrelationships of dual systems of water rights.
seepage waters ..... II: 572
spring waters .....II: 609-610
statutory forfeiture. *See* KANSAS – loss of water rights in watercourses.
watercourse, characteristics of ..... I: 32-33, 61, 67, 69 73, 86-87
water policy, declarations of State .....I: 10, 13, 15
LOSS OF WATER RIGHTS IN WATERCOURSES .....II: 255-443
See also State entries.
LOSS OF WATER RIGHTS IN WATERCOURSES – ABANDONMENT AND STATUTORY FORFEITURE .....II: 256-328
abandonment .....II: 256-286
abandonment defined ....II: 258-261
distinguished from abandonment of facilities .....II: 259-260
distinguished from abandonment of particles of water .....II: 260-261
circumstances not constituting abandonment, some ..II: 269-275
change in exercise of water right .....II: 273-274
circumstances regarding planning and operation ..II: 272-273
conveyance of title to water right .....II: 274-275
enforced discontinuance of water use .....II: 269-270
use and nonuse of water, other circumstances regarding .....II: 270-272
use of water by trespasser ..... II: 270
effect of abandonment ...II: 277-278
instant effect ..... II: 277
no revival of abandoned right .....II: 277-278
reversion of water to which right formerly attached ..... II: 278
essential elements of abandonment .....II: 261-266
act of relinquishment of possession ..... II: 263

Page

concurrence of act and intent ..... II: 265-266
intent ..... II: 262-263
relation of nonuse to intent ..... II: 264-265
establishment of abandonment ..... II: 266-269
burden of proof ..... II: 269
circumstances evidencing abandonment, some ..... II: 267-269
evidence ..... II: 266-267
question of fact ..... II: 266
question of oral sale of appropriative right ..... II: 275-277
rights in watercourses subject to abandonment ..... II: 257-258
See also LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT.
some other aspects of the doctrine ..... II: 279-284
abandonment by municipality ..... II: 282-283
abandonment of adjudicated water right ..... II: 280-281
abandonment of inchoate appropriative right ..... II: 281-282
abandonment of part of water right ..... II: 279
interstate case ..... II: 283-284
tenancy in common ..... II: 279-280
some statutory provisions ..... II: 284-286
Alaska ..... II: 284
Colorado ..... II: 284
Montana ..... II: 284-285
Oklahoma ..... II: 285
South Dakota ..... II: 285
Texas ..... II: 285
Washington ..... II: 286
abandonment and forfeiture distinguished ..... II: 317-318
plain, fundamental distinctions ..... II: 317-318
intent ..... II: 317-318
time element ..... II: 318
abandonment and forfeiture interrelated ..... II: 318-328
some State situations ..... II: 319-327
Kansas ..... II: 319
Nevada ..... II: 319-320
Oregon ..... II: 320-321
Texas ..... II: 321-324
Utah ..... II: 324-325
Wyoming ..... II: 325-327
summation of State situations ..... II: 327-328

Page

statutory forfeiture ..... II: 286-317
computation of forfeiture period ..... II: 298-302
effect of forfeiture ..... II: 313-315
disposition of water supply involved ..... II: 313-314
judicial comments ..... II: 314-315
establishment of forfeiture ..... II: 302-303
establishment of forfeiture: administrative procedures ..... II: 303-308
Kansas ..... II: 303
Nebraska ..... II: 303-304
North Dakota ..... II: 304
Oklahoma ..... II: 304-305
Oregon ..... II: 305
Texas ..... II: 305-306
Washington ..... II: 306
Wyoming ..... II: 306-308
forfeiture of part of water right ..... II: 315-317
some judicial holdings and comments ..... II: 316-317
statutes ..... II: 315
forfeiture statutes ..... II: 290-291
cancellation of unperfected rights to appropriate water generally not included ..... II: 290
classification of statutes ..... II: 291
inchoate appropriative right ..... II: 290
perfected appropriative right ..... II: 290-291
negating circumstances ..... II: 308-313
enforced discontinuance of use of water ..... II: 310-313
some examples ..... II: 308-310
rights subject to forfeiture ..... II: 286-290
chiefly appropriative rights ..... II: 286
generally not riparian rights ..... II: 286-289
not ancient Hawaiian water rights ..... II: 290
not pueblo water rights ..... II: 289-290
See also LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT.
statutory provisions: by States ..... II: 291-298
Alaska ..... II: 291
Arizona ..... II: 291-292
California ..... II: 292
Colorado ..... II: 292

Page

Hawaii ..... II: 292
Idaho ..... II: 292-293
Kansas ..... II: 293
Montana ..... II: 293
Nebraska ..... II: 293-294
Nevada ..... II: 294
New Mexico ..... II: 294-295
North Dakota ..... II: 295
Oklahoma ..... II: 295
Oregon ..... II: 295-296
South Dakota ..... II: 296
Texas ..... II: 296
Utah ..... II: 297
Washington ..... II: 297-298
Wyoming ..... II: 298

LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT ..... II: 255-256
ancient Hawaiian rights ..... II: 256
appropriative right ..... II: 255
pueblo right ..... II: 256
riparian right ..... II: 255-256

LOSS OF WATER RIGHTS IN WATERCOURSES – ESTOPPEL ..... II: 427-443
See also LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT.
equitable principle ..... II: 427
elements of equitable estoppel ..... II: 427-435
other party ..... II: 434-435
lack of knowledge ..... II: 434
reliance upon admission ..... II: 434-435
parties ..... II: 428-430
commonly private parties ..... II: 428
some decisions regarding public entities ..... II: 428-430
irrigation district ..... II: 428
municipal corporation ..... II: 428
State ..... II: 428
party making admission ..... II: 430-434
effect of silence ..... II: 431-432
inequitable conduct ..... II: 432-433
knowledge of his own title ..... II: 430
miscellaneous circumstances wherein estoppel held to have arisen ..... II: 433-434
representations ..... II: 430-431
turpitude ..... II: 431
estoppel and laches distinguished ..... II: 440-443
characteristics of laches ..... II: 440-442
defined ..... II: 440-441
public works ..... II: 441-442
distinctions ..... II: 442
estoppel by reason of laches ..... II: 442-443
measure of right ..... II: 435
some other facets ..... II: 435-440
estoppel by judgment ..... II: 436
executed parol license ..... II: 436-437
grant of riparian right ..... II: 437-439
mutual estoppel ..... II: 439-440
procedure ..... II: 435-436
relation to prescription ..... II: 436
statutory prohibition ..... II: 440
watercourse made artificially ..... II: 440

LOSS OF WATER RIGHTS IN WATERCOURSES – PRESCRIPTION ..... II: 328-427
basis of prescriptive right ..... II: 339-350
analogy to adverse holding of land ..... II: 342-345
general rule ..... II: 343
Texas situation ..... II: 343-345
coincidence of loss and acquisition of water right ..... II: 346-347
distinguished from appropriative right ..... II: 347-349
effect on irrigation development in California ..... II: 349-350
presumption of grant ..... II: 340-341
primitive ..... II: 339-340
statutes of limitations ..... II: 341-342
recognition of limitation in Hawaii ..... II: 342
replacement of lost grant fiction in California ..... II: 341-342
trespass ..... II: 345-346
character and quality of prescriptive title ..... II: 413-422
changes in exercise of prescriptive right ..... II: 419-422
easements in land for use of water ..... II: 419-420
rights to use water ..... II: 420-422
general ..... II: 420-421
place of use ..... II: 421-422
point of diversion ..... II: 421
purpose of use ..... II: 422
characteristics ..... II: 413
exclusive ..... II: 413
usufructuary ..... II: 413
effectiveness of title ..... II: 414
passing of title ..... II: 414-415
relation to appropriative and riparian rights in California ..... II: 415-418

Page

appropriative-prescriptive rights .....II: 416-417
classification of rights ..II: 415-416
prescription by riparians ...II: 417-418
relation to statutory adjudication .....II: 418-419
character of water rights affected .....II: 329-339
purpose of right gained by prescription .....II: 333-339
character of injuries to rightful owner ..... II: 333
ditch and reservoir easements .....II: 337-338
easement on public land .....II: 338-339
rights of drainage .....II: 335-337
diffused surface water ..... II: 336
drainage of waste water from irrigated land ...II: 336-337
flood plain of watercourse .....II: 335-336
rights of use .....II: 334-335
spring on vacant land ..... II: 335
storage of water by California riparian owner .....II: 334-335
waste or seepage water from land of another ..... II: 334
water of watercourses .... II: 334
rights subject to loss by prescription .....II: 330-333
ancient Hawaiian right ..... II: 332
appropriative right .... II: 330-331
prescriptive right .....II: 332-333
right acquired or reserved under contract ..... II: 333
riparian right .....II: 331-332
See also LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT.
distinguished from other methods of loss ..... II: 329
elements of prescriptive right .....II: 350-389
actual use of water ..... II: 351
adverse and hostile use ...II: 358-365
adverse use .....II: 358-359
deprivation of use of water .....II: 361-362
ground of action .....II: 362-363
hostility ..... .II: 359-360
invasion of prior right .....II: 360-361

Page

permissive use distinguished .....II: 363-364
revocation of permission .....II: 364-365
claim of right .....II: 374-378
color of title ..... II: 375
essential facets .....II: 374-375
payment of taxes .....II: 376-378
presumption of claim of right ..... II: 375
continuous and uninterrupted use .....II: 367-373
continuous use .....II: 367-369
interruption of adverse use .....II: 370-372
interruption of adverse use, circumstances negating ..II: 372-373
peaceable possession ..... II: 373
uninterrupted use .....II: 369-370
exclusive use .....II: 365-366
circumstances negating exclusiveness ..... II: 366
claim of exclusive right .....II: 365-366
exclusion of rightful owner by adverse claimant ..... II: 365
list of elements ..... II: 351
open and notorious use .....II: 351-357
acquiescence .....II: 356-357
knowledge ..... II: 355
notice .....II: 353-354
notice and knowledge compared ..... II: 353
presumption of knowledge .. II: 356
presumption of notice .....II: 354-355
visibility ..... II: 352
statute of limitations ....II: 378-389
abstracts of Western State statutory limitation periods pertaining to adverse possession of land .....II: 379-381
abstracts of Western State statutory limitation periods pertaining to adverse possession of water rights .....II: 381-383
applicability to adverse possession of water rights ..... II: 378
limitation and prescription ..... II: 389
statute set in motion ...II: 383-387
tolling of statute .....II: 387-388
establishment of prescriptive title .....II: 389-413

Page

adverse parties .....II: 389-393
appropriator .....II: 393
corporation .....II: 390-391
owners of rights affected .....II: 390
public .....II: 392
public entities or agencies .....II: 391-392
riparian proprietor .....II: 393
State .....II: 392-393
United States .....II: 393
circumstances negating establishment of prescription .....II: 400-402
interruption of running of statute .....II: 402
no adverse and hostile use ..II: 401
no claim of right .....II: 402
no deprivation of rightful owner's use of water ....II: 401
no exclusiveness .....II: 401-402
no knowledge and acquiescence .....II: 401
other .....II: 402
possibility of establishing prescriptive water right negated or questioned..II: 404-411
negations .....II: 405-407
Alaska .....II: 405
Kansas .....II: 405
Nevada .....II: 405-406
Utah .....II: 406-407
Washington .....II: 407
questionings .....II: 407-411
New Mexico .....II: 407-408
Oregon .....II: 408-409
Texas .....II: 409-410
Wyoming .....II: 410-411
prescription not favored ..II: 402-404
burden of proof: adverse use .....II: 403-404
burden of proof: permissive use .....II: 404
presumption against acquisition of title by adverse use ...II: 403
relation to necessity for a valid statutory appropriation .....II: 411-413
relative locations on stream channel .....II: 393-400
downstream prescriptive claimant: actual interference with upstream property or water right .....II: 397-400
importance contrasted with appropriative priorities .....II: 393-394

Page

prescriptive claimant usually upstream ....II: 394-397
loss of prescriptive rights .....II: 426-427
measure of prescriptive right .....II: 422-426
part of invaded right only ....II: 426
period of use .....II: 424-426
portion of the time only..II: 424-425
rotation .....II: 425-426
quantity of water diverted .....II: 423-424
use which conferred title .....II: 422-423

MONTANA –
abandonment. *See* MONTANA – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* MONTANA – determination of conflicting water rights.
administration of stream water rights and distribution of water .....II: 520, 526-527; III: 330-332
not administratively controlled .....I: 304, 306; II: 520, 526; III: 330
administrative agency, State .....III: 309-310
adverse possession and use. *See* MONTANA – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appropriation of water for use in another State .....I: 394; III: 107
completion of appropriation .....I: 367, 369-370, 375, 379-380; III: 311, 313
exclusiveness of procedure .....I: 178, 346, 370; III: 312, 315
land factor in appropriating water...I: 260, 262-264; III: 315
method of appropriating water, early, nonstatutory .....I: 287
Montana Water Use Act....III: 313-314

Page

pre-1973 procedures for appropriating water . . . . . I: 345-346; III: 310-313
not administratively controlled . . . I: 302, 312, 343, 345; III: 310
priority of appropriation . . . . . III: 311, 313-314
purpose of use of water . . . . I: 530, 543; III: 315
relation, doctrine of . . . . . I: 388; III: 311, 313
storage water appropriation . . I: 349, 351, 355-356, 360, 363; III: 316
trespass, no right acquired by . . . . . III: 315
waters subject to appropriation . . . . . I: 229; III: 315
who may appropriate water . . . . . I: 239, 251-252; III: 313, 315
recognition of doctrine of prior appropriation . . . I: 169-170, 173; III: 309-310
restrictions and preferences in appropriation of water . . . . . III: 316-319
some aspects of Montana appropriative right –
appurtenance of water right to land . . . . . I: 458-459, 467; III: 319
beneficial use . . . . . I: 9-10, 495, 502; III: 313, 315
change in exercise of water right . . . . . I: 631, 638, 641-642; III: 322
condemnation of right-of-way . . . . . I: 274-276, 280; III: 324
conveyance of title to appropriative right . . . . . I: 468; III: 319
diversion, distribution, and storage works . . . . . III: 321
diversion of water from watershed . . . . . I: 518-519
efficiency of practices . . . . . III: 320
exchange of water . . . I: 610; III: 322
inchoate appropriative right . . . . . II: 215
measure of appropriative right . . . . . I: 492-493, 508-509, 514-515; III: 320
natural channel, use of . . . . . I: 612; III: 322

Page

property, right of . . . . . I: 443-444, 447; III: 319-320
See also MONTANA – property nature of water and water rights.
relative rights of senior and junior appropriators . . . I: 580, 583; III: 320-321
rotation in use of water . . . III: 321
sale, rental, or distribution of water . . . . . I: 8, 556; III: 315
determination of conflicting water rights –
determination of existing rights under the 1973 Montana Water Use Act . . . . . III: 328-330
pre-1973 determination of existing rights in stream water . . . . . I: 303, 309-310; II: 459; III: 328
procedural matters in water rights litigation, some general . . . . . II: 504-505
See also MONTANA – protection of water rights in watercourses.
diffused surface waters . . . . . II: 543, 547-548, 560
distribution of water. *See* MONTANA – administration of stream water rights and distribution of water.
early water uses . . . . . III: 308
estoppel. *See* MONTANA – loss of water rights in watercourses.
governmental status . . . . I: 1-3, III: 308
ground waters –
artesian waters . . . . . II: 656
controlled ground water areas . . . . . II: 661; III: 327-328
definite underground stream . . . . . III: 326
legislative provisions . . . . III: 326-328
percolating ground waters . . . . II: 643; III: 326
subflow of surface stream . . . III: 326
international law affecting water rights –
Boundary Waters Treaty of 1909 . . . . . III: 126
Columbia River Treaty of 1961 . . . . . III: 129-130
interstate dimensions of water rights –
appropriation of water for use in another State . . . I: 394; III: 107

Page

loss of water rights in watercourses –
abandonment ..... II: 286, 270-272, 274-277, 279, 284-285; III: 323
estoppel ..... II: 439-440; III: 324
prescription .....II: 330, 340, 346, 348-349, 351-352, 358, 365, 377-378; III: 323-324
statutory forfeiture .....II: 293; III: 323
navigable waters, title to lands underlying .....I: 131
prescription. *See* MONTANA – loss of water rights in watercourses.
property nature of water and water rights .....I: 6, 138-139, 153-154, 260; III: 315
See also MONTANA – appropriation of water of watercourses – some aspects of Montana appropriative right.
protection of water rights in watercourses –
inchoate appropriative right .....II: 215
injunction or damages or both .....II: 237-239
means of diversion .....II: 211
protection of source of supply .....II: 203
See also MONTANA – determination of conflicting water rights.
remedies. *See* MONTANA – protection of water rights in watercourses.
return waters ....II: 583-584, 587-588, 591-592
riparian water-use doctrine, repudiation of .....I: 192-193, 202, 206; II: 1, 6, 9; III: 325-326
seepage waters .....II: 572-573
statutory forfeiture. *See* MONTANA – loss of water rights in watercourses.
waste waters .....II: 572-573
watercourse, characteristics of .....I: 51, 56
water policy, declarations of State .....I: 5-6, 8-10
NAVIGABLE WATERS ..... I: 102-136
See also FEDERAL-STATE RELATIONS; *and State entries.*
NAVIGABLE WATERS – CLASSIFICATION ..... I: 106-111

Page

navigable waters of State ... I: 106-107
navigable waters of United States .....I: 106
other waters related to navigability ..... I: 107-111
nonnavigable stretches of stream ..... I: 107-108
nonnavigable tributaries .. I: 108-110
Texas statutory navigable streams ..... I: 110-111
NAVIGABLE WATERS – CONTROL OVER NAVIGATION AND NAVIGABILITY ..... I: 102-106
exercise of sovereign power ..... I: 102-103
State: concurrent and subordinate power ..... I: 104-106
United States: paramount authority ..... I: 103-104
NAVIGABLE WATERS – DETERMINATION OF NAVIGABILITY FOR COMMERCE POWER AND BED TITLE PURPOSES... I: 111-116
criteria ..... I: 114-116
earlier tests of navigability ..... I: 114-115
later tests of navigability ..... I: 115-116
determining agencies ..... I: 111-114
Congress ..... I: 112-114
courts ..... I: 111-112
Federal question .....I: 111
NAVIGABLE WATERS – LANDS UNDERLYING NAVIGABLE WATERS ..... I: 128-134
original title vests in sovereign ..... I: 128-129
title passes to State on creation ..... I: 129-134
retention of title elected by State ..... I: 130-133
technical title a question of local law .....I: 130
title conferred by State upon riparian landowners ... I: 133-134
NAVIGABLE WATERS – LANDS UNDERLYING NONNAVIGABLE WATERS ..... I: 134-136
disposal of upland and riverbed ..... I: 135-136
title remains in United States ..... I: 134-135
NAVIGABLE WATERS – USES OF NAVIGABLE WATER ....I: 116-123

Page

See also NAVIGABLE WATERS – WATER RIGHTS IN NAVIGABLE WATERWAYS.
navigation ..... I: 116-117
other uses ..... I: 117-123
Federal ..... I: 117-119
non-Federal ..... I: 120-123
NAVIGABLE WATERS – WATER RIGHTS IN NAVIGABLE WATERWAYS ..... I: 123-128
appropriative rights ..... I: 123-125
Federal law ..... I: 123-124
State law ..... I: 124-125
riparian rights ..... I: 125-127
Federal law ..... I: 126-127
State law ..... I: 127-128
See also NAVIGABLE WATERS – USES OF NAVIGABLE WATER; *and* RIPARIAN DOCTRINE – RIPARIAN RIGHT – attachment of riparian rights to various water sources – navigable watercourses.
NEBRASKA –
abandonment. *See* NEBRASKA – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* NEBRASKA – determination of conflicting water rights.
administration of stream water rights and distribution of water .....I: 298, 301, 305-306, 319, 322; II: 527; III: 365
administrative agency, State ..... I: 308-310; III: 333
adverse possession and use. *See* NEBRASKA – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....II: 322; III: 337
appropriation of water for use in another State ..... I: 392-394
completion of appropriation .....I: 369, 378, 381

Page

constitutionality of procedure .....I: 314
current procedure...I: 302, 325, 333-335, 339, 341-343; III: 335
early procedure ..... I: 289; III: 334-335
exclusiveness of procedure .....III: 334-335
priority of appropriation .. III: 336
purpose of use of water ...I: 17-18, 524; III: 336
storage water appropriation...I: 352. 354-355; III: 336-337
water power appropriation...III: 337
waters subject to appropriation ...I: 229; III: 335-336, 339
who may appropriate water .....I: 252-253; III: 336
recognition of doctrine of prior appropriation ..... I: 13, 171; III: 333-334
restrictions and preferences in appropriation of water ...I: 13, 17, 19-20, 401, 408, 410, 417-419, 424, 429-430, 433; III: 337-339
some aspects of Nebraska appropriative right –
appurtenance of water right to land ...I: 463-466; III: 340-343
beneficial use ..... I: 9-10
change in exercise of water right ..... I: 634, 637, 642; III: 341-343
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of title to appropriative right.....I: 471
diversion of water from watershed .....I: 522; III: 340
measure of appropriative right .....I: 511
natural channels, use of ..... I: 612-613; III: 339
relative rights of senior and junior appropriators .... I: 575, 581; III: 339
rights-of-way for water control and related purposes .....I: 272, 280-281; III: 345-346
rotation in use of water .....I: 617, 620
See also NEBRASKA – interrelationships of dual systems of water rights.

Page

determination of conflicting water rights –
judicial construction .....II: 449, 451; III: 363-364
statutory provisions ..... I: 302; II: 455; III: 362-363
See also NEBRASKA – protection of water rights in watercourses.
diffused surface waters .....II: 540, 548-549, 560
distribution of water. *See* NEBRASKA – administration of stream water rights and distribution of water.
early uses of water .....III: 332-333
estoppel. *See* NEBRASKA – loss of water rights in watercourses.
governmental status .... I: 1-3; III: 332
ground waters –
court decisions ..... II: 643-644, 736-737; III: 358-359
statutes .....II: 644, 656, 661, 737-739; III: 359-362
interrelationships of dual systems of water rights .....I: 211-213; II: 239-241; III: 352-358
interstate dimensions of water rights –
appropriation of water for use in another State ..... I: 392-394
existing water apportionment compacts involving Western States .....III: 89-90, 102-103
loss of water rights in watercourses –
abandonment .....II: 268; III: 343
estoppel .....II: 432, 441; III: 345
prescription .....II: 335-336, 339, 403; III: 344-345
statutory forfeiture .....II: 293-294, 298, 303-304, 316; III: 343-344
navigable waters, title to lands underlying .....I: 133
prescription. *See* NEBRASKA – loss of water rights in watercourses.
property nature of water and water rights .....I: 6; III: 335
See also NEBRASKA – appropriation of water of watercourses – some aspects of appropriative right; *and* riparian doctrine – property characteristics of riparian right.

Page

protection of water rights in watercourses –
appropriative right ..... II: 193
damages ..... II: 219
injunction ..... II: 229
injunction or damages or both .....II: 239-241
mandamus ..... II: 250
See also NEBRASKA – determination of conflicting water rights.
remedies. *See* NEBRASKA – protection of water rights in watercourses.
riparian doctrine –
accrual of the riparian right .....III: 346-347
measure of riparian right .....I: 16-17; II: 92-93, 96-97, 103-104; III: 348
property characteristics of riparian right –
beneficial use, right of .... III: 348
flow of water, right to .... III: 348
severance of riparian right from land ....III: 347-348
See also NEBRASKA – property nature of water and water rights.
purpose of use of water .....II: 118, 124; III: 348, 351-352
recognition of riparian doctrine ..... I: 16, 181, 193, 196-197; II: 5; III: 346
riparian lands ..II: 51, 53-54; III: 349
riparian proprietors .....II: 63-64
riparian waters .....II: 68, 79; III: 349-351
summary of riparian doctrine .....II: 9-10
See also NEBRASKA – interrelationships of dual systems of water rights.
spring waters .....II: 611-612
statutory forfeiture. *See* NEBRASKA – loss of water rights in watercourses.
watercourse, characteristics of .....I: 30, 36, 42, 55-56, 64, 76, 78, 81, 84-85, 92-93, 98, 100
water policy, declarations of State .....I: 4, 6, 8-10, 13, 16-20

NEVADA –
abandonment. *See* NEVADA – loss of water rights in watercourses.

Page

adjudication of water rights
in watercourses. *See*
NEVADA – determination of
conflicting water rights.
administration of stream
water rights and dis-
tribution of water ..... I: 301,
304-306, 319-320; II: 520, 527-
528; III: 383-385
administrative agency,
State ..... I: 309-312; III: 366
adverse possession and use.
See NEVADA – loss of
water rights in watercourses –
prescription.
appropriation of water
of watercourses –
procedure for appropriating
water –
appeals .....I: 321; III: 370
appropriation of water for
use in another State .....I: 394
completion of appropria-
tion .....I: 375; III: 369
constitutionality of pro-
cedure .....I: 314
current procedure .... I: 325, 333,
337-338; III: 368
early procedure ...I: 175-176, 292;
III: 367
exclusiveness of pro-
cedure ..... III: 368
land factor in appropriat-
ing water .....I: 265
livestock water appropria-
tion ..... III: 369, 372
measure of appropriative
right ..... I: 493, 511-512
priority of appropria-
tion .....III: 369-370, 372
purpose of use of
water ....I: 531, 538-539, 543,
546; III: 368
relation, doctrine
of .....I: 389; III: 369
storage water appropria-
tion .....I: 353; III: 370
waters subject to appropria-
tion .....I: 228, 230; III: 368
who may appropriate
water .....I: 239-240, 242;
III: 369
recognition of doctrine
of prior appropria-
tion ..... I: 169-170, 233-234;
III: 366-367
restrictions on right to
appropriate water ... III: 370-371

Page

some aspects of Nevada
appropriative right –
appurtenance of water
right to land .....I: 459-460,
467; III: 371-372
beneficial use ..... I: 10, 13,
495-496, 497; III: 368
change in exercise of
water right ....I: 625, 632-634,
643; III: 371, 374
commingling of
water .....I: 604; III: 373
condemnation of right-
of-way ..... III: 376
conveyance of title to
appropriative right .....I: 474
diversion, distribution, and
storage works ..... I: 592-594
efficiency of practices .... III: 372
natural channels, use
of .....I: 613; III: 373
relative rights of senior and
junior appropriators ... III: 373
rotation in use of
water.....I: 617; III: 373
sale, rental, or distribution
of water .....I: 558, 560-561;
III: 371-372
determination of conflicting
water rights –
court transfer pro-
cedure ..... III: 382
procedural matters in water
rights litigation, some
general ..... II: 505, 512
statutory adjudication pro-
cedure .....I: 292, 303; II: 445,
455, 457-458, 461, 466; III: 382-
383
diffused surface waters ..... II: 543
distribution of water. *See*
NEVADA – administration of
stream water rights and dis-
tribution of water; *and*
appropriation of water of water-
courses – some aspects of Nevada
appropriative right – sale, rental,
or distribution of water.
early uses of water ..... III: 366
estoppel. *See* NEVADA –
loss of water rights in
watercourses.
Federal-State relations –
commerce power ..... III: 26, 34
governmental status .... I: 1-3; III: 365
ground waters –
artesian waters .....II: 656, 741;
III: 380

Page

definite underground stream ..... II: 740; III: 379
designated ground water areas ..... II: 661-662, 741-742; III: 381-382
court decisions ..... II: 740; III: 379
percolating waters ..... II: 644, 740-741; III: 379-380
statutory procedures .... II: 631, 644, 661-662, 740-742; III: 380-382
interrelationships of dual systems of water rights ..... I: 204; III: 378-379
interstate dimensions of water rights –
appropriation of water for use in another State ..... I: 394
Federal regulatory laws and projects, water allocation affected by ..... III: 104
loss of water rights in watercourses –
abandonment ..... III: 374
abandonment and forfeiture interrelated .... II: 319-320, 323, 328; III: 375
estoppel ..... III: 376
prescription ..... I: 265; II: 331, 382, 383, 405-406; III: 368, 375
statutory forfeiture ..... II: 294; III: 375
prescription. *See* NEVADA – loss of water rights in watercourses.
property nature of water and water rights ... I: 153-154; III: 368
See also NEVADA – appropriation of water of watercourses – some aspects of Nevada appropriative right.
return waters ..... II: 591
riparian water-use doctrine: recognition and repudiation –
early recognition ..... I: 181; II: 10; III: 376-377
repudiation ..... I: 192, 203; II: 1, 6, 10; III: 377-378
spring waters ..... II: 612-613
waste waters ..... II: 573-574
watercourse, characteristics of ..... I: 53-55, 58, 73-74
water policy, declarations of State ..... I: 7, 10, 13

NEW MEXICO –
abandonment. *See* NEW MEXICO – loss of water rights in watercourses.

Page

adjudication of water rights in watercourses. *See* NEW MEXICO – determination of conflicting water rights.
administration of stream water rights and distribution of water ..... I: 301, 306; II: 528; III: 406-407
administrative agency, State ..... I: 308-309, 311-312; III: 385-386
adverse possession and use. *See* NEW MEXICO – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
procedure for appropriating water –
appeals ..... I: 322; III: 393-394
appropriation of water for use in another State ..... I: 392-394; III: 107
completion of appropriation ..... III: 393
current procedure ..... I: 326, 339; III: 391
early procedure ... I: 289-290, 292
exclusiveness of procedure ..... III: 391
priority of appropriation ..... I: 14; III: 393
purpose of use of water ..... I: 528, 535, 538, 543-544; III: 392
relation, doctrine of ..... I: 388-389; III: 393
storage water appropriation ... I: 351, 364; III: 392-393
waters subject to appropriation ... I: 228-229, 231; III: 391
who may appropriate water ..... I: 240, 245, 249, 252; III: 392
recognition of doctrine of prior appropriation ... I: 13, 161, 170, 173, 284, 289; III: 389-391
restrictions on right to appropriate water ... I: 404, 411-412; III: 394-395
some aspects of New Mexico appropriative right –
appurtenance of water right to land ..... I: 460, 467-468; III: 395
beneficial use ..... I: 9, 13, 438, 442, 495; III: 392-393

Page

change in exercise of water right ....I: 626-628, 643; III: 396
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of title to appropriative right ...I: 470-471, 476; III: 397
diversion, distribution, and storage works .....III: 392-393
diversion of water from watershed .....I: 520; III: 396
exchange of water ..I: 611; III: 395
measure of appropriative right ..... I: 505, 511-512
natural channels, use of .....I: 613
relative rights of senior and junior appropriators .....I: 575, 582; III: 395
rights-of-way for water control and related purposes ..... I: 275, 280, 282; III: 399
rotation in use of water ..... I: 621-623
sale, rental, or distribution of water ..... I: 546, 550, 556, 562; III: 396
determination of conflicting water rights –
jurisdiction where stream crosses State line ..... II: 509
special statutory adjudication procedure ...I: 303; III: 405-406
distribution of water. *See* NEW MEXICO – administration of stream water rights and distribution water; *and* appropriation of water of watercourses – some aspects of New Mexico appropriative right – sale, rental, or distribution of water.
estoppel. *See* NEW MEXICO – loss of water rights in watercourses.
governmental status ....I: 1-3; III: 385
ground waters –
artesian conservancy districts ..... II: 657-658; III: 405
artesian wells .....II: 656-657
court decisions .... II: 645-646, 657-658; III: 400-403

Page

legislation .....II: 645-646, 656-657; III: 401-405
percolating waters ..... II: 645-646; III: 400-401
interstate dimensions of water rights –
appropriation of water for use in another State ..... I: 392-394; III: 107
effects of interstate compacts upon private or public rights under State law .....I: 622-623; III: 85-86
existing water apportionment compacts involving Western States .... III: 88-89, 96, 98, 101
determination of conflicting water rights –
jurisdiction where stream crosses State line ..... II: 509
loss of water rights in watercourses –
abandonment ..... III: 397
estoppel .....II: 429-431, 443; III: 398-399
prescription .....II: 366, 383, 407-408; III: 398
statutory forfeiture ..... II: 289-290, 294-295, 300-302, 309; III: 397-398
prescription. *See* NEW MEXICO – loss of water rights in watercourses.
property nature of water and water rights ..... I: 5, 145-148
See also NEW MEXICO – appropriation of water of watercourses – some aspects of New Mexico appropriative right.
protection of water rights in watercourses ..... II: 192
See also NEW MEXICO – determination of conflicting water rights.
pueblo water right .....II: 145, 158-171; III: 387-389
remedies. *See* NEW MEXICO – protection of water rights in watercourses.
riparian water-use doctrine, repudiation of .....I: 192; II: 1, 11; III: 399-400
statutory forfeiture. *See* NEW MEXICO – loss of water rights in watercourses.

Page

watercourse, characteristics of .....I: 30, 33-34, 45-46, 54
water enterprises, pre-American ..... III: 385
water policy, declarations of State ..... I: 5, 9, 13-14
water rights of community acequias ..... I: 145, 280, 289; III: 386-387
NORTH DAKOTA –
adjudication of water rights in watercourses. *See* NORTH DAKOTA – determination of conflicting water rights.
administration of stream water rights and distribution of water ..... I: 301, 306; II: 522, 528-529; III: 422-423
administrative agencies, State .....I: 307, 309, 311-312; III: 407-408
adverse possession and use. *See* NORTH DAKOTA – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
completion of appropriation .....I: 381
current procedure ....III: 410-411
dry draw law, repealed .....I: 325, 529
early procedure ....I: 292; III: 409
exclusiveness of procedure .....I: 316
purpose of use of water ..I: 17, 523-524; III: 410-411
relation, doctrine of .....I: 389; III: 411
storage water appropriation ..... III: 413
waters subject to appropriation .....I: 229-230; III: 410
who may appropriate water ..... I: 251-252
recognition of doctrine of prior appropriation ..... I: 15, 171, 173; III: 408-409
restrictions and preferences in appropriation of water ....I: 422-424; III: 411-413

Page

some aspects of North Dakota appropriative right –
appurtenance of water right to land ..... III: 413
change in exercise of water right ....I: 643; III: 414
condemnation of right-of-way .....I: 279; III: 415
conveyance of title to appropriative right ..... I: 470; III: 413
diversion of water from watershed .....I: 520
natural channels, use of .....I: 613; III: 414
sale, rental, or distribution of water ..... I: 556; III: 413
See also NORTH DAKOTA – interrelationships of dual systems of water rights.
determination of conflicting water rights –
special statutory adjudication procedure ...I: 303; II: 459, 463-464, 470, 496; III: 421-422
diffused surface waters ..... II: 538, 551, 556
distribution of water. *See* NORTH DAKOTA – administration of stream water rights and distribution of water.
governmental status ....I: 1-3; III: 407
ground waters –
appropriation statute applies to ground waters .....II: 631; III: 420
artesian waters .....II: 658; III: 421
percolating waters ..... II: 646-647; III: 420
international law affecting water rights –
Boundary Waters Treaty of 1909 .....III: 126-129
interrelationships of dual systems of water rights ..... I: 213-215, 220; III: 417-420
interstate dimensions of water rights –
litigation between States ..... III: 74
loss of water rights in watercourses –
prescription .....II: 382, 427; III: 414-415
statutory forfeiture .....II: 295, 304; III: 414

Page

navigable waters –
lands underlying navigable waters, title to ..... I: 131-132
lands underlying nonnavigable waters, title to ..... I: 134-135
water rights in navigable waterways .....I: 125
prescription. *See* NORTH DAKOTA – loss of water rights in watercourses.
property nature of water and water rights ..... I: 6, 17, 156, 524; III: 410
See also NORTH DAKOTA – appropriation of water of watercourses – some aspects of North Dakota appropriative right; *and* riparian doctrine – property characteristics of riparian right.
riparian doctrine –
accrual of riparian right ..... III: 416
measure of riparian right .....III: 416-417
property characteristics of riparian right –
flow of water, right to ..... II: 31-32; III: 417
property, right of ..... III: 417
severance of riparian right from land .....II: 42; III: 416-417
See also NORTH DAKOTA – property nature of water and water rights.
recognition of riparian doctrine .....I: 15, 181, 190-191, 198; II: 1, 4-5, 42; III: 415-416
riparian lands .....III: 416-417
riparian waters ..... II: 72
summary of riparian doctrine .. II: 11
See also NORTH DAKOTA – interrelationships of dual systems of water rights.
spring waters ..... II: 615
statutory forfeiture. *See* NORTH DAKOTA – loss of water rights in watercourses.
watercourse, characteristics of .... I: 30, 36-37, 79-80, 95, 100-101

OKLAHOMA –
abandonment. *See* OKLAHOMA – loss of water rights in watercourses.

Page

adjudication of water rights in watercourses. *See* OKLAHOMA – determination of conflicting water rights.
administration of stream water rights and distribution of water ..... I: 301, 306; III: 340
administrative agency, State .....I: 309, 311; III: 423
adverse possession and use. *See* OKLAHOMA – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
procedure for appropriating water –
appeals ..... III: 427
completion of appropriation .....I: 379; III: 426-427
current procedure . . .I: 326; III: 425-426
early procedure. .I: 292; III: 424-425
priority of appropriation . . . III: 426
purpose of use of water ..... I: 17-18, 529, 540
relation, doctrine of .....I: 389; III: 426
storage water appropriation ..... III: 429
waters subject to appropriation .....I: 228, 230; III: 425
who may appropriate water .....I: 252
recognition of doctrine of prior appropriation ..... I: 171; III: 423-424
restrictions on right to appropriate water . . . III: 427-428
some aspects of Oklahoma appropriative right –
appurtenance of water right to land ..... III: 428
beneficial use .....I: 11
change in exercise of water right. . .I: 634, 643; III: 428
condemnation of right-of-way .....I: 278; III: 430
conveyance of title to appropriative right ..... I: 470; III: 428
natural channels, use of .....I: 613; III: 429

Page

relative rights of senior and junior appropriators ..... III: 427, 429
rotation in use of water ..... I: 617-618
sale, rental, or distribution of water .....I: 556
See also OKLAHOMA – interrelationships of dual systems of water rights.
determination of conflicting water rights –
special statutory adjudication procedure ... I: 303; III: 439-440
See also OKLAHOMA – protection of water rights in watercourses.
diffused surface waters .....II: 550, 560-561
distribution of water. *See* OKLAHOMA – administration of stream water rights and distribution of water.
governmental status .... I: 1-3; III: 423
ground waters ...II: 647-648; III: 436-439
interrelationships of dual systems of water rights ..I: 215-217; III: 433-436
interstate dimensions of water rights –
existing water apportionment compacts involving Western States ..... III: 97, 103
validity of State legislative restrictions on taking water out of State .....III: 110-114
loss of water rights in watercourses –
abandonment .....II: 285; III: 429
prescription ..... II: 336
statutory forfeiture .....II: 295, 304-305; III: 429
navigable waters –
classification .....I: 108
determination of navigability for commerce power and bed title purposes .....I: 112
lands underlying nonnavigable water, title to .....I: 135
uses .....I: 121
prescription. *See* OKLAHOMA – loss of water rights in watercourses.
protection of water rights in watercourses –
burden of proof ..... II: 254
damages ..... II: 220, 222

Page

injunction ..... II: 229
riparian right ..... II: 196
See also OKLAHOMA – determination of conflicting water rights.
remedies. *See* OKLAHOMA – protection of water rights in watercourses.
riparian doctrine –
diversion of water ..... III: 432
measure of riparian right ... II: 5, 91, 94-95; III: 431
place of use of water .....II: 136; III: 433
property characteristics of riparian right –
beneficial use, right of ..... II: 24
flow of water, right to ..... III: 432
property, right of ..... III: 431
severance of riparian right from land .....II: 39-40
purpose of use of water ..... II: 107, 111, 123-124; III: 431-432
recognition of riparian doctrine ..... I: 15, 181, 191-192, 198-199; III: 430-431
riparian lands ..... III: 432
riparian proprietors .....III: 432-433
riparian waters .....II: 72
summary of riparian doctrine .....II: 11-12
See also OKLAHOMA – interrelationships of dual systems of water rights.
spring waters ..... II: 615
statutory forfeiture. *See* OKLAHOMA – loss of water rights in watercourses.
watercourse, characteristics of .....I: 42, 54-55, 85, 87-88, 97
water policy, declarations of State ..... I: 11, 15, 17-18
OREGON –
abandonment. *See* OREGON – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* OREGON – determination of conflicting water rights.

Page

administration of stream water rights and distribution of water ..... I: 301, 306, 319-320; II: 529-530; III: 475-477
administrative agencies, State .....I: 308-309, 311-312; III: 440-441
adverse possession and use. *See* OREGON – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....I: 321; III: 446
appropriation of water for use in another State .....I: 395
completion of appropriation. . .I: 376-377, 379, 385; III: 445
current procedure. . .I: 323, 325, 331, 334, 340-342; III: 443-444
early procedure .....I: 287-288; III: 442-443
exclusiveness of procedure . . .I: 316; III: 443
land factor in appropriating water ..... I: 256-257
purpose of use of water .... I: 18, 525, 535, 537-538, 540, 543, 545-546; III: 445
quantity of water, specific .....I: 490
relation, doctrine of .....III: 444-445
storage water appropriation .....I: 353, 364; III: 444
waters subject to appropriation . . . I: 227, 230-232; III: 445
who may appropriate water . . . .I: 241-243, 245, 247, 249-250, 253; III: 446
recognition of doctrine of prior appropriation . . I: 171, 173, 235, 413-414; III: 441-442, 452-453
restrictions and preferences in appropriation of water . . .I: 20, 418-419, 424, 426-427, 430-431, 433; III: 447-452
some aspects of Oregon appropriative right –
appurtenance of water right to land ..... III: 453

Page

beneficial use .....I: 11, 500
change in exercise of water right. . . .I: 635, 639, 643; III: 456-457
condemnation of right-of-way. *See subtopic* right-of-way for water control and related purposes.
conveyance of title to appropriative right . . . I: 486-487; III: 453
Desert Land Act of 1877, interpretation of .....I: 174
diversion, distribution, and storage works. . . .I: 595-596; III: 453
exchange or substitution of water ..... I: 606-607; III: 456
measure of appropriative right ..... I: 513; III: 445-446
natural channels, use of .....I: 613
relative rights of senior and junior appropriators . . .I: 571, 579-580; III: 454-455
rights-of-way for water control and related purposes .....I: 272-273, 280, 282; III: 459
rotation in use of water .....III: 455-456
sale, rental, or distribution of water. . .I: 547-549, 559-560, 564, 566-567; III: 453-454
See also OREGON – interrelationships of dual systems of water rights.
determination of conflicting water rights –
court transfer procedure .....II: 495; III: 475
early water rights . . . II: 496; III: 475
statutory adjudication procedure . . I: 303; II: 418-419, 444, 451-452, 455, 456-458, 464, 466-467, 491-494, 512; III: 471-475
constitutionality .....II: 494-495
judicial views, some other ..... II: 495
See also OREGON – protection of water rights in watercourses.
developed waters ..... II: 565
diffused surface waters .....II: 543, 552-553

Page

distribution of water. *See* OREGON – administration of stream water rights and distribution of water; *and* appropriation of water of watercourses – some aspects of Oregon appropriative right – diversion, distribution, and storage works, *and* sale, rental, or distribution of water.
estoppel. *See* OREGON – loss of water rights in watercourses.
Federal-State relations –
proprietary power and reservation doctrine ..... III: 39-41
See also OREGON – appropriation of water watercourses – some aspects of Oregon appropriative right – Desert Land Act of 1877, interpretation of; *and* navigable waters.
governmental status .... I: 1-3; III: 440
ground waters –
court decisions, some pre-1955 ..... III: 467-468
critical ground water area ..... II: 662
definite underground stream ..... II: 632
Ground Water Act of 1955 ..... III: 468-471
percolating waters ..... II: 648-649
international law affecting water rights –
Columbia River Treaty of 1961 ..... III: 129
interrelationships of dual systems of water rights –
effect of legislation and court decisions on dual system relationship ..... I: 11, 195, 219-220; II: 3; III: 466-467
judicial modification of riparian doctrine... I: 218; III: 462-463
legislative modification of riparian doctrine ... I: 15, 195, 205-206, 218, 313; III: 463
legislative modification of riparian doctrine, validity of ....I: 195, 204, 218-219, 315; III: 463-465
statutory adjudication of riparian rights ....I: 219; III: 465
interstate dimensions of water rights –

Page

appropriation of water for use in another State ..... I: 395
loss of water rights –
abandonment ..... II: 261, 267-269, 274-275, 283-284; III: 457
abandonment and statutory forfeiture interrelated..... II: 320-321, 324, 328
estoppel ... II: 436-437; III: 458-459
prescription ..... II: 338-339, 345, 359, 374-376, 383, 388, 391-392, 404, 408-409, 418-419, 422-423, 425; III: 458, 461
statutory forfeiture ..... II: 295-296, 305; III: 457-458
navigable waters –
determination of navigability for commerce power and bed title purposes ..... I: 114-115
lands underlying navigable waters, title to ..... I: 132
uses ..... I: 121
water rights in navigable waterways ..... I: 124
prescription. *See* OREGON – loss of water rights in watercourses.
property nature of water and water rights ....I: 148; III: 445
protection of water rights in watercourses –
injunction ..... II: 228-229, 236
means of diversion ..... II: 211
riparian right ..... II: 200-201
See also OREGON – determination of conflicting water rights.
remedies. *See* OREGON – protection of water rights in watercourses.
return waters ..... II: 581, 583
riparian doctrine –
accrual of riparian right ..... III: 460-461
diversion of water ..... II: 125-126; III: 461
measure of riparian right .....I: 15, 313, 315; II: 87, 91-93, 97-100; III: 460
place of use of water ..... II: 137-138; III: 461
purpose of use of water ..... II: 113-114
recognition of riparian doctrine .....I: 15, 181, 193-195; II: 3; III: 459-460

Page

riparian lands ..... II: 50-51, 54, 56-57; III: 461
riparian proprietors ..... II: 61-65
severance of riparian right from land ..... III: 461-462
summary of riparian doctrine ..... II: 12-13
See also OREGON – interrelationships of dual systems of water rights.
seepage waters ..... II: 575-577
spring waters ..... II: 593, 616-620
statutory forfeiture. *See* OREGON – loss of water rights in watercourses.
waste waters ..... II: 575-577
watercourse, characteristics of ... I: 33, 35-36, 78-79, 81, 88-89, 91-92, 95, 97
water policy, declarations of State ..... I: 11, 15, 18, 20

PREFERENCES IN APPROPRIATION OF WATER. *See* APPROPRIATION OF WATER – RESTRICTIONS AND PREFERENCES IN APPROPRIATION OF WATER.

PRESCRIPTION *and* PRESCRIPTIVE RIGHTS. *See* LOSS OF WATER RIGHTS IN WATERCOURSES – PRESCRIPTION.

PRIORITY OF APPROPRIATION. *See* APPROPRIATION OF WATER – METHODS OF APPROPRIATING WATER OF WATERCOURSES – priority of appropriation.

PROPERTY NATURE OF WATER AND WATER RIGHTS PERTAINING TO WATERCOURSES ... I: 137-151
See also State entries.

PROPERTY NATURE OF WATER AND WATER RIGHTS PERTAINING TO WATERCOURSES – WATER FLOWING IN NATURAL STREAM ..... I: 137-143
property classification of water ..... I: 142-143
rights of ownership of water ..... I: 137-142
no private ownership: general rule ..... I: 137-138
no private ownership: some real or apparent contradictions ..... I: 139-140

Page

ownership by public, State, or no one, subject to private rights of capture, possession, and use ..... I: 140-141
natural streamflow belongs to public, State, or no one ..... I: 140-141
positive or negative ownership subject to private water rights ..... I: 141-142

PROPERTY NATURE OF WATER AND WATER RIGHTS PERTAINING TO WATERCOURSES – WATER REDUCED TO PHYSICAL POSSESSION BY MEANS OF ARTIFICIAL STRUCTURES ..... I: 143-151
property classification of water ..... I: 147-151
California rule ..... I: 149-150
approval of California rule by Texas court ..... I: 151
water diverted for irrigation or in use therefor ..... I: 150
water flowing in conduits or stored in reservoirs ... I: 149-150
water severed from realty ..... I: 150
general rule ..... I: 147-149
rights of ownership of water ..... I: 143-147
necessity of obtaining physical possession of water ..... I: 143-144
private rights of ownership of water ..... I: 144-147
exceptions to general rule ..... I: 145-147
upon severance from streamflow, water generally becomes private property ..... I: 144-145
See also APPROPRIATIVE RIGHT – PROPERTY CHARACTERISTICS; *and* RIPARIAN DOCTRINE – RIPARIAN RIGHT – property characteristics.

PROTECTION OF WATER RIGHTS IN WATERCOURSES ..... II: 191-254
See also State entries.

PROTECTION OF WATER RIGHTS IN WATERCOURSES – APPROPRIATIVE RIGHT ... II: 193-195

Page

junior appropriator ..... II: 195
senior appropriator .....II: 193-195
See also APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS.
PROTECTION OF WATER RIGHTS IN WATERCOURSES – INCHOATE APPROPRIATIVE RIGHT .....II: 214-216
PROTECTION OF WATER RIGHTS IN WATERCOURSES – JUDICIAL RECOGNITION OF NEED ..... II: 192
PROTECTION OF WATER RIGHTS IN WATERCOURSES – MEANS OF DIVERSION ....II: 209-213
alteration of senior diversion by junior appropriator ...II: 212-213
restrictions on junior appropriator .....II: 211-212
restrictions on senior appropriator .....II: 210-211
See also APPROPRIATIVE RIGHT – RELATIVE RIGHTS OF SENIOR AND JUNIOR APPROPRIATORS.
PROTECTION OF WATER RIGHTS IN WATERCOURSES – NEED FOR PROTECTION ... II: 191
PROTECTION OF WATER RIGHTS IN WATERCOURSES – PROTECTION OF SOURCE OF SUPPLY .....II: 201-205
stream tributaries .....II: 201-203
tributary sources, other .....II: 203-205
See also APPROPRIATIVE RIGHT – PROPERTY CHARACTERISTICS – right of property – right to flow of water – quantity of water in tributaries; *and* RIPARIAN DOCTRINE – RIPARIAN RIGHT – attachment of riparian rights to various water sources.
PROTECTION OF WATER RIGHTS IN WATERCOURSES – QUANTITY AND QUALITY OF WATER .....II: 205-209
quality of water .....II: 207-209
quantity of water .....II: 206-207
See also APPROPRIATIVE RIGHT – ELEMENTS OF APPROPRIATIVE RIGHT – measure of appropriative right; RIPARIAN DOCTRINE – RIPARIAN RIGHT – measure of riparian right, *and* property characteristics.
PROTECTION OF WATER RIGHTS IN WATERCOURSES – REMEDIES FOR INFRINGEMENT .....II: 216-254
See also ADJUDICATION OF WATER RIGHTS IN WATERCOURSES.
burden of proof .....II: 251-254
appropriators .....II: 251-253
riparian owners .....II: 253-254
damages .....II: 218-224
declaratory decree and reservation of continuing jurisdiction .....II: 246-247
injunction .....II: 225-236
appropriators .....II: 225-229
applicability of injunctive relief .....II: 225-226
local situations .....II: 227-229
Colorado ..... II: 228
Nebraska ..... II: 229
Oklahoma ..... II: 229
Oregon .....II: 228-229
Texas ..... II: 228
Utah .....II: 227-228
prerequisites ..... II: 226
rights of junior appropriator ..... II: 227
interstate suit ..... II: 236
riparian owners .....II: 230-234
applicability of injunctive relief ..... II: 230
California .....II: 233-234
Texas .....II: 230-233
temporary injunction ..... II: 235
injunction or damages or both .....II: 237-245
both remedies ..... II: 237
some instances in which injunction not justified .....II: 237-239
Montana ..... II: 239
Nebraska ..... II: 239
South Dakota .....II: 238-239
Texas ..... II: 238
United States .....II: 237-238
some State riparian-appropriation situations .....II: 239-245
California .....II: 241-245
Kansas ..... II: 245
Nebraska .....II: 239-241
mandamus .....II: 249-251
physical solution ..... II: 245-246, 515-518

Page

reverse or inverse condemnation .....II: 247-249
PROTECTION OF WATER RIGHTS IN WATERCOURSES – RIPARIAN RIGHT .....II: 195-201
as against appropriators ....II: 197-201
as against other riparians ...II: 195-196
See also RIPARIAN DOCTRINE – RIPARIAN RIGHT – measure of riparian right – as against appropriators, *and* as against other riparian proprietors.
PUEBLO WATER RIGHT ...II: 145-171
PUEBLO WATER RIGHT – CHARACTER OF RIGHT ... II: 145
PUEBLO WATER RIGHTS IN CALIFORNIA .....II: 145-158
See also CALIFORNIA – pueblo water right.
early judicial inquiries .....II: 147-148
early Los Angeles cases .....II: 147-148
Lux v. Haggin ..... II: 147
extent of pueblo water right .....II: 149-154
adjudication of pueblo water rights of Los Angeles and San Diego .....II: 153-154
needs of inhabitants of city ..... II: 149
full extent of needs of inhabitants ..... II: 149
grows with needs of expanding city ..... II: 149
place of use of water ..... II: 150
purpose of use of water ..... II: 150
superiority of pueblo water right .....II: 150-153
not inconsistent with California constitution .....II: 151-152
preservation of pueblo right .....II: 152-153
prior and paramount right .....II: 150-151
superior to appropriative rights, generally ..... II: 151
superior to riparian rights of other landowners, generally ..... II: 151
waters to which pueblo rights attach ..... II: 150
foundation of California doctrine .....II: 155-158

Page

ever-expanding pueblo water right .....II: 157-158
original pueblo water right .....II: 155-157
origin .....II: 145-147
American municipal succession .....II: 146-147
colonization of California by Spain .....II: 145-146
question of local law .....II: 148-149
PUEBLO WATER RIGHTS IN NEW MEXICO .....II: 158-171
See also NEW MEXICO – pueblo water right.
Cartwright case .....II: 160-168
authorities on which Cartwright decision rests .....II: 162-163
matter of public welfare .....II: 167-168
municipal pueblo right vis-a-vis appropriative right .....II: 163-167
original case .....II: 160-162
doctrine not applicable in earlier cases .....II: 158-160
effect of earlier decisions .....II: 159-160
Santa Fe .....II: 158-159
Tularosa ..... II: 158
situation in summary .....II: 170-171
subsequent litigation .....II: 168-170
Albuquerque case .....II: 169-170
second Cartwright case .....II: 168-169
PURPOSE OF USE OF WATER OF WATERCOURSE. *See* APPROPRIATIVE RIGHT – ELEMENTS OF APPROPRIATIVE RIGHT – purpose of use of water; *and* RIPARIAN DOCTRINE – RIPARIAN RIGHT – purpose of use of water.
REMEDIES FOR INFRINGEMENT OF WATER RIGHTS IN WATERCOURSES. *See* PROTECTION OF WATER RIGHTS IN WATERCOURSES – REMEDIES FOR INFRINGEMENT.
RETURN WATERS. *See* WASTE, SEEPAGE, AND RETURN WATERS.
RIPARIAN DOCTRINE .....II: 1-144
RIPARIAN DOCTRINE IN WEST .....II: 1-14

Page

See also WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – ESTABLISHMENT OF RIPARIAN DOCTRINE IN WEST; INTERRELATIONSHIPS OF DUAL WATER RIGHTS SYSTEMS; *and State entries.*
importance of riparian doctrine ..... II: 1-5
States in which doctrine generally repudiated ..... II: 1
States in which doctrine recognized in varying degree ..... II: 1-5
California ..... II: 2-3
generally based on common law ..... II: 2
other 100th meridian States ..... II: 4-5
other Pacific States ..... II: 3-4
Texas ..... II: 3
summary of recognition, repudiation, and status of riparian doctrine in individual Western States ..... II: 6-14
Alaska ..... II: 6
Arizona ..... II: 6-7
California ..... II: 7
Colorado ..... II: 7-8
Hawaii ..... II: 8
Idaho ..... II: 8
Kansas ..... II: 9
Montana ..... II: 9
Nebraska ..... II: 9-10
Nevada ..... II: 10
New Mexico ..... II: 11
North Dakota ..... II: 11
Oklahoma ..... II: 11-12
Oregon ..... II: 12-13
South Dakota ..... II: 13
Texas ..... II: 13-14
Utah ..... II: 14
Washington ..... II: 14
Wyoming ..... II: 14
RIPARIAN DOCTRINE – RIPARIAN RIGHT ..... II: 15-144
See also State entries.
accrual of right ..... II: 15-23
source of title of land ..... II: 15-20
Federal land grants ..... II: 17-19
lands in Spanish and Mexican grants ..... II: 16-17
California ..... II: 16
Texas ..... II: 16-17
riparian rights relate chiefly to private land ..... II: 15-16
State land grants ..... II: 19-20

Page

time of accrual of riparian right ..... II: 21-23
parcel of land detached from stream ..... II: 23
protection of title by relation back ..... II: 21-22
riparian right acquired by owner as part of land acquisition ..... II: 22-23
when land title passes from public to private ownership ..... II: 21
attachment of riparian rights to various water sources .... II: 65-80
interconnected water supplies ..... II: 76-78
main stream and tributary ... II: 76
river and cienaga ..... II: 77
river and lake ..... II: 77
river and slough ..... II: 76-77
spring discharging into watercourse ..... II: 77-78
California ..... II: 77-78
Texas ..... II: 78
Washington ..... II: 78
natural versus artificial water source ..... II: 65-67
navigable watercourses .... II: 78-80
California ..... II: 79
Nebraska ..... II: 79
South Dakota ..... II: 80
Texas ..... II: 80
Washington ..... II: 80
See also NAVIGABLE WATERS – WATER RIGHTS IN NAVIGABLE WATERWAYS – riparian rights.
some other sources ..... II: 73-76
diffused surface water ... II: 74-76
lake ..... II: 73
marsh or swamp ..... II: 74
pond ..... II: 73-74
spring ..... II: 74
underground watercourse .. II: 70-72
definite underground stream ..... II: 72
underflow of stream ..... II: 70-72
watercourse ..... II: 67-70
continuity of streamflow ..... II: 69-70
definite stream ..... II: 67
portion of streamflow ... II: 68-69
return flow from foreign waters ..... II: 69
water while opposite riparian land ..... II: 70
exercise of riparian right ..... II: 124-144

Page

diversion of water ..... II: 124-127
conveyance of water from diversion point .....II: 127
means of diversion of water ..... II: 126-127
place of diversion of water ..... II: 124-126
place of use of water .... II: 133-138
nonriparian land ..... II: 134-138
relation to watershed .....II: 138
riparian land ..... II: 133-134
relations between organization and riparian proprietors ..... II: 140-144
character of water organizations .....II: 140
private company relations ..... II: 140-142
California ..... II: 140-141
Texas ..... II: 141-142
public district relations ..... II: 142-144
California .....II: 142
Texas ..... II: 143-144
return of unused water to stream ..... II: 139-140
long-established requirement .....II: 139
point of return of water to stream ..... II: 139-140
rotation in use of water among riparians .....II: 131-133
storage of water ..... II: 128-131
California distinctions ..... II: 128-129
seasonal storage ..... II: 128-129
temporary storage .....II: 128
Kansas .....II: 131
Texas ..... II: 129-131
general situation as to riparian storage ... II: 129-130
limitations on riparian right to storage ..... II: 130
permit exemption for small reservoirs .....II: 130
Washington ..... II: 130-131
measure of riparian right ..... II: 80-104
as against appropriators ..... II: 91-104
apportionment among riparians and appropriators..... II: 97-99
cutoff dates ..... II: 92-95
reasonable and beneficial use ..... II: 95-97
segment of stream flow .....II: 95
States involved .....II: 92
unused riparian right ... II: 99-104

Page

as against other riparian proprietors ..... II: 80-91
common rights in flow of water .....II: 85
determining quantity of water ..... II: 87-91
adjudication and apportionment of water .....II: 88
adjudication of existence of rights only .....II: 87
apportionment decrees as res judicata .....II: 91
apportionment of water by rotation ..... II: 90-91
apportionment, problems of criteria to determine. . .II: 88-90
natural flow theory versus reasonable use ..... II: 80-81
reasonableness, implications of ..... II: 82-85
application to individual ...II: 82
limitation to actual needs of proprietor ..... II: 82-83
materiality of source of water in slough ..... II: 84-85
question of fact ..... II: 83-84
reasonableness of quantity of water .....II: 84
reasonableness of riparian practices .....II: 83
rights of riparian owners are reciprocal .....II: 82
reasonable use theory, prevalence of ..... II: 81-82
return of surplus water to stream .....II: 91
use of entire stream by riparian: when not permissible ....II: 86
use of entire stream by riparian: when permissable .... II: 85-86
property characteristics ..... II: 23-46
beneficial use, right of .... II: 23-25
not dependent on use of water ..... II: 24-25
right of use for beneficial purposes .....II: 24
usufruct ..... II: 23-24
See also subtopic property, right of –usufructuary right.
flow of water, right to .... II: 27-34
generally no right to water that has left premises ..... II: 33-34
quality of water ..... II: 29-32
quantity of water ..... II: 27-29
right to use water attaches only on reaching riparian land ..... II: 32-33

Page

specific quantity of water, when fixed ..... II: 29
preservation of riparian right on change of title to land ..... II: 34-36
partition of land by decree ..... II: 35-36
partition of land by deed ..... II: 36
right passes with conveyance of land ..... II: 34
subdivision of land ..... II: 35
property, right of ..... I: 154-144; II: 25-27
part and parcel of soil ..... I: 156; II: 26-27
private property ..... I: 151-153; II: 25-26
real property ..... I: 155-156; II: 26
usufructuary right ..... I: 151
See also subtopic beneficial use, right of – usufruct.
See also PROPERTY
NATURE OF WATER AND WATER RIGHTS PERTAINING TO WATERCOURSES.
severance of riparian right from land ..... II: 36-46
condemnation ..... II: 42-43
dedication ..... II: 46
grant ..... II: 37-40
effect as against grantees ..... II: 37-38
effect on other riparians ..... II: 39-40
loss of contact with stream by avulsion ..... II: 41-42
loss of contact with stream by conveyance ..... II: 40-41
nonuse of right ..... II: 43-46
See also subtopics measure of riparian right – as against appropriators – cutoff dates *and* unused riparian rights; *and*
LOSS OF WATER RIGHTS IN WATERCOURSES – CHARACTER OF RIGHT – riparian right.
question of abandonment. . II: 44-45
question of statutory forfeiture ..... II: 45-46
prescription ..... II: 42
reservation of right in conveyance of land ..... II: 36-37
purpose of use of water ... II: 104-124
all useful beneficial purposes. . II: 104

Page

attractive surroundings and recreation ..... II: 120-123
esthetic considerations not recognized in early riparian cases ..... II: 120
uses having tangible value ..... II: 120-123
attractive surroundings. . II: 120-121
fishing and propagation of fish ..... II: 122-123
recreation ..... II: 121
domestic use of water ... II: 106-110
commercialized domestic use ..... II: 109-110
long established part of riparian right ..... II: 106-107
reasonableness of domestic use ..... II: 108-109
what domestic use includes ..... II: 107-108
industrial ..... II: 119-120
irrigation ..... II: 112-115
artificial use of water ..... II: 112
cultivated and uncultivated land ..... II: 113
long recognized riparian use of water ..... II: 112
some restrictions upon riparian irrigation ..... II: 113-115
mining ..... II: 119
municipal ..... II: 118
natural and artificial uses of water ..... II: 105-106
distinguished in many riparian jurisdictions ..... II: 105
preferences accorded to natural uses of water ..... II: 105-106
natural and artificial uses on same stream ..... II: 106
upper and lower natural uses of water ..... II: 106
Weil's summary ..... II: 105-106
other uses of riparian water ..... II: 123-124
floating logs ..... II: 123-124
recovery of materials ..... II: 124
stockwatering ..... II: 110-112
associated with domestic use ..... II: 110-111
not associated with domestic use ..... II: 111-112
water power ..... II: 115-118
generation of hydroelectric power ..... II: 116-118
propulsion of mill machinery ..... II: 115-116
riparian lands ..... II: 47-59

Page

contiguity to water source ..II: 48-51
acquisition by riparian of non-contiguous land .....II: 50-51
contiguity to underflow of stream .....II: 48-49
frontage on stream channel ...II: 49
lands in flood plain of stream .....II: 49-50
necessity of contiguity .....II: 48
determination of rights in land .....II: 47
extent of lands having riparian status .....II: 47
relation to chain of title ...II: 51-55
not affected by acts of trespasser .....II: 55
origin of title to riparian land .....II: 51-52
original grant from government .....II: 52-53
smallest tract held under one title .....II: 53-54
State lands .....II: 54-55
relation to watershed .....II: 55-59
delta land sloping away from stream .....II: 58-59
exception in Oregon .....II: 56
injury to other riparians ..II: 56-57
principal reason for rule .....II: 56
relation to watersheds of tributaries .....II: 57-58
riparian right generally limited to watershed .....II: 55-56
riparian proprietors .....II: 59-65
individual .....II: 64-65
appropriation of water by riparian proprietor .....II: 65
trespasser .....II: 64-65
municipality .....II: 61-64
California .....II: 62
Texas .....II: 62-63
Other States .....II: 63-64
public and private organizations .....II: 64
public domain .....II: 59-61
grantees .....II: 60-61
holders of possessory rights .....II: 60
United States as riparian proprietor.....II: 59-60
State lands .....II: 61
SALVAGED AND DEVELOPED WATERS .....II: 565-567
physical distinctions .....II: 565
rights of use .....II: 565-567
SEEPAGE WATERS. *See* WASTE, SEEPAGE, AND RETURN WATERS.

Page

SOUTH DAKOTA –
abandonment. *See* SOUTH DAKOTA – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* SOUTH DAKOTA – determination of conflicting water rights.
administration of stream water rights and distribution of water .....I: 301, 306; II: 522, 530-531; III: 502
administrative agency, State .....I: 307, 309, 311; III: 477-478
adverse possession and use. *See* SOUTH DAKOTA – loss of water rights in watercourses–prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....III: 482
completion of appropriation .....I: 367, 381
current procedure .....I: 333; III: 480-481
dry draw law .....I: 325, 364, 529; III: 482
original statutory procedure ....I: 292; III: 479-480
prestatutory procecedure .....III: 478-479
priority of appropriation .....III: 482
purpose of use of water .....I: 17-18, 523-525, 529, 533, 536-538; III: 481
relation, doctrine of .....I: 389
storage water appropriation .....I: 364; III: 486
waters subject to appropriation .....I: 228-230; III: 481
who may appropriate water .....I: 240, 247, 252-253; III: 481
recognition of doctrine of prior appropriation ....I: 173; III: 418
restrictions and preferences in appropriation of water. .I: 420-422, 424; III: 483-485
some aspects of the South Dakota appropriative right –
appurtenance of water right to land .....I: 460-461; III: 485

Page

beneficial use ..... I: 439, 494
change in exercise of water right ..... I: 643-644; III: 485
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of title to appropriative right ..... I: 470-471, 482; III: 485
Desert Land Act of 1877, interpretation of ..... I: 174
diversion, distribution, and storage works ..... I: 591
measure of the appropriative right ..... I: 511
natural channels, use of .....I: 613; III: 486
rights-of-way for water control and related purposes .....I: 272; III: 487
rotation in use of water .....I: 620; III: 486
See also SOUTH DAKOTA – interrelationships of dual systems of water rights.
determination of conflicting water rights –
judgments and decrees .....II: 511
special statutory adjudication procedures .....I: 303, 459, 470; III: 501
See also SOUTH DAKOTA – protection of water rights in watercourses.
diffused surface waters .....II: 543-545, 561-562
distribution of water. *See* SOUTH DAKOTA – administration of stream water rights and distribution of water.
estoppel. *See* SOUTH DAKOTA – loss of water rights in watercourses.
governmental status .... I: 1-3; III: 477
ground waters –
artesian waters .....II: 658
early statutes and court decisions ..... III: 498-499
Ground Water Act of 1955 .....III: 499-501
percolating waters ..... II: 649-650
interrelationships of dual systems of water rights –
legislation of 1955 and its effect .....I: 204, 221, 313, 315; II: 93-94

Page

rules applied in early supreme court decisions .....I: 220-221; III: 494-496
loss of water rights in watercourses –
abandonment ..... II: 257, 263-264, 284-285; III: 486
estoppel ..... II: 435-436; III: 487
prescription ... II: 332, 336; III: 487
statutory forfeiture .....II: 288, 296; III: 486-487
navigable waters –
uses ..... I: 122-123
water rights in navigable waterways .....I: 125
prescription. *See* SOUTH DAKOTA – loss of water rights in watercourses.
property nature of water and water rights .....I: 148
See also SOUTH DAKOTA – appropriation of water of watercourses – some aspects of South Dakota appropriative right; *and* riparian doctrine – property characteristics of riparian right.
protection of water rights in watercourses –
injunction or damages or both ..... II: 238
riparian right ..... II: 201
See also SOUTH DAKOTA – determination of conflicting water rights.
riparian doctrine –
accrual of riparian right .....II: 18; III: 489
diversion of water ..... III: 491
measure of riparian right .....I: 15-17, 313, 315; II: 90, 93-94, 96, 98-103; III: 493-494
place of use of water .....II: 138; III: 490
property characteristics of riparian right –
beneficial use, right of .....II: 24; III: 490
property, right of ..... III: 490
severance of riparian right from land .....II: 42, 44-45; III: 490
purpose of use of water ..... I: 17; II: 107-108, 111, 114-115, 118; III: 491-493
recognition of riparian doctrine .. I: 15-17, 181, 190-191, 193, 195-196; II: 4-5; III: 487-489

Page

riparian lands ..... II: 138; III: 490
riparian proprietors ... II: 63; III: 490
riparian waters ... II: 72, 80; III: 490
summary of riparian doctrine ..... II: 13
See also SOUTH DAKOTA – inter-relationships of dual systems of water rights.
spring waters ..... II: 620-621
statutory forfeiture. *See* SOUTH DAKOTA – loss of water rights in watercourses.
watercourse, characteristics of ..... I: 26-27, 29, 31-32, 34-40 47-48, 51-52, 55, 63, 65-66
water policy, declarations of State ..... I: 4, 6-8
SPRING WATERS ..... II: 592-630
See also State entries.
confined to tract on which located ..... II: 594
developed spring water ... II: 595-596
nature of spring water .... II: 592-593
source of spring ..... II: 595
source of watercourse .... II: 593-594
spring on public land ..... II: 594-595
State situations ..... II: 596-630
Alaska ..... II: 596
Arizona ..... II: 596-597
California ..... II: 597-603
developed spring water ..... II: 599-600
property characteristics ..... II: 597-598
sources of spring water ..... II: 603
spring not flowing from land on which located ..... II: 600-601
spring on public land .. II: 601-603
spring tributary to watercourse ..... II: 598-599
Colorado ..... II: 603-605
Hawaii ..... II: 605-607
Idaho ..... II: 607-609
spring not flowing from land on which located ..... II: 608
spring on public domain ..... II: 608-609
spring tributary to watercourse ..... II: 607-608
Kansas ..... II: 609-610
rights of ownership ..... II: 609
spring as source of watercourse ..... II: 609-610
Montana ..... II: 610-611
Nebraska ..... II: 611-612
Nevada ..... II: 612-613
appropriation of spring waters ..... II: 612-613

Page

property rights in springs ... II: 612
New Mexico ..... II: 613-614
North Dakota ..... II: 615
Oklahoma ..... II: 615
Oregon ..... II: 616-620
conveyance of title ..... II: 616
definition of spring ..... II: 616
spring not flowing from land on which located ..... II: 616-618
spring on public domain ..... II: 619-620
spring tributary to watercourse 618-619
statutes ..... II: 616
South Dakota ..... II: 620-621
Texas ..... II: 621-623
property characteristics .... II: 621
sources of spring water ..... II: 622-623
spring not flowing from land on which located ... II: 622
spring tributary to watercourse ..... II: 621-622
Utah ..... II: 623-626
conveyance of title ..... II: 623
definition ..... II: 623
developed spring water ..... II: 625
loss of spring water rights ... II: 626
rights of use ..... II: 623
source of spring water ..... II: 625-626
spring located on private property ..... II: 623-624
spring on public domain .... II: 624
spring tributary to watercourse ..... II: 624-625
Washington ..... II: 626-629
easement in spring ..... II: 629
increase in flow of spring resulting from return water from irrigation brought from another watershed ..... II: 628
loss of spring water right ..... II: 628-629
new spring flowing to other land ..... II: 628
percolating water feeding spring on another's land ..... II: 628
spring on public land ..... II: 628
spring source of natural watercourse ..... II: 627
spring with no surface inlet or outlet ..... II: 628
statutes ..... II: 626-627
Wyoming ..... II: 630
STATE WATER POLICIES ..... I: 1-20
STATE WATER POLICIES – ARIDITY AND WATER RIGHT SYSTEMS ..... I: 1-3

246-767 O - 77 - 51

Page

STATE WATER POLICIES – ATTAINMENT OF STATEHOOD IN WEST ..... I: 1
STATE WATER POLICIES – DECLARATIONS OF POLICY ..... I: 3-20
See also State entries.
ownership of water supplies ....I: 5-6
property of public ..... I: 5
property of State or people .... I: 6
place of water in State's economy .....I: 3-5
constitutional declarations ....I: 3-4
some judicial observations ....I: 4-5
some legislative statements ..... I: 4
public supervision over waters ...I: 6-8
basis of State control .....I: 6-7
supervisory functions .....I: 7-8
use of water .....I: 8-20
beneficial use of water .....I: 9-13
need of useful or beneficial purpose .....I: 9-11
constitutional declarations ... I: 9
some typical legislative and judicial statements ...I: 10-11
question of waste of water ... I: 12
strictures apply essentially to unnecessary waste .....I: 12-13
preferences in use of water ...I: 19-20
purpose of use of water ....I: 17-19
rights to use water .....I: 13-17
appropriation of water: priority of right ..... I: 14
appropriation of water: recognition and safeguarding of right ...I: 13-14
constitutional confirmation of existing water rights ..... I: 13
riparian doctrine: recognized and limited.....I: 14-17
riparian doctrine: repudiated...I: 14
use of water a public use .....I: 8-9
condemnation by individuals...I: 8-9
public use in general ..... I: 8
sale and rental of water ..... I: 8
STATUTORY FORFEITURE OF WATER RIGHTS IN WATERCOURSES. *See* LOSS OF WATER RIGHTS IN WATERCOURSES – ABANDONMENT AND STATUTORY FORFEITURE, *and* CHARACTER OF RIGHT.
TEXAS –
abandonment. *See* TEXAS – loss of water rights in watercourses.

Page

adjudication of water rights in watercourses. *See* TEXAS – determination of conflicting water rights.
administration of stream water rights and distribution of water ....I: 301, 306, 319-320; II: 531-532; III: 533-535
administrative agency, State ...I: 309, 311; III: 504
adverse possession and use. *See* TEXAS – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....I: 322; III: 509
appropriation of water for use in another State ..... I: 393-394; III: 107, 110-115
certified filings .....III: 509, 514
completion of appropriation...I: 369, 373, 375; III: 508
current procedure...I: 324-327, 332, 335-337, 339; III: 506-508
exclusiveness of procedure ...I: 316
land factor in appropriating water ..... I: 260, 263
original statutory procedure ....I: 292, 387; III: 506
permit types .....III: 508
prestatutory procedure ...III: 506
See also subtopic recognition of doctrine of prior appropriation.
priority of appropriation .....III: 509, 512
purpose of use of water...I: 17, 525, 527, 533, 537-539, 540-542, 544-545, 549; III: 508
storage water appropriation...I: 349, 352, 356-359, 361, 364; III: 512
waters subject to appropriation .....I: 229, 231; III: 507
who may appropriate water .....I: 242-244, 247-249
recognition of doctrine of prior appropriation ..... I: 171; III: 504-505
restrictions and preferences in appropriation of water .... I: 405, 407-408, 411, 423-424, 426, 434-435; III: 509-511

Page

some aspects of Texas appropriative right –
appurtenance of water right to land ... I: 455, 461; III: 511-512
beneficial use ..... I: 9, 11, 439-440, 494-495; III: 513
change in exercise of water right ....I: 625-627, 637, 644; III: 514
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of title to appropriative right ... I: 483-484, 574
diversion of water from watershed .....I: 520-521; III: 513-514
measure of appropriative right .....I: 493, 506
natural channels, use of .....I: 613-614; III: 513
rights-of-way for water control and related purposes ..... I: 272, 279, 283; III: 515-516
rotation in use of water ... III: 513
See also TEXAS – interrelationships of dual systems of water rights.

determination of conflicting water rights –
procedural matters in water rights litigation, some general .....II: 498-500, 503-504, 510, 513-514
special statutory adjudication procedure ... I: 302; II: 450-451, 455-457, 462-463; III: 531-533
See also TEXAS – protection of water rights in watercourses.

diffused surface waters .....II: 545-547, 555, 562-563

distribution of water. *See* TEXAS – administration of stream water rights and distribution of water.

early use and regulation of water in Texas ..... I: 284-285; III: 503-504

estoppel. *See* TEXAS – loss of water rights in watercourses.

governmental status .....I: 1-3, 16-18; III: 503

Page

ground waters –
artesian water, general public regulation of ..... II: 658-659, 747; III: 531
definite underground streams .....II: 743; III: 528
percolating waters –
court decisions ..... II: 650-651, 744-747; III: 528-530
underground water conservation districts ..... II: 662-663, 747-748; III: 530-531
underflow of surface streams .... II: 743-744; III: 528
See also GROUND WATER RIGHTS IN SELECTED STATES – TEXAS.

international law affecting water rights –
Rio Grande Irrigation Convention of 1906 .....III: 133-134
Rio Grande, Colorado, and Tijuana Treaty of 1944 ... III: 135-136

interrelationships of dual systems of water rights –
diversion of riparian water to nonriparian land .....II: 39, 56-59, 133, 136; III: 526
effect of some early water statutes on riparian rights .. I: 260, 315; II: 20, 55; III: 525
in general .....III: 524-525
riparian and nonriparian waters .....III: 525-526
riparian-appropriative conflicts and adjustments ..I: 205, 221-223, 407-408; II: 20, 38, 55, 92, 94, 96, 101, 133, 198-200; III: 526-528

interstate dimensions of water rights –
appropriation of water for use in another State ..... I: 393-394
existing water apportionment compacts involving Western States .....III: 97-98
validity of State legislative restrictions on taking water out of State ....III: 107, 110-115

loss of water rights in watercourses –
abandonment ..... II: 266-267, 273, 282-283, 285; III: 514-515
abandonment and forfeiture interrelated .... II: 321-324, 328; III: 514-515
estoppel ..... II: 428-429, 438-439

Page

prescription ..... II: 333, 343-345, 361, 378, 382-383, 386-389, 391-392, 404, 409-410, 415, 426; III: 515
statutory forfeiture ..... II: 296, 305-306, 309, 328; III: 514-515
navigable waters –
classification of navigable waters ..... I: 110-111
determination of navigability for commerce power and bed title purposes ..... I: 115
lands underlying navigable waters, title to ..... I: 128
uses of navigable waters ..... I: 120
water rights in navigable waterways ..... I: 128
prescription. *See* TEXAS – loss of water rights in watercourses.
property nature of water and water rights ..... I: 142, 151, 153, 155-156; III: 507
See also TEXAS – appropriation of water of watercourses – some aspects of Texas appropriative right; *and* riparian doctrine – property characteristics of riparian right.
protection of water rights in watercourses –
burden of proof ..... II: 252-253
injunction ..... II: 228, 230-233, 235
injunction or damages or both ..... II: 237-238
remedies in general ..... II: 218
riparian right ..... II: 198-200
See also TEXAS – determination of conflicting water rights.
reconstruction courts of Texas ..... III: 503
remedies. *See* TEXAS – protection of water rights in watercourses.
riparian doctrine –
accrual of riparian right ..... II: 15-17, 20; III: 517-518
diversion of water ... II: 126; III: 523
measure of riparian right ..... I: 16; II: 85, 88, 92, 94, 96, 101; III: 521-522
place of use of water ..... II: 136; III: 523-524
property characteristics of riparian right –
beneficial use, right of ..... II: 24
flow of water, right to ..... II: 29-31

Page

preservation of riparian right on change of title to land ..... II: 36
severance of riparian right from land ..... II: 38-39, 41-43, 46; III: 519-520
See also TEXAS – property nature of water and water rights.
purpose of use of water ..... II: 108, 112, 115, 118, 121-124; III: 522-523
recognition of riparian doctrine ..... I: 16, 181-182, 184-185, 188-190, 193-194; II: 1-3; III: 516-518
relations between organization and riparian proprietors .. II: 141-144
return of unused water to stream ..... III: 523
riparian lands ..... II: 51-52, 55-59; III: 518-519
riparian proprietors ..... II: 62-63; III: 520
riparian waters ..... II: 66, 70-73, 75-76, 78, 80; III: 520-521
rotation in use of water among riparians ..... II: 133
storage of water .. II: 129-130; III: 524
summary of riparian doctrine ..... II: 13-14
See also TEXAS – interrelationships of dual systems of water rights.
spring waters ..... II: 621-623
watercourse, characteristics of ..... I: 33, 40-42, 47, 50-57, 69-72, 76, 77-79, 88-89, 95
water policy, declarations of State ..... I: 4, 8, 246; III: 512
TREATIES. *See* INTERNATIONAL LAW AFFECTING WATER RIGHTS.
UNITED STATES. *See* FEDERAL-STATE RELATIONS.
UTAH –
abandonment. *See* UTAH – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* UTAH – determination of conflicting water rights.
administration of stream water rights and distribution of water ..... I: 301, 306; II: 532-533; III: 569-570

Page

administrative agency, State ... I: 307-309, 311-312; III: 536
adverse possession and use. *See* UTAH – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
classification of primary and secondary rights, early ... III: 551-552
diligence rights ..... III: 541
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....I: 322-323; III: 548
appropriation for future needs ..... III: 545
appropriation of water for use in another State...I: 395; III: 107
completion of appropriation...I: 373; III: 544
constitutionality of procedure ..... III: 541
current procedure .... I: 330, 337; III: 541, 543-544
early statutory procedure ... I: 294, 296-298; III: 540-541
exclusiveness of procedure .....I: 317; III: 542
land factor in appropriating water ....I: 258, 263, 265-266; III: 553
prestatutory procedure .... I: 284-285, 294; III: 538-540
priority of appropriation .....I: 397; III: 546-547
purpose of use of water .....I: 525, 527-528, 531, 534, 539, 543; III: 545-546
quantity of water, specific...III: 546
relation, doctrine of ..... I: 389; III: 547-548
storage water appropriation .....I: 351, 361; III: 548
waters subject to appropriation .....I: 228, 230, 234-235, 237; III: 542
who may appropriate water...I: 239-241, 243, 245-248, 250-251; III: 542-543
recognition of doctrine of prior appropriation ..I: 160, 171, 173; III: 536-538
restrictions and preferences in appropriation of water .... I: 20, 413, 425, 427, 431-433; III: 548-551

Page

some aspects of Utah appropriative right –
appurtenance of water right to land ....I: 455, 461; III: 554
beneficial use.....I: 9, 12-13, 495
change in exercise of water right...I: 628, 644; III: 559-560
commingling of water ..... I: 605; III: 559
condemnation of right-of-way. *See subtopic* rights-of-way for water control and related purposes.
conveyance of title to appropriative right ...I: 472, 476-477, 482, 484; III: 554
diversion, distribution, and storage works ..... I: 591; 593; III: 554-556
efficiency of practices .....I: 650
measure of appropriative right .....I: 503; III: 552
natural channels, use of .....I: 614
property, right of ..... I: 444, 446-448; III: 552-553
See also UTAH – property nature of water and water rights.
relative rights of senior and junior appropriators...I: 570, 576; III: 557-558
rights-of-way for water control and related purposes ..... I: 8, 273, 275-277, 282; III: 563
rotation in use of water ... III: 558
sale, rental, or distribution of water ....I: 564; III: 556
substitution of water .....I: 608
determination of conflicting water rights –
jurisdiction where stream crosses State line ..... II: 506
special statutory adjudication procedure .....I: 303; II: 445, 457, 459, 463, 465-466; III: 568-569
See also UTAH – protection of water rights in watercourses.
developed waters ..... II: 566
diffused surface waters .....I: 536, 563
distribution of water. *See* UTAH – administration of stream water rights and distribution of water; *and* appropriation of water of watercourses – some aspects of

Page

Utah appropriative right – sale, rental, or distribution of water.
estoppel. *See* UTAH – loss of water rights in watercourses.
governmental status . . . . .I: 1-3; III: 535
ground waters –
artesian wells, control of . . . . . II: 659, 756; III: 567
current procedure for appropriating ground water . . . .II: 651-652, 749-750; III: 565
drainage of land versus interference with ground water rights . . . . . II: 756; III: 566-567
early decisions relating to ground water . . . . . II: 751-752; III: 567-568
forfeiture and abandonment . . .II: 755; III: 567
ground waters subject to appropriation . . . . . II: 651, 748-749; III: 564-565
protection of means of diversion . . . . .II: 753-754; III: 565-566
See also GROUND WATER RIGHTS IN SELECTED STATES – UTAH.
interstate dimensions of water rights –
determination of conflicting water rights –
jurisdiction where stream crosses State line . . . . . II: 506
restrictions on taking water out of State . . . . . .I: 395; III: 107
irrigation in Utah, early . . . . . I: 162-163, 525, 534; III: 535-536
loss of water rights in watercourses –
abandonment . . .II: 755; III: 561, 567
abandonment and forfeiture distinguished . . . . . III: 562
abandonment and forfeiture interrelated . . . . . .II: 324-325, 328
estoppel . . . .II: 431-433, 435; III: 563
prescription . . . . . II: 329, 372-373, 382, 406-407, 414-415; III: 562-563
statutory forfeiture . . . . .II: 297, 300, 311-312, 314-317, 755; III: 560-561, 567
navigable waters, description of . . . . . I: 106-108
prescription. *See* UTAH – loss of water rights in watercourses.

Page

property nature of water and water rights . . . . . I: 144-145, 148-149; III: 552-553
See also UTAH – appropriation of water of watercourses – some aspects of Utah appropriative right.
protection of water rights in watercourses –
damages . . . . . II: 220, 224
injunction . . . . . .II: 227-228
means of diversion . . . . . .II: 213, 753-754; III: 565-566
See also UTAH – determination of conflicting water rights.
remedies. *See* UTAH – protection of water rights in watercourses.
return waters . . . . . II: 582
riparian water-use doctrine, repudiation of . . . . . .I: 192; II: 1, 6, 14; III: 563-564
seepage waters. *See* UTAH – waste and seepage waters.
spring waters . . . . . .II: 623-626
statutory forfeiture. *See* UTAH – loss of water rights in watercourses.
waste and seepage waters . . .II: 577-579
watercourse, characteristics of . . . . . .I: 33, 50
water policy, declarations of State . . . . . .I: 8-9, 12-13, 20

WASHINGTON –
abandonment. *See* WASHINGTON – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* WASHINGTON – determination of conflicting water rights.
administration of stream water rights and distribution of water . . . . . .I: 301, 306, 320-321, 337; II: 533; III: 612
administrative agency, State . . . I: 309, 311-312; III: 571
adverse possession and use. *See* WASHINGTON – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.

Page

procedure for appropriating water –
act of 1890 ..... III: 574
act of 1891 ..... III: 574-575
appeals ..... III: 577
appropriation of water for use in another State .....I: 395
completion of appropriation .....I: 380; III: 577-578, 585-586
current procedure . .I: 326-327, 337; III: 575
exclusiveness of procedure. . .III: 575
land factor in appropriating water ....I: 256-257, 262, 264, 267; III: 576, 586
prestatutory procedure .... I: 288; III: 573-574
priority of appropriation . . .III: 578
purpose of use of water . .I: 17, 525
relation, doctrine of ..... III: 578
storage water appropriation ..... III: 579
waters subject to appropriation ..... I: 228, 231, 232; III: 575-576
who may appropriate water. . .I: 243-245; III: 576
recognition of doctrine of prior appropriation ... I: 173; III: 571-572
restrictions and preferences in appropriation of water ... I: 405-406, 412, 428, 435; III: 580-585
some other aspects of Washington appropriative right –
appurtenance of water right to land .....I: 456, 462; III: 586
beneficial use .....I: 11
change in exercise of water right . .I: 631, 644; III: 588-589
conveyance of title to appropriative right ..... I: 471-472
Desert Land Act of 1877, interpretation of .... I: 173-174
measure of appropriative right ..... III: 579
natural channels, use of .....I: 614; III: 588
property, right of .....I: 450
See also WASHINGTON – property nature of water and water rights.
relative rights of senior and junior appropriators .... I: 579-580; III: 587
rotation in use of water .... I: 617-618; 621-622; III: 587-588
sale, rental, or distribution of water ..... III: 587
See also WASHINGTON – interrelationships of dual systems of water rights.
claim-filing requirement ...III:612-613
determination of conflicting water rights –
procedural matters in water rights litigation, some general ...II: 504-511
statutory adjudication procedure –
effect of statute on preexisting court jurisdiction .... III: 611
ground waters, additional provisions regarding ..... III: 611
statutory procedure ..... I: 303; II: 458, 462; III: 609-611
See also WASHINGTON – protection of water rights in watercourses.
diffused surface waters ... II: 547, 550
distribution of water. *See* WASHINGTON – administration of stream water rights and distribution of water.
estoppel. *See* WASHINGTON – loss of water rights in watercourses.
governmental status .....I: 1-3; III: 570-571
ground waters –
court decisions .....II: 652; III: 602-605
legislation .....I: 361; II: 652, 659; III: 605-609
international law affecting water rights –
Columbia River Treaty of 1961 ..... III: 129
interrelationships of dual systems of water rights .....I: 223-225; III: 597-601
interstate dimensions of water rights –
appropriation of water for use in another State .....I: 395
loss of water rights in watercourses –
abandonment .....II: 257-258, 267, 269, 275, 283-284, 286; III: 589-590
estoppel.....II: 440, 442; III: 591
prescription .....II: 335, 337, 339, 346-347, 369, 382-384, 390, 392, 398-399, 407; III: 590-591
statutory forfeiture ..... II: 287-288, 297-298, 306; III: 589-590

Page

navigable waters –
lands underlying navigable waters, title to ..... I: 131
water rights in navigable waterways ..... I: 124, 128
prescription. *See* WASHINGTON – loss of water rights in watercourses.
property nature of water and water rights ..... I: 139, 147, 149; III: 585
See also WASHINGTON – appropriation of water of watercourses – some other aspects of Washington appropriative right; *and* riparian doctrine – property characteristics of riparian right.
protection of water rights in watercourses –
injunction ..... II: 230, 236
riparian right ..... II: 200
source of supply ..... II: 204-205
See also WASHINGTON – determination of conflicting water rights.
remedies. *See* WASHINGTON – protection of water rights in watercourses.
return waters ..... II: 588-589, 592
riparian doctrine –
accrual of riparian right ..... II: 22; III: 592
diversion of water ..... II: 127; III: 597
measure of riparian right ..... I: 16; II: 3, 83, 95, 101-102; III: 594-595
place of use of water ..... II: 135, 138; III: 593-594
property characteristics of riparian right –
beneficial use, right of ..... II: 24
flow of water, right to ..... III: 592, 594
property, right of ..... III: 593
severance of riparian right from land ..... II: 40-41, 44-46; III: 593
See also WASHINGTON – property nature of water and water rights.
purpose of use of water ..... I: 17; II: 117-118, 121, 123; III: 596-597
recognition of riparian doctrine ..... I: 16, 193, 197; II: 3; III: 591-592

Page

riparian lands ..... II: 54; III: 593
riparian proprietors ..... II: 63, 65
riparian waters ..... II: 69, 73-74, 80; III: 595-596
storage of water ..... II: 130-131; III: 595
summary of riparian doctrine ..... II: 14
See also WASHINGTON – interrelationships of dual systems of water rights.
spring waters ..... II: 593, 595-596, 626-629
statutory forfeiture. *See* WASHINGTON – loss of water rights in watercourses.
watercourse, characteristics of ..... I: 58, 67, 70-71, 76, 80-85, 89, 97-98, 100-101
water policy, declarations of State ..... I: 8-9, 11, 16-17
WASTE, SEEPAGE, AND RETURN WATERS ..... II: 568-592
See also State entries.
return waters ..... II: 579-582
claim of equivalent diversion for return flow ..... II: 591-592
return flow from foreign waters ..... II: 585-590
appropriators ..... II: 586-588
riparians ..... II: 589-590
return flow within watershed ..... II: 585-590
Colorado ..... II: 581
distinguished from right to convey water in watercourse ..... II: 585
Idaho ..... II: 582
Oregon ..... II: 581
some other situations ..... II: 583-585
Utah ..... II: 582
return waters in international stream ..... II: 591
return waters in interstate stream ..... II: 591
waste and seepage waters ..... II: 568-592
several State situations ..... II: 569-579
Arizona ..... II: 569
California ..... II: 569-570
Colorado ..... II: 570-571
Idaho ..... II: 571-572
Kansas ..... II: 572
Montana ..... II: 572-573
Nevada ..... II: 573-574
New Mexico ..... II: 574-575

Page

Oregon ..... II: 575-577
Utah ..... II: 577-579
WATER POLICIES, STATE. *See* STATE WATER POLICIES.
WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES ..... I: 157-225
WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – DUAL SYSTEMS OF WATER RIGHTS ..... I: 157-158
See also WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – INTERRELATIONSHIPS OF DUAL WATER RIGHTS SYSTEMS.
WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – ESTABLISHMENT OF APPROPRIATION DOCTRINE IN WEST ... I: 159-180
See also subtopic appropriation of water of watercourses – recognition of doctrine of prior appropriation *under State entries.*
development of appropriation doctrine ..... I: 166-180
congressional legislation .. I: 171-175
act of 1866 ..... I: 172-173
act of 1870 ..... I: 173
appropriations under State procedures ..... I: 175
Desert Land Act of 1877 ..... I: 173-174
limitations on congressional recognition ..... I: 175
period of silent acquiescence ..... I: 172
general recognition of appropriation doctrine ..... I: 170-171
modification of strict priority rule ..... I: 178-180
condemnation of inferior uses of water ..... I: 179
priorities in large developments ..... I: 179-180
priorities in periods of water shortage ..... I: 179
priorities in time of acquiring water rights ..... I: 178-179
State and local laws and customs ..... I: 166-170
possessory rights on public domain ..... I: 166-167

Page

relative rights of appropriators ..... I: 168-170
resort to common law principles ..... I: 167-168
State water rights administration ..... I: 175-178
current administrative procedures ..... I: 176-178
early appropriation procedures ..... I: 175-176
origins of appropriation doctrine ..... I: 159-165
California gold rush ..... I: 164-165
Mormon colonization of Utah ..... I: 162-163
Spanish settlements in parts of southwest ..... I: 160-162
WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – ESTABLISHMENT OF RIPARIAN DOCTRINE IN WEST .... I: 180-199
See also RIPARIAN DOCTRINE IN THE WEST; *and subtopic* riparian doctrine – recognition of riparian doctrine *under State entries.*
early development of riparian doctrine in specified jurisdictions ..... I: 186-192
California ..... I: 186-188
Oklahoma ..... I: 191-192
Territory of Dakota ..... I: 190-191
North Dakota and South Dakota ..... I: 190-191
Texas ..... I: 188-190
origins and asserted origins of riparian doctrine ..... I: 180-185
common law of England .. I: 180-181
adoption of riparian doctrine in Western States ... I: 180-181
disagreement as to earlier history ..... I: 181
French civil law ..... I: 181-183
dissents ..... I: 182-183
Wiel's thesis ..... I: 181-182
Spanish-Mexican law ..... I: 183-185
California ..... I: 183
Texas ..... I: 184-185
status of riparian doctrine in West ..... I: 192-199
nonrecognition ..... I: 192-193
recognition in varying degree ..... I: 193-199
Alaska ..... I: 199
California ..... I: 193
Hawaii ..... I: 199

Page

Kansas ..... I: 196
Nebraska ..... I: 196-197
North Dakota ..... I: 198
Oklahoma ..... I: 198-199
Oregon ..... I: 194-195
South Dakota ..... I: 195-196
Texas ..... I: 193-194
Washington ..... I: 197

WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – INTERRELATIONSHIPS OF DUAL WATER RIGHTS SYSTEMS ..... I: 200-225
See also State entries.
century of conflict and adjustment ..... I: 200-206
reasons for conflict ..... I: 200-202
some features of conflict .. I: 202-206
modification of riparian principles ..... I: 204-206
purpose of use of water ..... I: 202
question of abrogating riparian rights ..... I: 204-206
recourse of appropriator where riparian rights attached to all water ..... I: 203
results in arid States .... I: 202-203
results in other States ..... I: 203
sources of conflict ..... I: 202
status in summary: by States ... I: 206-225
Alaska ..... I: 206-207
California ..... I: 207-210
Kansas ..... I: 210-211
Nebraska ..... I: 211-213
North Dakota ..... I: 213-215
Oklahoma ..... I: 215-217
Oregon ..... I: 218-220
South Dakota ..... I: 220-221
Texas ..... I: 221-223
Washington ..... I: 223-225
States in which there generally are no interrelationships ..... I: 206
See also RIPARIAN DOCTRINE IN WEST.

WATER RIGHTS SYSTEMS PERTAINING TO WATERCOURSES – IRRIGATION AGRICULTURE ..... I: 158-159

WATERCOURSE, CHARACTERISTICS OF ..... I: 26-101
See also State entries.

WATERCOURSE, CHARACTERISTICS OF – COLLATERAL QUESTIONS RESPECTING WATERCOURSES ..... I: 85-98

Page

change of channel ..... I: 90-95
effect on political boundaries ..... I: 92-93
effect on property boundaries ..... I: 90-92
abrupt change of channel .... I: 91-92
gradual change of channel .... I: 90-91
obstruction, alteration, diversion of flow ..... I: 94-95
general rule ..... I: 94
limitation to noninjurious changes ..... I: 95
protection of land against change of channel ..... I: 93
restoration of original channel ..... I: 93-94
overflows: rights of landowners ..... I: 85-90
See also WATERCOURSE, CHARACTERISTICS OF – FLOODFLOWS.
protection of lands against inundation ..... I: 85-89
California ..... I: 86
Idaho ..... I: 86
Kansas ..... I: 86-87
Nebraska ..... I: 87
Oklahoma ..... I: 87-88
Oregon ..... I: 88
Texas ..... I: 88-89
rights of use ..... I: 89-90
watercourse originally made artificially ..... I: 96-98
effect upon riparian rights ..... I: 98
important factors ..... I: 96-98
characteristics of watercourse ..... I: 96
dedication ..... I: 98
estoppel ..... I: 98
indications of permanence ..... I: 96
long acquiescence of parties affected ..... I: 98
prescription, question of ..... I: 97-98
time element ..... I: 97
may become in effect a natural watercourse ..... I: 96

WATERCOURSE, CHARACTERISTICS OF – DEFINITION AND GENERAL DESCRIPTION ..... I: 26-28
gains and losses of water ..... I: 27-28
legal composition of watercourse ..... I: 26-27
surface stream system ..... I: 27

Page

WATERCOURSE, CHARACTERISTICS OF – ELEMENTS . . . I: 28-75
channel . . . . . I: 35-49
bed and banks or sides . . . . . I: 39-42
exception in South Dakota . . I: 39-40
necessary in most cases to classification of channel . . . I: 39
what constitutes bed and banks . . . . . I: 40-42
continuity of channel . . . . . I: 44-45
definiteness of channel . . . . . I: 38-39
definite channel . . . . . I: 38
visual indications of definiteness . . . . . I: 38-39
flood plain . . . . . I: 42-43
flood plain of ordinary stream is part of watercourse . . I: 42-43
principle does not govern great rivers . . . . . I: 43
general features . . . . . I: 35-37
some judicial expressions . . . . . I: 36
some legislative requirements . . . . . I: 36-37
terms designating channels . . . . I: 37
natural channel . . . . . I: 37-38
some local situations . . . . . I: 45-49
draws and coulees . . . . . I: 46-48
slough connected with watercourse . . . . . I: 48-49
Southwestern arroyos . . . . I: 45-46
definitions, typical . . . . . I: 28-30
See also WATERCOURSE, CHARACTERISTICS OF – DEFINITION AND GENERAL DESCRIPTION.
judicial . . . . . I: 28-29
substantial agreement as to basic elements . . . . . I: 29
variations in interpretations . . . . . I: 29
legislative . . . . . I: 29-30
the three essential elements . . . . . I: 30
negating circumstances . . . . . I: 63-65
overall situation: water and topography . . . . . I: 64-65
topography . . . . . I: 63
water . . . . . I: 63
flows of water . . . . . I: 63
source of water supply . . . . . I: 63
other factors . . . . . I: 65-75
beginning of watercourse . . . I: 65-66
permanence of existence . . . . I: 68-69
long existence persuasive in determining permanence . . . I: 68

Page

short existence alone does not bar permanence . . . . . I: 69
relation of watercourse to connected sources of water supply . . . . . I: 72-75
ground waters . . . . . I: 75
lake: integration of connected sources . . . . . I: 73
lake: reciprocal importance of lake level and outflow . . I: 73-75
lakes and ponds . . . . . I: 72-73
other surface sources . . . . . I: 75
termination of watercourse . . I: 66-68
in general . . . . . I: 66-67
some particulars . . . . . I: 67-68
utility of watercourse . . . . . I: 69-72
drainageway . . . . . I: 71-72
navigation . . . . . I: 72
value to adjacent lands . . . . . I: 69-70
water rights . . . . . I: 70-71
source of supply . . . . . I: 49-59
definiteness and permanence . . . . . I: 50-53
definite source . . . . . I: 51
permanent source . . . . . I: 51
some interpretations of definiteness and permanence . . . . . I: 51-53
diffused surface water . . . . . I: 56-57
percolating ground water . . . . . I: 59
precipitation . . . . . I: 53-56
localized precipitation and runoff . . . . . I: 55-56
majority viewpoint respecting watershed runoff . . . . . I: 53-55
minority viewpoint . . . . . I: 55
spring water . . . . . I: 57-58
ultimate source . . . . . I: 49-50
waste and seepage waters . . . I: 58-59
stream . . . . . I: 30-35
continuity of flow generally not required . . . . . I: 32-35
general rule . . . . . I: 32-33
some expressions of the principle . . . . . I: 33-34
some variations in interpreting the principle . . . . . I: 34-35
definite and substantial existence . . . . . I: 31-32
definite stream . . . . . I: 31
indications of existence . . . . . I: 31-32
moving body of water . . . . . I: 30-31
size or velocity immaterial . . . . I: 32
underflow . . . . . I: 59-62
essential features . . . . . I: 60
subterranean side flow . . . . . I: 60-61

Page

underflow is part of watercourse ..... I: 61-62
affinity of surface and subsurface flows ..... I: 61-62
burden of proof .....I: 62
effect of withdrawal of subsurface waters .....I: 62
WATERCOURSE, CHARACTERISTICS OF–FLOODFLOWS. .I: 76-85
See also WATERCOURSE, CHARACTERISTICS OF – COLLATERAL QUESTIONS RESPECTING WATERCOURSES – overflows: right of landowners.
classification ..... I: 76-77
purpose of classification .....I: 77
use of terms ..... I: 76-77
flood overflows ..... I: 80-85
joinder with another watercourse .....I: 85
overflows not separated from stream ..... I: 80-83
general rule ..... I: 80-81
situation in Washington ... I: 81-83
overflows permanently escaped from stream ..... I: 83-84
classification: diffused surface water .....I: 83
classification: floodwater .....I: 84
no contact with any watercourse .....I: 83
rejoinder with original watercourse ..... I: 84-85
ordinary and extraordinary floods ..... I: 77-80
criteria ..... I: 79-80
distinctions ..... I: 78-79
extraordinary floods .....I: 79
ordinary floods ..... I: 78-79
WATERCOURSE, CHARACTERISTICS OF – LAKES AND PONDS ..... I: 99-101
governing principles of law .....I: 101
physical characteristics ..... I: 99-101
WYOMING –
abandonment. *See* WYOMING – loss of water rights in watercourses.
adjudication of water rights in watercourses. *See* WYOMING – determination of conflicting water rights.
administration of stream water rights and distribution of water –
generally ...I: 176-178, 298-301, 306

Page

judicial views of administrative authority .....I: 314, 318-319; III: 648-649
statutory provisions ..... I: 305; II: 521, 534; III: 647-648
administrative agencies, State ...I: 7-8, 176-178, 307-309, 312; II: 521; III: 613-614
adverse possession and use. *See* WYOMING – loss of water rights in watercourses – prescription.
appropriation of water of watercourses –
preferences in appropriation of water. *See subtopic* restrictions and preferences in appropriation of water.
procedure for appropriating water –
appeals .....I: 178, 322; III: 621
appropriation of water for use in another State .....I: 391-393, 395-396; III: 107
completion of appropriation ... I: 380-381; III: 622-623, 627-628
current procedure...I: 340, 342-343; III: 620-621
early procedure ...I: 291-292, 387; III: 618-619
exclusiveness of procedure ..I: 316; III: 619
land factor in appropriating water .....I: 262; III: 628
priority of appropriation .... I: 14; III: 621-622
purpose of use of water .... I: 536; III: 620
quantity of water, specific ..I: 342-343
relation, doctrine of .....I: 380
storage water appropriation ..... I: 353-354, 364-365, III: 623-625
waters subject to appropriation .....I: 229; III: 619
who may appropriate water..I: 247-248, 252; III: 620
recognition of doctrine of prior appropriation ... I: 13, 170, 173; III: 614-618
restrictions and preferences in appropriation of water .. I: 13, 402, 407, 410, 423, 425, 435-536; III: 625-627

Page

some other aspects of Wyoming appropriative right –
appurtenance of water right to land .....I: 457, 462-463, 468; III: 628-629
beneficial use ..... I: 9, 439, 495; III: 629
change in exercise of water right .... I: 627, 631, 634, 644; III: 631-633
conveyance of title to appropriative right ...I: 473, 477, 484
exchange of water. . .I: 611; III: 630-631
measure of appropriative right. .I: 511
natural channels, use of .....I: 614
relative rights of senior and junior appropriators ... III: 629
rotation in use of water .... I: 617-618; III: 629-630
sale, rental, or distribution of water .....I: 549, 556, 563
determination of conflicting water rights –
jurisdiction where stream crosses State line ..... II: 508
special statutory adjudication procedures –
current procedure... I: 302; II: 446-452, 454-455, 462-464, 486-491; III: 644-647
territorial procedure ..... I: 291; II: 486; III: 644
diffused surface waters ..... II: 564
distribution of water. *See* WYOMING – administration of stream water rights and distribution of of water; *and* appropriation of water of watercourses – some other aspects of Wyoming appropriative right – sale, rental, or distribution of water.
estoppel. *See* WYOMING – loss of water rights in watercourses.
governmental status .... I: 1-3; III: 613

Page

ground waters –
court decisions .....II: 652; III: 639
legislation .....II: 652-653, 663-664; III: 639-644
interstate dimensions of water rights –
appropriation of water for use in another State. . .I: 391-393, 395-396; III: 107
existing water apportionment compacts involving Western States . . III: 88-90
determination of conflicting water rights –
jurisdiction where stream crosses State line ..... II: 508
loss of water rights in watercourses –
abandonment ..... II: 281
abandonment and forfeiture interrelated. . .II: 325-328; III: 633-635
estoppel ...II: 439-440; III: 637-638
prescription .....II: 370, 376, 391, 410-411; III: 636
statutory forfeiture .....II: 290, 298, 306-308, 310, 313
prescription. *See* WYOMING – loss of water rights in watercourses.
property nature of water and water rights ..... I: 6, 141, 152; III: 628-629
See also WYOMING – appropriation of water of watercourses – some other aspects of Wyoming appropriative right.
return waters ..... II: 583
riparian water use doctrine, repudiation of .....I: 192; II: 1, 6, 14; III: 638-639
spring waters ..... II: 630
statutory forfeiture. *See* WYOMING – loss of water rights in watercourses.
watercourse, characteristics of ... I: 30-32, 47, 96
water policy, declarations of State .....I: 3, 6-9, 13-14

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